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PART 1: MARITIME UNION OF AUSTRALIA

CHAPTER 1

MARITIME EMPLOYEES TRAINING FUND

ON THE WATERFRONT: THE HIGH PRICE OF INDUSTRIAL PEACE

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

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

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

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

1. This Chapter concerns the Maritime Union of Australia (MUA). In particular, it concerns payments totalling $3,200,000 by a number of employers in the maritime industry at the direction or request of the
MUA or its officials. The payments include payments made to the MUA, a separate entity established by officials of the MUA (ie Chris Cain, Paddy Crumlin and Rod Pickette), and a payment to a political candidate, who happened to be the Deputy State Secretary of the MUA.

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

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

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

---

\(^1\) Simon Earle, witness statement, 29/9/14, para 22, Annexure B.
WA Special Purpose Fighting Fund (WASP). The WASP is used to pay the general day to day running expenses of the Western Australian Branch of the MUA (MUA WA Branch).² Thirdly, there are payments to the Training and Development Fund (Training Fund). The Training Fund was a bank account established by the Executive of the MUA WA Branch to be used for the training of members of that branch.³ On 13 March 2014, one day after the Commission’s Letters Patent were issued and 33 days after the decision to set up the Royal Commission was announced, the Training Fund was closed.⁴ Fourthly, there are payments to an Occupational Health & Safety Fund established by the MUA WA Branch (OH&S Fund). Fifthly, there are payments to sponsor MUA conferences. Sixthly, there are payments to a political candidate by Van Oord.

B – RELATIONSHIP TO TERMS OF REFERENCE

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

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

² Chris Cain, witness statement, 29/9/14, para 25.
³ Chris Cain, witness statement, 29/9/14, para 43 (first).
⁴ Chris Cain, witness statement, 29/9/14, para 46(iv) (second).
⁵ 29/9/14, T:8.41-9.43, 10.32-11.6.
of the definition of ‘separate entity’ in the Terms of Reference is that it be ‘a separate legal entity from any employee association’. Counsel assisting agreed with this submission. They were correct to do so. The MUA is obviously not a legal entity which is separate from any employee association – it is an employee association. Those three ‘funds’ are not ‘separate entities’. They are simply bank accounts of the MUA.6

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

8. The MUA submitted:8

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

6 Submissions of the MUA, 14/11/14, paras 18-19.
7 Submissions of the MUA, 14/11/14, para 20.
8 Submissions of the MUA, 14/11/14, para 21.
9. The MUA continued:\(^9\)

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

10. This was a perhaps inexact reference to the following paragraph of
counsel assisting’s submissions in chief:\(^{10}\)

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

11. The MUA submitted that some of the conduct discussed fell outside
the Terms of Reference. It therefore submitted that various parts of the
submissions of counsel assisting should not form part of the findings in
the Report.\(^{11}\)

12. In reply, counsel assisting contended that payments to the WASP, the
Training Fund and the OH&S Fund are within the Commission’s
Terms of Reference by reason of two arguments.\(^{12}\)

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

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\(^{9}\) Submissions of the MUA, 14/11/14, para 22.
\(^{10}\) Submissions of Counsel Assisting, 31/10/14, para 160.
\(^{11}\) Submissions of the MUA, 14/11/14, para 23.
\(^{12}\) Submissions of Counsel Assisting, 25/11/14, para 5.
METL is a relevant entity. An inquiry into the circumstances in which funds were obtained from employers is reasonably incidental to an inquiry into how they ended up being paid to METL.

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

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

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

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13 Cain MFI-1, 29/9/14, p 18.
METL were not ‘reasonably incidental’ to it. It relied on the temporal
gaps.\textsuperscript{14} But the expression ‘reasonably incidental’ does not relate only
to questions of time. It refers to a relationship between two matters.
Take the relationship created by the second invoice. It was dated 9
May 2012, one day after Fair Work Australia approved an Enterprise
Agreement between the MUA and Dredging International.\textsuperscript{15} The
invoice of 9 May 2012 was sent to Dredging International by Chris
Cain seeking payment of $200,000 as ‘sponsorship of our State
Conference/Committee’.\textsuperscript{16} It is suspicious that the invoice followed so
swiftly on the finalisation of the Enterprise Agreement. It is also
suspicious that money, never originally intended for METL, ended up
in METL’s hands, but did so only a few days after the Royal
Commission was announced. There is a suggestion of what some
might call ‘a sudden tidy up’.

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

\textsuperscript{14} 26/11/14, T:22.6-29.
\textsuperscript{15} Di Giorgi MFI-1, 29/9/14, p 484.
\textsuperscript{16} Di Giorgi MFI-1, 29/9/14, p 488.
any conduct which may amount to a breach of any law, regulation or professional standard by any officer of an employee association in order to:

(i) procure an advantage for the officer or another person or organisation; or

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

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

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

18 29/9/14, T:10.47-11.1; Submissions of the MUA, 14/11/14, para 22; 26/11/14, T:21.16-18.
that procuring industrial peace has occurred suggests that there was a threat of industrial war. You won’t find that in any of the proposed evidence."\textsuperscript{19} This oral submission, made on 29 September 2014 before any evidence was called, was not repeated in the written submissions filed after the evidence had closed, nor in later oral submissions.

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

C – CHRIS CAIN

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

\textsuperscript{19} 29/9/14, T:11.4-6.

\textsuperscript{20} See also Royal Commission into Trade Union Governance and Corruption, \textit{Interim Report} (2014)., Vol 1, ch 1, pp 16-21, paras 49-67.
the founders of METL. At all relevant times he was the Secretary of the MUA WA Branch. In the witness box he gave the impression of being bluff and engaging. He seemed to be a vigorous and forceful leader, strongly devoted to what he saw as the interests of the MUA and its members, and very likely to place those interests in marked priority to any other consideration.

D – UNCONTROVERSIAL FACTS

Need for training in the maritime industry

22. The relevant background facts are largely uncontroversial.21

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

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

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

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

23 Paddy Crumlin, witness statement, 29/9/14, paras 17, 19.
maritime hydrocarbon resource extraction. The expression ‘integrated rating’ refers to an international qualification for entry level seafarers.

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

**METL: establishment and objects**

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

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24 Paddy Crumlin, witness statement, 29/9/14, para 19.
25 Marinus Meijers, witness statement, 29/9/14, para 22.
26 Di Giorgi MFI-1, 29/9/14, p 7.
27. Clause 2.4 of METL’s Constitution provides for the objects of METL as follows:\textsuperscript{27}

The objects for which the Company is established are to receive donations and to appropriate such donations and any income derived from investment of donations towards:

(i) expenses, fees, disbursements and other costs associated with or incidental to activities directly related to the delivery of maritime instruction, training and education to Maritime Employees necessary to equip Maritime Employees with the skills and knowledge to be qualified for and to work as Maritime Employees;

(ii) expenses, fees, disbursements and other costs associated with or incidental to activities directly related to the establishment and operation of the company;

(iii) expenses, fees, disbursements and other costs associated with or incidental to activities directly related to the establishment and operation of a Registered Training Organisation or Group Training Organisation.

28. It ‘costs approximately $75,000 to train an Integrated Rating’.\textsuperscript{28} Since METL began to operate, at least 156 Trainees have commenced training with METL.\textsuperscript{29}

METL: officers and members

29. METL has two employer director positions and two employee representative director positions.\textsuperscript{30}

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

\textsuperscript{28}Simon Earle, witness statement, 29/9/14, Annexure B.

\textsuperscript{29}Simon Earle, witness statement, 29/9/14, para 26.
30. METL was initially established by four people. Three of them were Paddy Crumlin, the National Secretary of the MUA,\(^{31}\) Chris Cain, and Rod Pickette, an official at the MUA.\(^{32}\)

31. The four people were all foundation directors and members of METL.\(^{33}\)

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

Contributions to METL

33. METL receives contributions from a variety of sources.

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

\(^{30}\) Paddy Crumlin, witness statement, 29/9/14, para 13.
\(^{31}\) Paddy Crumlin, witness statement, 29/9/14, para 2.
\(^{32}\) Di Giorgi MFI-1, 29/9/14, pp 1-3.
\(^{33}\) Di Giorgi MFI-1, 29/9/14, p 27.
\(^{34}\) Marinus Meijers, witness statement, 29/9/14, paras 17, 19.
\(^{35}\) Marinus Meijers, witness statement, 29/9/14, para 19.
\(^{36}\) See paras 156-157.
construction allowances for particular jobs or projects: they contribute part of that allowance to METL. Paddy Crumlin gave the example of MUA members on the Gorgon project contributing $10 per day of the $200 per day construction allowance that they receive whilst working on that project.

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

E – SAIPEM AND THE BLACKTIP PROJECT

Background

The factual background to the Blacktip Project is not controversial.

The Blacktip gas field is located west of Darwin. It supplies gas to the Northern Territory’s domestic market.

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

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37 Di Giorgi MFI-1, 29/9/14, p 182.
38 Paddy Crumlin, witness statement, 29/9/14, para 34.
39. Saipem is engaged in a variety of onshore and offshore maritime activities. It provides a full range of services including engineering, fabrication, installation and commissioning of platforms and pipelines, and other related activity.\(^41\)

40. Saipem’s principal on the Blacktip Project was ENI. ENI at the material time owned around 40% of Saipem.\(^42\)

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

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

\(^{41}\) Fabio Di Giorgi, 29/9/14, T:13.1-7.
\(^{42}\) Fabio Di Giorgi, 29/9/14, T:13.9-18; Fabio Di Giorgi, witness statement, 26/9/14, para 8.
\(^{43}\) Fabio Di Giorgi, witness statement, 29/9/14, para 9.
\(^{44}\) Fabio Di Giorgi, witness statement, 29/9/14, para 13.
\(^{45}\) David Lansbury, affidavit, 29/9/14, para 9.
\(^{46}\) Fabio Di Giorgi, 29/9/14, T:14.33-45.
\(^{47}\) Fabio Di Giorgi, witness statement, 29/9/14, para 18.
Complex (AMC). The AMC was close to Fremantle in Western Australia.48

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

Negotiations for the use of foreign crews

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

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

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

48 Fabio Di Giorgi, 29/9/14, T:22.20-36.
49 Fabio Di Giorgi, 29/9/14, T:14.41-45.
50 Fabio Di Giorgi, witness statement, 29/9/14, para 18.
51 Fabio Di Giorgi, witness statement, 29/9/14, para 18.
to address the shortage of skilled domestic labour that caused Saipem to need foreign workers.\textsuperscript{52}

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

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

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

\textbf{25 August 2008 meeting}

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

\textsuperscript{52} Fabio Di Giorgi, witness statement, 29/9/14, para 20.

\textsuperscript{53} Di Giorgi MFI-1, 29/9/14, p 270.

\textsuperscript{54} Di Giorgi MFI-1, 29/9/14, p 272-273.
MUA reiterated concerns regarding the use by Saipem of foreign crewed tugs bringing empty barges to the AMC facility. The MUA also said that there were domestic vessels and crew members available for the Blacktip Project. The MUA said there was ‘[n]o way that their membership will accept foreign crewed tugs on or around the Project’ and that if a foreign crewed tug brought empty barges to the AMC facility it ‘could create a massive issue’. That plainly meant a massive issue of industrial war or peace.

**28 August 2008 meeting**

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

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

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55 Di Giorgi MFI-1, 29/9/14, p 274.
56 Di Giorgi MFI-1, 29/9/14, p 274.
57 Di Giorgi MFI-1, 29/9/14, p 278.
58 Di Giorgi MFI-1, 29/9/14, p 279; Fabio Di Giorgi, 29/9/14, T:23.28-36.
The MUA said it was looking for a contribution of $1,830,000. On the other hand, Saipem’s starting price was $200,000.\footnote{Fabio Di Giorgi, 29/9/14, T:23.42-24.1; Di Giorgi MFI-1, 29/9/14, p 279.}

53. The evidence about this meeting affords an opportunity to examine a significant controversy. Its background is the MUA’s opposition to the use of foreign crews and vessels on the project.\footnote{Fabio Di Giorgi, witness statement, 29/9/14, para 19.}

54. According to Fabio Di Giorgi, Chris Cain told him at various discussions that Australian maritime workers would not work with foreign workers.\footnote{Fabio Di Giorgi, 29/9/14, T:15.32-34.} He also told him that the Australian workers would ‘disrupt the project’ if there were foreign workers on the project.\footnote{Fabio Di Giorgi, 29/9/14, T:15.36-39.} Whilst Chris Cain did not expressly state the form that the disruption would take, Fabio Di Giorgi’s understanding was that the workers could ‘slow down the project’ by either ‘[w]orking very slow or maybe not working at all’.\footnote{Fabio Di Giorgi, 29/9/14, T:15.41-47.}

55. Chris Cain’s evidence was that his job was to ‘maximise Australian content’ on the Blacktip Project.\footnote{Chris Cain, 29/9/14, T:113.42-44.}

56. The MUA submitted that any apparent contradiction between Fabio Di Giorgi’s evidence of what Chris Cain said and Chris Cain’s evidence of what he said could be explained by setting out Chris Cain’s
evidence more fully. The MUA referred to Chris Cain’s testimony that he said at the meeting in Fremantle on 28 August 2008:

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

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

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

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

65 Chris Cain, 29/9/14, T:113.43-47.
66 Submissions of the MUA, 14/11/14, para 27.
saw a purpose of the payment to METL as the need to ‘calm down’ MUA workers working on the Castoro Otto.\textsuperscript{67} Chris Cain conceded that he may have had to calm down MUA workers on the Castoro Otto.\textsuperscript{68} He said he told the members to work hard, deliver the project on time, and ‘stop the bullshit’.\textsuperscript{69} This evidence reveals the MUA to have played a central role in the dispute so far as it involved members of the Castoro Otto crew. The MUA was negotiating on behalf of those members to procure a contribution from Saipem to METL to alleviate their concern about foreign-crewed vessels by increasing training for Australian crew members. It would have been very unlikely for MUA members to have disrupted the job against the wishes of those acting for them, namely Chris Cain and the MUA.

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

\begin{quote}
[T]he MUA again made it clear that \textit{they} would not accept foreign tugs entering AMC or Darwin and if this did happen \textit{they} would take action to disrupt the Project supply chain and activities on the Project site.\textsuperscript{70}
\end{quote}

(emphasis added)

Chris Cain denied that he said what the minutes recorded.\textsuperscript{71} For reasons given in the next paragraph but one, there is no reason to prefer

\textsuperscript{67} Fabio Di Giorgi, 29/9/14, T:14.31-35.
\textsuperscript{68} Chris Cain, 29/9/14, T:115.38-39.
\textsuperscript{69} Chris Cain, 29/9/14, T:114.23-28.
\textsuperscript{70} Di Giorgi MFI-1, 29/9/14, p 278.
\textsuperscript{71} 29/9/14, T:114.2-5.
his oral evidence of events six years ago to the contemporary record in the minutes.

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

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

Q. Did anyone say to you that Australian maritime workers would not work with foreign workers?
A. Yes, I heard this from Chris Cain.

Q. Did he say what they might do – that is, what Australian maritime employees might do – if there were foreign workers?
A. Yes. Disrupt the project.

Q. How do you disrupt a project?
A. You slow down the project.

Q. By doing what?
A. Working very slow or maybe not working at all, depending. It was not clear exactly what the definition of “disruption” was.

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72 Fabio Di Giorgi, witness statement, 26/9/14, para 22.
73 29/9/14, T:15.32-47.
There was no cross-examination on that evidence from either senior counsel for the MUA or any other legal representative.\textsuperscript{74} It is neutral as to whether the cause of the disruption would be the MUA or spontaneous worker action.

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

\textsuperscript{74} 29/9/14, T:58.8-15.
composed roughly contemporaneously with that event is much more likely to be reliable than testimony given six years later based upon the memory, only recently called upon, of an understandably rather partisan witness. These considerations make it probable that the minutes of 28 August 2008 are correct. They create a safe foundation for concluding that the MUA was prepared to threaten industrial disruption pursuant to its general desire to stop foreign tugs entering AMC or Darwin. But were there threats by the MUA of industrial disruption to achieve its more specific desires in relation to the funding of METL?

2 September 2008 meeting and email

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

75 Di Giorgi MFI-1, 29/9/14, p 288.
76 Fabio Di Giorgi, 29/9/14, T:24.34-25.4.
77 Submissions of Counsel Assisting, 31/10/14, para 45.
78 Submissions of the MUA, 14/11/14, paras 29-30.
If that evidence is considered by itself, the MUA’s submission is correct.

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

5. MUA agrees that any funds paid by Company will be to an agreed fund which is legitimately organised and government approved and which operates transparently for the benefit of training and development opportunities in the maritime sector, and which operates under a deed or similar arrangement…

…

7. MUA agrees that the funds will be paid in 2 equal instalments, one at the beginning of the Project subject to point 5 above and a final instalment at the project completion.

…

9. MUA agrees that Company may withhold the final instalment if the Project is impacted negatively due to actions by MUA officials or any MUA members involved with the Project.

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

79 Di Giorgi MFI-1, 29/9/14, p 290.
80 Di Giorgi MFI-1, 29/9/14, pp 290-291.
81 Fabio Di Giorgi, 29/9/14, T:25.35-46.
for the proposition that condition 9 was ever proposed to the MUA.\textsuperscript{82} There does appear to be no evidence to suggest it was put to the MUA in those terms at that time.

3 September 2008 meeting

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

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

11 September 2008 meeting

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

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

\textsuperscript{82} Submissions of the MUA, 14/11/14, para 31.
\textsuperscript{83} David Lansbury, affidavit, 29/9/14, para 15.
\textsuperscript{84} Di Giorgi MFI-1, 29/9/14, p 292.
METL and the utilisation of foreign crewed tugs.\textsuperscript{85} David Lansbury’s file note of that meeting recorded that:\textsuperscript{86}

Training and Foreign Crewed Tugs

From the start of these discussions it became clear that Cain was angry about the hold up in closing out the training levy and what he claimed was allowing foreign crewed vessels to commence operating on behalf of the Project without his knowledge or consent. Saipem pushed back on this by reminding him that Saipem had indeed informed the MUA that foreign crewed vessels were going to arrive and that agreements were made for the first two ones provided that a final agreement on training is found.

After a break the meeting resumed and in what could only be described as tense [sic], especially in regard to the foreign crewed tugs on their way to Australia. These discussions got quite heated with Cain claiming that he could not trust Saipem or ENI on the training levy and that they were just spinning the MUA along so that they could get the foreign crewed vessels working. It took some time to settle the meeting down and to refocus on what need [sic] to be done to get the training question resolved.

…

Cain made it clear that there will be no further concessions made in regard to foreign crewed tugs until the Training Levy is agreed.

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

Was there an agreement at the 11 September 2008 meeting?

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

\textsuperscript{85} Di Giorgi MFI-1, 29/9/14, p 294.
\textsuperscript{86} David Lansbury, affidavit, 29/9/14, Exhibit DL-6, p 12.
Blacktip Project unless a payment of $1,000,000 to METL were made could not have been related to that payment. The ground assigned for the submission relied on a claim that the duty to make the payment had been agreed weeks earlier. The MUA submitted the relevant agreement was reached at the 11 September 2008 meeting.87

73.

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

74.

The MUA also submitted that the fact that agreement had been reached on 11 September 2008 is confirmed by a letter from Saipem to the MUA on 18 September 2008.91 That letter, however, did not refer to any contract. It was headed ‘Confidential and Without Prejudice’. It stated that ‘in principle understandings’ had been reached. Payment of

87 Submissions of the MUA, 14/11/14, paras 32-33.
88 Submissions of the MUA, 14/11/14, paras 32-33.
89 See para 70.
90 Di Giorgi MFI-1, 29/9/14, p 295.
91 Submissions of the MUA, 14/11/14, para 34.
the MUA claim was not to be made ‘until these arrangements are finalised and in place’. The letter also said: ‘A formal agreement covering the above points can be drafted in detail in a separate document signed by Saipem and the local and national officers of the MUA’. The words to which emphasis has been added all point against any enforceable agreement having been reached on 11 September 2008. Further, the copy of the 11 September 2008 letter relied on was only a draft sent for comment to another person who recommended a change.

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

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

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92 Dr Giorgi MFI-1, 29/9/14, pp 301-302.
93 Dr Giorgi MFI-1, 29/9/14, pp 303-306, 308-310.
94 Di Giorgi MFI-1, 29/9/14, p 303.
On the same day Paolo Guaita, Development Project Manager of ENI, emailed Fabio Di Giorgi and others to the following effect.\textsuperscript{95}

In addition we note in the letter from Paddy Crumlin addressed to yourself and dated 23 September 2008 it states the final payment to [sic] be made 1 month prior to project completion. This is not acceptable; the final payment will not be made until after the completion of the project.

Company advises the Contractor that in future it needs to review the documents provided by the union and provide to the Company a draft of the response that it intends to send to the union to ensure that the requirements are met.

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

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

\textsuperscript{95} Di Giorgi MFI-1, 29/9/14, p 306.
\textsuperscript{96} Di Giorgi MFI-1, 29/9/14, p 310.
\textsuperscript{97} Di Giorgi MFI-1, 29/9/14, p 354.
79. In short, the most that could be said of the 11 September 2008 meeting is, as the MUA at a later point in its submissions said, that it reflected an understanding. But it was an understanding on only some issues. It was not an understanding which deprived any later threats of their coercive character.

24 October 2008 telephone call

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

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

I have just finished a 30 minutes “discussion” with Chris Cain. He was absolutely furious and completely pissed off. He spent the whole time [yelling] and screaming at Saipem/ENI. He threatened to shut down the whole job at several occasions, especially at the beginning of the phone call.

…

– He was demanding a meeting with ENI this afternoon, not even next week, otherwise the job will be shut down if we refuse; which I eventually managed to push back without immediate consequences on the project.

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

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98 Submissions of the MUA, 14/11/14, para 43.
99 Di Giorgi MFI-1, 29/9/14, p 313.
payment (which he accepted in his testimony was the MUA’s fault), and that this led to a heated debate. But he testified that he ‘never said to Saipem that I would close the job down, ever’. He continued:

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

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

84. On 24 October 2008, shortly after speaking with Chris Cain, Antoine Legrand urgently contacted the cost controller at Saipem. He immediately sought to arrange a request for $1,000,000 to be paid to the training fund - $500,000 immediately and $500,000 at the end of
the project. This suggests a link, at least in his mind, between the dispute over the Training Levy and the threat to shut down the job. If there was a link of that kind in the mind of an executive so closely involved in the negotiations, it is probable that the link actually existed in reality.

7 November 2008 telephone call

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

During our phone conversation, he was of course upset by the fact “we were trying to fix things with [Paddy Crumlin]” but I reassured him that the MUA contact of Saipem is the local branch and that the Sydney discussion was an AMMA-MUA one. I explained to him as well the consideration of the escrow fund to “show the good faith of ENI” and that following legal meetings on Monday, we’ll have a clearer idea on how to sort this out quickly.

He understood but his reaction was mainly that “I don’t give a fuck what you do with [Paddy Crumlin], I am going to shut down this job; you’ll see what will happen on this rig”.

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

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

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104 Di Giorgi MFI-1, 29/9/14, p 314.
105 Di Giorgi MFI-1, 29/9/14, p 351.
106 Di Giorgi MFI-1, 29/9/14, p 351.
it: ‘that’s fanciful, that’s fanciful, not at all’.\textsuperscript{107} What has just been said about comparing the email of 24 October 2008 with Chris Cain’s testimony six years later applies to comparing the 7 November 2008 email with that testimony as well.

**The conversations of 24 October and 7 November 2008 evaluated**

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

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

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

\textsuperscript{107} Chris Cain, 29/9/14, T:116.18-21.

\textsuperscript{108} Submissions of the MUA, 14/11/14, paras 38-39.

\textsuperscript{109} Submissions of the MUA, 14/11/14, para 39.

\textsuperscript{110} Submissions of the MUA, 14/11/14, para 39.
conversations ended calmly. The 24 October 2008 email said that at the end of Chris Cain’s call, he ‘was quiet and ok’. \(^{111}\) The email of 7 November 2008 said: ‘He did seem to be calmed down compared to yesterday.’ But this emollient impression was qualified by the next words: ‘(No insult, not too many threats of shutting down the job) but more on the cold anger side.’ \(^{112}\)

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

\(^{111}\) Di Giorgi MFI-1, 29/9/14, p 313.
\(^{112}\) Dr Giorgi MFI-1, 29/9/14, p 351.
90. That conclusion is reinforced by the concluding words of the 7 November 2008 email. They referred to Chris Cain’s ‘cold anger’. They said that it did not involve ‘too many threats of shutting down the job’. These words imply that there were some threats of shutting down the job. The document does not suggest that the conversation expunged the memory of earlier threats.

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

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

113 Di Giorgi MFI-1, 29/9/14, p 354.
114 Di Giorgi MFI-1, 29/9/14, p 354.
115 Submissions of the MUA, 14/11/14, para 41, discussing Di Giorgi MFI-1, 29/9/14, p 354.
or by the recollection, triggered by the experience of negotiating with Chris Cain, of threats made on earlier occasions.

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

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

Payments made to METL

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

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116 Fabio Di Giorgi, 29/9/14, T:40.12-19.
117 Danilo Codazzi, witness statement, 29/9/14, para 12; Di Giorgi MFI-1, 29/9/14, pp 355-365.
118 Di Giorgi MFI-1, 29/9/14, p 359.
119 Danilo Codazzi, witness statement, 29/9/14, paras 13-18.
120 Danilo Codazzi, witness statement, 29/9/14, para 14.
Dawson Trust Account toward the Escrow deposit second instalment in accordance with clause 2.2 of the Escrow Deed.121

**Saipem’s desire for industrial peace**

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

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

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

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

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121 Danilo Codazzi, witness statement, 29/9/14, para 18.
122 Di Giorgi MFI-1, 29/9/14, p 274.
124 Di Giorgi MFI-1, 29/9/14, p 313.
Specifically, these barges were required to load the equipment that was required offshore, so any day of delay would have caused a delay of the vessel, of the pipe layer offshore, which means the cost of the spread offshore was in the region of $1 million per day. So every day was $1 million lost.

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

Q. Really, the position was you just wanted to get the Blacktip Project done as quickly and as cheaply as possible?
A. Yes.

Q. You didn't want to get interrupted by a lot of IR disputes and the like?
A. Correct.

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

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

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

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

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126 Fabio Di Giorgi, 29/9/14, T:38.26-37.
127 Fabio Di Giorgi, witness statement, 26/9/14, para 25.
Q. … [Y]ou say the purpose of paying for industrial training was to address the skills shortage and calm down the workforce. The real purpose was calming down the workforce; that’s right, isn’t it?

A. That was also a real issue of skills shortage, sure [sic].

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

Q. Yes, quite so, but what you were trying to achieve by the making of that agreement was industrial peace; that’s right, isn’t it?

A. It was to calm down the people on board the vessel.

Q. And by calming them down you mean achieve industrial peace, because they’re calmed down; that’s right, isn’t it?

A. By “calm down”, I intend, yes, no disruption, no disruption for the project.

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

Q. … [T]he position was you just wanted to get the Blacktip Project done as quickly and as cheaply as possible?

A. Yes.

Q. You didn’t want to get interrupted by a lot of IR disputes and the like?

128 Fabio Di Giorgi, 29/9/14, T:40.30-34.
129 Fabio Di Giorgi, 29/9/14, T:39.4-12.
130 Fabio Di Giorgi, 29/9/14, T:38.26-39.2.
A. Correct.

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

A. Correct.

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

A. Was to maintain the words with the unions.

Q. Maintain the what?

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

Q. Are you saying maintain your word?

A. The “words” means the agreement done.

104. The question and answer after it were:131

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

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

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

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

132 See para 58.
106. The MUA submitted that even if, contrary to its earlier submissions, it was accepted that Chris Cain had made threats, they were of no significance. For one thing, it submitted that the 24 October and 7 November 2008 threats took place over six weeks after Saipem had already reached ‘understanding’ with the MUA on 11 September 2008 to make the payment. The word ‘understanding’ is a sounder characterisation of what had happened than ‘contract’ or ‘agreement’, for the reasons given above. But it was an understanding which was itself too inchoate to make the lateness of the threats inoperative. That is because there were still too many things in dispute.

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

Advantages for Saipem in making the payments

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

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133 Submissions of the MUA, 14/11/14, para 43.
134 See paras 72-79.
109. Counsel assisting submitted that the correspondence between ENI and Saipem reveals the true purpose of the contribution by Saipem to METL.\textsuperscript{135}

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

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

\begin{itemize}
\item[(a)] ensuring the supply of the pipe for the Blacktip Project; and
\item[(b)] reducing the hard-lying claim from $200 to $30 per employee.
\end{itemize}

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

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

\textsuperscript{135} Submissions of Counsel Assisting, 31/10/14, para 69.
\textsuperscript{136} See paras 81-84.
\textsuperscript{137} Di Giorgi MFI-1, 29/9/14, p 312.
\textsuperscript{138} Fabio Di Giorgi, 29/9/14, T:32.8-15.
This training contribution is intended to maintain the relationships established with the maritime unions and facilitate their cooperation to mitigate the risks with HSE/IR issues in relation to Blacktip Project activities…

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

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

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

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

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

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139 Di Giorgi MFI-1, 29/9/14, p 318.
140 Di Giorgi MFI-1, 29/9/14, p 319 (‘HSE’ stands for ‘Health Safety and Environment’).
141 Di Giorgi MFI-1, 29/9/14, p 321.
142 Fabio Di Giorgi, 29/9/14, T:35.39-42.
2008 communication. In it he re-categorised the purpose for the payment to METL in the following terms: ‘This training contribution is intended to sustain the training of new and existing Employee, in relation to future projects in Australia, at Company’s [ie ENI’s] benefit as well’. These emollient euphemisms changed words. They did not change realities.

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

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

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

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143 Di Giorgi MFI-1, 29/9/14, p 327.
144 Di Giorgi MFI-1, 29/9/14, p 366.
145 Di Giorgi MFI-1, 29/9/14, p 366.
146 Di Giorgi MFI-1, 29/9/14, p 369.
However, Paolo Guaita remained steadfast that the contribution should be used as leverage to achieve a successful project. In a further letter dated 30 January 2009, Paolo Guaita stated: 

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

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

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

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122. Di Giorgi MFI-1, 29/9/14, p 371.
123. Submissions of the MUA, 14/11/14, para 47.
124. Submissions of the MUA, 14/11/14, para 50.
124. Paddy Crumlin gave evidence that Saipem made the payment as a way of demonstrating its commitment to Australian maritime skills development.\textsuperscript{150} The MUA submitted that Paddy Crumlin signed the agreement, that there was no challenge to his evidence whether by cross-examination or otherwise, and that it should be accepted.\textsuperscript{151} The problem with this submission is that Paddy Crumlin’s evidence on this point was, with respect, worthless. It expressed a belief without identifying any information on which it was based, or any other sources or grounds for it. The witness could have had no knowledge of, and certainly expressed no basis for knowing, the motivations of Saipem or the relevant executives of Saipem for making payments to METL. The witness had very limited involvement in the negotiations, unlike Chris Cain.\textsuperscript{152} It is so hard to challenge evidence of this kind in cross-examination that the absence of cross-examination lacks any significance. The best evidence of the ENI-Saipem purpose is that of their executives. It is particularly to be found in Fabio Di Giorgi’s evidence that Saipem thought that the Blacktip Project was going to be interrupted if it did not make the payment to METL.\textsuperscript{153}

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

\textsuperscript{150} Paddy Crumlin, witness statement, 25/9/14, para 31.
\textsuperscript{151} Submissions of the MUA, 14/11/14, para 51.
\textsuperscript{152} See Di Giorgi MFI-1, 29/9/14, pp 288, 292.
\textsuperscript{153} Fabio Di Giorgi, 29/9/14, T:38.35-37.
\textsuperscript{154} Submissions of the MUA, 14/11/14, paras 8, 48.
weakness in these submissions is that Stephen Walton’s comment concerned the reasons for the payment generally, not simply the contractual wording. The comment was made when Fabio Di Giorgi explained the intention underlying the payment of $1,000,000 as ‘to maintain the relationships established with the maritime unions and facilitate their cooperation to mitigate the risks with HSE/IR issues in relation to Blacktip Project activities …’. 155

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

155 Di Giorgi MFI-1, 29/9/14, p 318 (‘HSE’ stands for ‘Health Safety and Environment’).
156 Submissions of the MUA, 14/11/14, para 51.
157 Letter dated 17/9/14, TURC to Slater & Gordon Lawyers, p 2 [3].
158 Chris Cain, 29/9/14, T:95.15-28.
paying to calm down industrial unrest and paying to ensure industrial peace. In industrial life ‘peace’ is calmness and ‘unrest’ is not.

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

**Saipem’s submissions**

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

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159 Submissions of the MUA, 14/11/14, paras 50, 56, 62.
160 Submissions of Saipem, 14/11/14, paras 5, 8.
161 Submissions of Saipem, 14/11/14, paras 13-16.
position as the MUA on many points. The circumstances ineluctably pressed its arguments into the same flawed mould.

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

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

F – SAPURAKENCANA AND THE GORGON GAS PROJECT

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

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162 See paras 120-122.
163 Submissions of Saipem, 14/11/14, paras 22-23.
the acquisition of the marine construction division of Clough Limited by SapuraKencana Petroleum Berhad in December 2011.\textsuperscript{164}

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

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

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

\textbf{Issue of foreign crewed tugs}

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

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\textsuperscript{164} Guido Bressani, witness statement, 29/9/14, para 2.
\textsuperscript{165} Guido Bressani, witness statement, 29/9/14, para 6.
\textsuperscript{166} Guido Bressani, witness statement, 29/9/14, para 7.
\textsuperscript{167} Guido Bressani, witness statement, 29/9/14, para 8.
\end{flushright}
Australia. Safety and operational issues could have arisen because those crews would have been unfamiliar with the tugs. Crewing all towing tugs with Australian personnel would have added approximately $2,000,000 to the cost of pipe transportation.\textsuperscript{168}

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

Meetings with the MUA regarding the project

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

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

\textsuperscript{168} Guido Bressani, witness statement, 29/9/14, paras 8-9.
\textsuperscript{169} Guido Bressani, witness statement, 29/9/14, para 10.
\textsuperscript{170} Guido Bressani, witness statement, 29/9/14, para 1.
\textsuperscript{171} Fabio Di Giorgi, witness statement, 29/9/14, para 6.
\textsuperscript{172} Guido Bressani, witness statement, 29/9/14, paras 14-15.
said that using foreign crews on certain vessels for the purpose of the project was the only economically practicable approach in implementing the proposed pipe transportation method. He asked what alternatives there were. Chris Cain responded by suggesting that SapuraKencana could contribute to the training of Australian labour to encourage wider local employment opportunities. Guido Bressani explained that SapuraKencana could not provide that training directly on any of its vessels because of a lack of available bedding for trainees, so another solution was required.173

Agreements to pay to METL and sponsorship

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

140. This agreement was formalised in a Memorandum of Understanding between SapuraClough and the MUA. It was signed by Chris Cain on 13 July 2012.175 The Memorandum included the following provisions:176

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

173 Guido Bressani, witness statement, 29/9/14, paras 16-17.
174 Guido Bressani, witness statement, 29/9/14, paras 19-20.
175 Di Giorgi MFI-1, 29/9/14, pp 406-407.
176 Di Giorgi MFI-1, 29/9/14, p 406.
training. To assist with this SapuraClough agrees to contribute an amount of $50,000AUD towards sponsorship of the MUA State Conference/State Committee. SapuraClough also agrees to contribute to the MUA a total amount of $308,000AUD to be used to provide industry specific training to 4 individual local trainees representing a training cost of $77,000AUD per trainee.

The parties also acknowledge that SapuraClough is a newly established entity and that its future in Western Australia is largely dependent on the successful completion of the Project. To accommodate this, the parties agree that this event sponsorship payment of $50,000 plus the training payment of $308,000 will be paid to the MUA as follows:

a)  Within 5 business days of the execution of this agreement. SapuraClough will pay an amount of $25,000 for sponsorship plus $100,000 for individual training; and

b)  Within 5 business days of the successful completion of SapuraClough's offshore campaign for the Project and its subsequent vessel demobilisation, the remaining $25,000 for sponsorship plus $208,000 for individual training will be paid by SapuraClough.

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

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

177 Fabio Di Giorgi, 29/9/14, T:66.24-33.
179 Guido Bressani, 29/9/14, T:63.42-64.21.
association with the party sponsored to be publicised, not concealed. It was the decision of a corporation which shrank from any public association with the MUA but had been compelled by the MUA to pay it money.

Benefits SapuraKencana received for making the payments

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

\begin{quote}
Q. You were hoping to get the MUA to assist in dealing with those issues by making these payments?

A. That’s affirmative, yes.
\end{quote}

\textsuperscript{180} Guido Bressani, 29/9/14, T:65.15-22.
\textsuperscript{181} Guido Bressani, 29/9/14, T:65.15-32.
\textsuperscript{182} Submissions of the MUA, 14/11/14, para 53.
\textsuperscript{183} Guido Bressani, 29/9/14, T:65.34-36.
The way in which the MUA was to ‘assist’ was to prevent their members from ‘fabricating issues’ like accommodation or fumes. So the MUA, in return for payments, were to procure a form of industrial peace. This was as much the purpose of the MUA as it was of SapuraKencana.

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

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

146. On 21 June 2012, Guido Bressani sent an email to Chris Cain. It referred to the need for ‘a very smooth execution’ with respect to the project.\(^{187}\) Fabio Di Giorgi understood this as referring to a need to

\(^{184}\) See para 54.
\(^{185}\) Fabio Di Giorgi, 29/9/14, T:50.9-13.
\(^{186}\) Fabio Di Giorgi, 29/9/14, T:50.15-19.
\(^{187}\) Di Giorgi MFI-1, 29/9/14, p 399.
avoid ‘industrial disruption’, ie ‘industrial unrest’. Fabio Di Giorgi understood that the MUA could disrupt the execution of the project by finding problems or ‘creating problems that maybe are not real problems’. These words are reminiscent of the words of Guido Bressani, quoted above. Again, the MUA submitted that Fabio Di Giorgi never suggested that the word ‘disruption’, which did not appear in the email, referred to the MUA engaging in finding non-existent or non-real problems. But the context of the evidence – which related to the project involving work to be done by MUA members – meant that it was potential conduct of MUA members that was being referred to. The likeliest way in which MUA members might have caused disruption would have been as a result of MUA persuasion.

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

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

188 Fabio Di Giorgi, 29/9/14, T:51.21-30.
189 Fabio Di Giorgi, 29/9/14, T:51.32-37.
190 See para 143.
191 Submissions of the MUA, 14/11/14, para 54.
193 Guido Bressani, 29/9/14, T:66.3-6.
contributions to METL. The MUA submitted that even if SapuraKencana had the purpose of securing industrial peace by the payments, the MUA had not requested the payments in exchange for industrial peace. This unrealistic submission must be rejected for the same reasons as caused it to be rejected in relation to Saipem. It is to be inferred from the evidence that SapuraKencana paid to avoid industrial disruption. It is also to be inferred that despite Chris Cain’s denials, the MUA both knew and intended this. It wanted the money. It knew that the money was the price of satisfying SapuraKencana’s concerns.

G – DREDGING INTERNATIONAL

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

2009 Dredging International Agreement

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

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194 Chris Cain, 29/9/14, T:95.24-25.
195 Submissions of the MUA, 14/11/14, para 56.
196 Joris De Meulenaere, witness statement, 29/9/14, paras 2-3.

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

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

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

2012 Dredging International Agreement

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

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

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

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

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

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

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

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

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

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201 Di Giorgi MFI-1, 29/9/14, p 484.
202 Di Giorgi MFI-1, 29/9/14, pp 486.
203 Joris De Meulenaere, witness statement, 29/9/14, para 22.
204 Joris De Meulenaere, witness statement, 29/9/14, para 25.
205 Joris De Meulenaere, witness statement, 29/9/14, para 24.
Sponsorship of State Conference

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

160. Under the arrangements for that sponsorship, Dredging International agreed to pay $200,000 to the MUA for sponsorship of the MUA WA State Conferences to be held between 2012 and 2015.207 The full $200,000 was paid, as to three of the Conferences well in advance of their dates, one week after the invoice was received, on 16 May 2012.208

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

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

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206 Di Giorgi MFI-1, 29/9/14, p 488.
207 Di Giorgi MFI-1, 29/9/14, p 489.
208 Di Giorgi MFI-1, 29/9/14, p 489.
209 Chris Cain, 29/9/14, T:101.16-22.
They further submitted that unless an enterprise agreement is approved it does not have statutory force and leaves the employer at risk of protected industrial action. Hence they submitted that, if there was an arrangement to make a payment of sponsorship conditional on an enterprise agreement, it follows that the payment would only have been due when the agreement was approved not, for example, when the terms agreed or the proposed agreement was put to a vote. On the other hand, Dredging International submitted that the proposition in the last sentence preceded by the word ‘if’ was not established. That is considered below in the light of all the circumstances.

Benefits received from sponsorship

In his statement, Joris De Meulenaere described the benefit that Dredging International received from the sponsorship as ‘intangible’. He testified that making contributions is a way of showing that Dredging International is not hostile towards unions, and that it is willing to work with unions.
Dredging International’s payments to the Training and Development Fund and the OH&S Fund

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

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

166. The three payments made comprised $338,818 to the OH&S Fund in December 2012; $169,409 to the Training Fund in March 2013; and $169,409 to the Training Fund in June 2013.216

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

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

214 Joris De Meulenaere, witness statement, 29/9/14, paras 51-52.
215 Joris De Meulenaere, witness statement, 29/9/14, para 53.
216 Joris De Meulenaere, witness statement, 29/9/14, para 54.
217 Joris De Meulenaere, witness statement, 29/9/14, para 60.
169. The MUA submitted that there was no evidence to the contrary of Chris Cain’s claim that there was no connection between the request for $200,000 in conference sponsorship and the negotiations for an enterprise agreement.\textsuperscript{218} The MUA also relied on Chris Cain’s denial that the payments by Dredging International were motivated by a desire for industrial peace.\textsuperscript{219} The MUA further contended that the vague evidence of Joris De Meulenaere about working together with the union,\textsuperscript{220} on which Dredging International also relied, contradicted the idea that Dredging International was seeking to minimise industrial disruption.\textsuperscript{221}

170. The MUA also referred to the following evidence of Joris De Meulenaere:\textsuperscript{222}

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

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

\textsuperscript{218} Submissions of the MUA, 14/11/14, para 58.

\textsuperscript{219} Chris Cain, 29/9/14, T:109.23-27.

\textsuperscript{220} Joris De Meulenaere, 29/9/14, T:78.20-29, 81.4-8.

\textsuperscript{221} Submissions of the MUA, 14/11/14, paras 59-60.

\textsuperscript{222} Joris De Meulenaere, witness statement, 29/9/14, para 60.
171. Dredging International submitted that there was no evidence to support a finding that it made any payments for the purpose of achieving industrial peace. It submitted that the contrary submission of counsel assisting was ‘purely speculation’.\(^ {223} \) Dredging International further submitted that the credibility of Joris De Meulenaere’s denial that the payments to the MUA had the purpose of minimising industrial disruption could not be rejected where there was no alternative evidence against which it was to be compared.\(^ {224} \) Dredging International also submitted that Joris De Meulenaere’s evidence could ‘be directly compared with the evidence provided by other witnesses’\(^ {225} \) (emphasis added).

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

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

\(^{223}\) Submissions of Dredging International, 7/11/14, para 10.
\(^{224}\) Submissions of Dredging International, 7/11/14, para 16.
\(^{225}\) Submissions of Dredging International, 7/11/14, para 17.
\(^{226}\) See at para 99.
\(^{227}\) Fabio Di Giorgi, 29/9/14, T:38.31-37.
the MUA’s stand on Fabio Di Giorgi and Dredging International’s stand.

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

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

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

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228 Joris De Meulenaere, 29/9/14, T:81.8.
International was to satisfy the financial importunities of the MUA quite independently of any demonstrated need for specific training.

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

Q. … It says:

... [we] would like to thank you ... 

229 Joris De Meulenaere, 29/9/14, T:81.4-8.
230 Di Giorgi MFI-1, pp 488-9; Joris De Meulenaere, 29/9/14, T:75.47-83.21.
231 Joris De Meulenaere, witness statement, 24/9/14, para 11.
232 Joris De Meulenaere, 29/9/14, T:79.34-82.21.
Support for training and development will assist us in the delivery and convening and/or attendance of our members and officials at the following events ...

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

A. Yes.

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

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

Q. Have you asked anybody?

A. No.

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

A. That’s correct.

Q. You have been for the last year?

A. That’s correct.

Q. You’ve taken over from Mr Vermeulen?

A. That’s correct.

Q. This is your responsibility?

A. Correct.

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

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

Q. Ever since then, have you wondered about it at all? What’s going on, Mr De Meulenaere? It seems as if there’s money flooding out of this company to this union, and no-one can tell us why?
A. It is my understanding that the payments have been made for the purposes that are described in the letters.

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

A. That’s correct, yes.

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

A. Correct.

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

A. It hasn’t been raised to me, no.

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

A. I don’t think so.

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

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

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

A. Excuse me?

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

A. I can only base my opinion on the documentation that I have, and it is used for the purposes that are mentioned in the letter.
Q. You can’t shed any light on why, when the letters refer to the state conference – the two letters, 25 March and 4 June, both refer to the state conference – the fact that you’d already paid $200,000 for the state conference a year before, you just say you’ve got no idea?

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

Q. No, but you are now.

A. That’s correct.

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

A. That’s correct.

Q. You were his deputy at the time?

A. Yes, that’s correct.

Q. And you were reporting to him?

A. I was reporting to him.

Q. Didn’t you discuss it?

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

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

A. I was not involved in the discussions.

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

A. Correct.

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

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

Q. You’ll have a discussion?

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

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

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

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

233 Joris De Meulenaere, witness statement, 29/9/14, para 11.
234 Joris De Meulenaere, 29/9/14, T:76.32-36.
235 Joris De Meulenaere, witness statement, 29/9/14, para 41.
Vermeulen about the true purposes of the $200,000 payment and the reason for its timing. Another failure to inquire was Joris De Meulenaere’s failure to ask why the subsequent commitment of $338,818 in sponsorship of the MUA was made less than 12 months later. The conclusion that the payment of the $200,000 was connected with the approval of the enterprise agreement is also supported by another instance of the MUA seeking sponsorship from companies at or around the time of enterprise agreement negotiations with them.  

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

H – VAN OORD

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

2009 Van Oord Agreement

184. On 16 February 2010, Fair Work Australia approved an enterprise bargaining agreement. It was the ‘Van Oord Australia Pty Ltd and The

236 Marinus Meijers, 29/9/14, T:86.16-87.4 (concerning the Van Oord payments).
Maritime Union of Australia Contract Propelled Dredging Union Collective Agreement 2009’ (*2009 Van Oord Agreement*).\(^{237}\)

185. Clause 11.16 of the 2009 Van Oord Agreement was headed ‘Training Fund’. It provided that Van Oord agreed to make contributions to a fund being set up by the MUA for the training of employees in the industry. It also provided that Van Oord agreed to conclude a Memorandum of Understanding with the MUA in relation to the level and frequency of contributions to the fund.\(^{238}\)

186. As was the case with Dredging International under the 2009 Dredging International Agreement, Van Oord did not make any contributions under the 2009 Van Oord Agreement, because no Memorandum of Understanding was concluded pursuant to it.\(^{239}\)

**2011 Agreement**

187. The 2009 Van Oord Agreement expired on 30 June 2011. In around February 2011 negotiations for a replacement agreement commenced.\(^{240}\)

188. On 22 December 2011, Fair Work Australia approved a new enterprise bargaining agreement. It was called the ‘Van Oord Australia Contract

\(^{237}\) Di Giorgi MFI-1, 29/9/14, pp 530-533; Marinus Meijers, witness statement, 29/9/14, para 28.

\(^{238}\) Di Giorgi MFI-1, 29/9/14, p 532.

\(^{239}\) Marinus Meijers, witness statement, 29/9/14, para 31.

\(^{240}\) Marinus Meijers, witness statement, 29/9/14, para 32.
Clause 11.4 of the 2011 Agreement provided as follows: 242

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

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

Over this period Van Oord made payments to METL in two different ways. One comprised regular payments to a total of $635,698.78. These were amounts deducted from the wages of Van Oord employees in accordance with clause 11.4 of the 2011 Agreement. 244 The other comprised one-off payments. The most significant of these were $100,000 in January 2012; 245 $192,500 in February 2013; 246 $250,000 in November 2013; 247 $25,000 in December 2013; 248 $25,000 in January 2014; 249 and $68,578 in January 2014. 250

241 Marinus Meijers, witness statement, 29/9/14, para 46; Di Giorgi MFI-1, 29/9/14, pp 534-540.
242 Di Giorgi MFI-1, 29/9/14, p 538.
243 Marinus Meijers, witness statement, 29/9/14, para 83.
244 Marinus Meijers, witness statement, 29/9/14, para 55.
245 Marinus Meijers, witness statement, 29/9/14, para 56(a).
246 Marinus Meijers, witness statement, 29/9/14, para 56(b).
247 Marinus Meijers, witness statement, 29/9/14, para 56(e).
Van Oord’s contributions to the Training Fund and the WASP

192. Van Oord paid $56,200 to WASP on 7 December 2012. It paid $56,200 to the Training Fund on 11 February 2013. It paid $56,200 to WASP on 14 June 2013.²⁵¹

Sponsorship of the MUA State Conference

193. Marinus Meijers testified that after the negotiations for the 2011 Agreement were complete, and the MUA and Van Oord had agreed on the heads of agreement, Chris Cain said to him: ‘Martin, we also have state conferences, and everybody is sponsoring that, so you should also’.²⁵² Marinus Meijers understood that by ‘everybody’, Chris Cain was referring to the other major dredging companies, namely Dredging International, Jan De Nul and Boskalis.²⁵³ Chris Cain then told Marinus Meijers that the others were putting in ‘X times for $50,000’.²⁵⁴ But Marinus Meijers agreed to contribute only $30,000, which he thought was reasonable.²⁵⁵

²⁴⁸ Marinus Meijers, witness statement, 29/9/14, para 94(e).
²⁴⁹ Marinus Meijers, witness statement, 29/9/14, para 94(e).
²⁵⁰ Marinus Meijers, witness statement, 29/9/14, para 56(c).
²⁵¹ Marinus Meijers, witness statement, 29/9/14, para 94; Cain MFI-1, 29/9/14, p 18.
²⁵³ Marinus Meijers, 29/9/14, T:86:35-36.
²⁵⁴ Marinus Meijers, 29/9/14, T:86:41-42.
²⁵⁵ Marinus Meijers, 29/9/14, T:86:45-46.
194. Van Oord’s sponsorship of MUA State Conferences took the following forms: $10,000 in January 2011 to sponsor the 2011 MUA WA Branch Conference; $30,000 in April 2012 to sponsor the 2012 MUA WA Branch Conference; and $30,000 in February 2013 to sponsor the 2013 MUA WA Branch Conference. Van Oord also paid $500 in July 2014 to sponsor a Picnic Day Function in Darwin.\(^\text{256}\)

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

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

197. The only benefit Marinus Meijers was able to point to was getting people in the same place to talk about the maritime industry.\(^\text{259}\) Indeed, Van Oord declined the MUA’s offer for banner and advertising rights at the conference.\(^\text{260}\) Van Oord’s behaviour in this respect is like that of SapuraKencana.\(^\text{261}\) It is not the behaviour of a genuine sponsor.

\(^{256}\) Marinus Meijers, witness statement, 29/9/14, para 101.
\(^{257}\) Marinus Meijers, 29/9/14, T:87:29-31.
\(^{258}\) Marinus Meijers, 29/9/14, T:87:11-31.
\(^{259}\) Marinus Meijers, 29/9/14, T:87:11-31.
\(^{260}\) Marinus Meijers, 29/9/14, T:87:33-37.
\(^{261}\) Marinus Meijers, witness statement, 29/9/14, para 103.

\(^{261}\) See para 142.
voluntarily supporting an event. Rather it is the behaviour of a corporation simply being compelled to pay money for a cause with which it has no sympathy.

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

**Hasluck election campaign**

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

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

201. Chris Cain testified as follows. He denied that he had ‘sought’ that Van Oord make a contribution to Adrian Evans’ campaign expenses. 265

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262 Marinus Meijers, 29/9/14, T:88.19-22.
263 Marinus Meijers, witness statement, 29/9/14, para 108.
264 Marinus Meijers, 29/9/14, T:88.38-89.1.
265 Chris Cain, 29/9/14, T:116.27-29.
Then he agreed that he ‘asked’ Van Oord to make a contribution.\(^{266}\) Then he accepted that the request was made immediately following a discussion with Herm Pol but could not remember if it was about manning levels.\(^{267}\)

202. Chris Cain did agree that he had a conversation with Herm Pol. Chris Cain testified:\(^{268}\)

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

203. On 3 May 2013, Adrian Evans sent Herm Pol a letter thanking him for committing to contribute $30,000 to the Hasluck Australian Labor Party campaign.\(^{269}\) He copied in Chris Cain using Chris Cain’s MUA email address.\(^{270}\)

204. On 14 May 2013, Van Oord actually made the payment of $30,000 to the Hasluck Election Campaign Fund.\(^{271}\)

205. The MUA submitted that there was no connection between that payment and any workplace issue.\(^{272}\) The MUA relied on the evidence

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\(^{266}\) Chris Cain, 29/9/14, T:116.31-36.

\(^{267}\) Chris Cain, 29/9/14, T:116.38-42.

\(^{268}\) Chris Cain, 29/9/14, T:117.3-7.

\(^{269}\) Di Giorgi MFI-1, 29/9/14, p 605.

\(^{270}\) Di Giorgi MFI-1, 29/9/14, p 605.

\(^{271}\) Marinus Meijers, witness statement, 29/9/14, para 107.

\(^{272}\) Submissions of the MUA, 14/11/14, para 73(iv).
of Chris Cain and Marinus Meijers. The evidence of Chris Cain, quoted above,\textsuperscript{273} was contradictory and unsatisfactory. The evidence of Marinus Meijers on which the MUA relied was:

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

206. However, the MUA did not deal with the following evidence. According to Marinus Meijers, Herm Pol was approached by Chris Cain after a meeting on ‘manning levels’. Chris Cain accepted that there was a meeting, although he could not remember whether it was about manning levels. The expression ‘manning levels’ is one which ‘refers to the skills and qualifications of the members of the crew on a vessel. For example, how many officers, engineers, deck hands, cooks, stewards, welders are on the vessel.’\textsuperscript{274} Hence manning levels involve workplace issues. Thus there was a direct temporal connection between a meeting on workplace issues, Chris Cain’s request for a contribution to the campaign of a Deputy State Secretary of the MUA for election to federal parliament, and the agreement of Van Oord, through Herm Pol, to contribute $30,000. Further, it is an extraordinary thing for a multinational company like Van Oord to do. This is strongly supported by the following evidence of Marinus Meijers:\textsuperscript{275}

\textsuperscript{273} See para 201.
\textsuperscript{274} Marinus Meijers, witness statement, 29/9/14, para 73.
\textsuperscript{275} Marinus Meijers, witness statement, 29/9/14, paras 109-114.
109. When I asked Mr Pol if he had promised any donation to the fundraising campaign of Mr Evans, he said he promised the amount of AUD$30,000.

110. I had my doubts to donate money to a political party.

111. I made it clear to Mr Pol it should not happen again.

112. Mr Pol had already promised the donation and it is my culture that once a promise is made it must be carried out.

113. In hindsight, I did not think the donation was appropriate and I should not have honoured Mr Pol’s promise to donate $30,000 to Mr Evans for his political campaign.

114. Van Oord Australia does not support donations to political parties as a general rule.

207. The MUA also submitted that there was no evidence that Van Oord made the payments to secure industrial peace or that Chris Cain asked for them as the price of industrial peace. It used to be common to see a sign: ‘Do not ask for credit as a refusal sometimes offends.’ When a trade union official with Chris Cain’s forceful manner requests a contribution from an employer’s representative, it would be a foolish representative who did not appreciate that refusal would offend and that consequences would flow from that.

I – FINDINGS

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

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

210. Whilst the payments may be characterised in these ways, counsel assisting submitted that, in many cases, the true motivation for the payments is to make industrial peace with the MUA. Counsel assisting correctly relied on two factors which support this analysis. One factor is the ease with which projects can be disrupted. Fabio Di Giorgi gave evidence that a training contribution made in connection with the Blacktip Project was made so that the MUA would calm down its members, and stop them from raising fictitious industrial issues. Guido Bressani conceded that payments in connection with the DomGas Project were made for the purpose of maintaining leverage over the MUA – so that ‘if … relations broke down and there was a lot of industrial unrest’, he wanted to be in a position to say: ‘Well, we’re not going to pay you that second tranche’. Another factor is the high costs of disruptions. Fabio Di Giorgi quantified the damages that Saipem would be likely to incur from delays from industrial disruption as being in the region of $1,000,000 per day. In the face of such risks companies are likely to seek to ensure that projects run smoothly by making donations to or at the request of a union.

276 Fabio Di Giorgi, 29/9/14, T:33.31-40.
277 Guido Bressani, 29/9/14, T:66.31-39.
278 Fabio Di Giorgi, 29/9/14, T:22.9-18.
211. The MUA complained that the only evidence references given by counsel assisting concerned the Blacktip Project and the DomGas Project. However, both factors are similar for all case studies. The detailed circumstances of all case studies even apart from the Blacktip and DomGas Projects support the submissions.

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

213. A further factor is Chris Cain. He wields considerable power. He has the power to ‘shut down a job’. He has the power to agitate crews to fabricate issues or to identify and exploit issues that would not otherwise have been exploited. Equally, if he desires to exercise it, he has the power to pull grumbling crews into line and assist with the smooth running of a project. It would be totally unrealistic to proceed either on the basis that Chris Cain did not have abilities in these respects, or on the basis that employers were unaware of this. The MUA submitted that these matters were never raised in negotiations, except in relation to Saipem in a manner Chris Cain denied. However, that denial has not been accepted. The MUA submitted that counsel assisting’s submissions ‘that the MUA could or would

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279 Submissions of the MUA, 14/11/14, para 70.
280 See paras 80-87.
agitate crews or fabricate issues is without any basis in the evidence whatsoever’.\(^\text{281}\) There is in fact evidence of this kind.\(^\text{282}\)

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

215. Chris Cain’s evidence was that the companies contributed to the conferences because they saw the benefits in doing so.\(^\text{283}\) However, the representatives of these companies giving evidence before the Commission were unable to articulate clearly any benefits. Indeed, neither SapuraKencana nor Van Oord wanted to display their support by having their logos on show or giving other indications of connection with the MUA at the conference.

216. The MUA submitted that the genuineness of the payments, considered in the light of the fact that they were for conference sponsorships, could not be affected by their size, by the incapacity of the employer witnesses to explain what benefits there were, or by the failure of employers to take up their rights to display banners, advertisements, or logos at the MUA conferences they had supposedly ‘sponsored’.\(^\text{284}\) The MUA also submitted in effect that even if the payments were not

\(^{281}\) Submissions of the MUA, 14/11/14, para 70.

\(^{282}\) See paras 54-64.

\(^{283}\) Chris Cain, 29/9/14, T:102.2-3.

\(^{284}\) Marinus Meijers, witness statement, 29/9/14, para 103.
genuine, that was irrelevant to whether they were motivated by a desire to achieve industrial peace.285

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

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

219. The first was Saipem’s agreement to pay $1,000,000 to METL. Counsel assisting submitted that the MUA had cornered Saipem in relation to its proposed use of foreign tugs and was facing a loss of $1,000,000 for every day lost. The MUA said that no evidence had been cited for Saipem being ‘cornered’, and that the timing of the payment was merely coincidental with the dispute between the MUA and Saipem over foreign crews. That submission is quite

285 Submissions of the MUA, 14/11/14, paras 70-71.
unconvincing. It does not take into account the findings above about Chris Cain’s behaviour.

220. Counsel assisting’s next example was Dredging International. The day after it had its enterprise agreement approved by the Fair Work Commission it received an invoice for a $200,000 sponsorship payment of the MUA WA Branch conference. The MUA submitted that this too was a fallacy. It rested on ‘unwarranted speculation that at some time in the past there could have been an arrangement between Dredging International and the MUA for payment made conditional on the approval of the enterprise agreement by the Fair Work Commission many weeks after the agreement had been negotiated.’\textsuperscript{286} But there is no fallacy. The enterprise agreement was a thing writ in water until the Fair Work Commission had approved it. No doubt the time of agreement between the employer and the union was an important time. But so is the time of approval by the Fair Work Commission: it is crucial. The close connection in time between the approval by the Fair Work Commission and the invoice was not a coincidence.

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

222. Counsel assisting took another Van Oord example. Immediately after a discussion over manning levels, Chris Cain requested a contribution

\textsuperscript{286} Submissions of the MUA, 14/11/14, para 73(ii).
\textsuperscript{287} Submissions of the MUA, 14/11/14, para 73(iii).
to the electoral campaign of the MUA’s Deputy State Secretary. The MUA’s submissions about the lack of connection were rejected above.288

223. Finally, counsel assisting referred to SapuraKencana. There was evidence that it was aware that ‘its future in Western Australia is largely dependent on the successful completion of the Project’ and was after a ‘smooth execution’. On that basis it decided to pay $358,000 between the MUA and METL.289 The MUA submitted that whatever SapuraKencana’s purpose, there was no evidence that the MUA had requested the payment in exchange for industrial peace.290 This argument was rejected above.291

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

J – LEGAL ISSUES

225. Counsel assisting declined to submit that, on the evidence before the Commission, the conduct of Chris Cain or the MUA in respect of the negotiations considered above met the requirements of an offence under s 338A of the Criminal Code (WA). Whether it did is one question. Whether, even if it did, a prosecution would have sufficient prospects of success is another. Because of the decision of counsel

288 See paras 205-207.
289 See paras 137-148.
290 Submissions of the MUA, 14/11/14, para 73(v).
291 See para 148.
assisting to decline to make submissions about s 338A, it is not desirable to consider whether the requirements of s 338A were met, even on the balance of probabilities. It is therefore not appropriate to refer the matter to the Western Australian Director of Public Prosecutions in order that consideration be given to a prosecution for that offence. It would be prudent, however, for the MUA to bear s 338A in mind in deciding what conduct to pursue in future.

K – PROFESSIONAL STANDARDS

226. However, even if s 338A does not apply, it will generally be a breach of the professional standards applicable to officials of the MUA to threaten industrial action against a business, expressly, by implication or by conduct, with a view to procuring financial contributions from that business to the MUA or to others. That conduct tends to evade the legislation and other laws preventing certain types of industrial action. And generally that conduct is insufficiently related to an attempt to improve the terms and conditions of MUA members. That is the case with the conduct examined in the case studies considered in this Chapter.

227. It has been announced that the CFMEU and the MUA are to merge. The characteristics which the MUA will bring to the merged entity will be supplementary, not complementary.
PART 2

CHAPTER 2

TRANSPORT WORKERS’ UNION
(WESTERN AUSTRALIAN BRANCH)

MISAPPROPRIATION OF BRANCH FUNDS

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A – INTRODUCTION

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

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1 Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 4.2 (union election funds), ch 6.2 (superannuation) and ch 7.2 (training funds); Vol 2, ch 10.2 (fraudulent misrepresentations to the Australian Labor Party about TWU membership).
2. The TWU is a trade union and organisation of employees registered pursuant to the provisions of the *Fair Work (Registered Organisations) Act* 2009 (Cth) (*FW(RO) Act*). It has Branches constituted across the states and territories of Australia. One of them is the Western Australian Branch (*the Branch*).

3. Pursuant to Chapter 5 of the *FW(RO)* Act, the TWU has adopted and registered a set of rules (*the National Rules*).² The Rules cover the National Union and the State Branches.³ The Branch also has a set of rules registered with the Western Australian Industrial Relations Commission (*the Branch Rules*).⁴

4. James McGiveron began work at the Branch in January 1985. In 1993 he was elected Branch Secretary. The term he was serving in 2012 was due to expire at the end of November 2014⁵ but he left early. He resigned with effect from 31 December 2012. After his resignation, James McGiveron remained employed by the Branch in a position described as ‘Special Projects Officer’. On 30 May 2013, his successor purported to make that position redundant, with effect from 12 July 2013.⁶ So ended more than 28 years of service.

5. James McGiveron also held national office in the TWU. At the TWU’s National Council in May 2012, he was elected unopposed as

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² TWU WA Rules Bundle, 11/5/15, tabs 1-3.
³ TWU WA Rules Bundle, 11/5/15, tab 1: r. 16.
⁵ James McGiveron, 12/5/2015, T:149.23-32.
the National President of the TWU. That is an honorary position.\textsuperscript{7} The holder is appointed annually by and from the National Council.\textsuperscript{8} James McGiveron’s term as National President expired the following year, since he did not stand for re-election at the National Council in May 2013.

6. Richard Burton, too, was a very experienced official. He began work at the Branch in April 1992. In January 2012 he assumed the newly created role of Assistant Branch Secretary.\textsuperscript{9} He served as Acting Branch Secretary from 9 October to 31 December 2012. On 1 January 2013, following James McGiveron’s resignation, he became the Branch Secretary. He held that position until his resignation from all positions in the TWU on 12 April 2014. Tim Dawson then became the Branch Secretary.

7. James McGiveron at all material times until 1 January 2013 was an officer of the Branch. Richard Burton at all material times until 12 April 2014 was an officer of the Branch. Each therefore owed a number of duties to the Branch, including:

(a) a fiduciary duty not to act in a position where there was a real sensible possibility that his interests might conflict with his fiduciary duty to the Branch to act in good faith and for proper purposes in advancing the interests of the Branch;

\textsuperscript{7} James McGiveron, 12/5/15, T:179.24-28.

\textsuperscript{8} TWU WA Rules Bundle, 11/5/15, tab 1: r. 57-58; James McGiveron, 12/5/15, T:151.10-16.

\textsuperscript{9} Starr MFI-1, 11/5/15, p 280; TWU WA Rules Bundle, 11/5/15, tab 1: r. 31(2)(d) and r. 40(2)(a).
(b) a fiduciary duty not to use his position to confer an advantage on himself or someone else to the detriment of the Branch;

(c) an obligation under s 285 of the FW(RO) Act to exercise his powers with due diligence;

(d) an obligation under s 286 to exercise his powers in good faith, in what he believed to be the best interests of the Branch and for proper purposes;

(e) an obligation under s 287 not improperly to use his position to gain an advantage for himself or cause detriment to the Branch.

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

James McGiveron’s plan to retire

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

The events of 18 July 2012

10. On the morning of 18 July 2012, Richard Burton visited two Perth car dealerships. He was accompanied by Glen Barron, a member of the Branch. They inspected a Ford F350. One of those dealerships was Barbagallo Motors (Barbagallo). Two Ford F350s were ultimately purchased from Barbagallo.

11. The Ford F350s were quite unlike the normal cars purchased by the Branch. The Ford F350s cost about $150,000 each. The usual cost of vehicles purchased by the Branch was about $50,000.

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10 McGiveron MFI-1, 12/5/15, para 2; Starr MFI-1, 11/5/15, pp 101-103.
12. On the evening of 18 July 2012 there was a meeting of the Branch Committee of Management (BCOM). The minutes record, amongst other matters, the following three events.\(^{14}\)

13. First, James McGiveron gave a report on his role as National President and its impact on his role as Branch Secretary. He announced that he and Richard Burton would resign from their respective positions at a BCOM meeting on 26 September 2012. He also announced that Richard Burton would take over the role of Branch Secretary. He said he himself would take up a position as ‘Gas and Mining Officer’. Later this came to be called the position of ‘Special Projects Officer’.


15. Thirdly, the BCOM resolved that James McGiveron be ‘granted ownership of the union motor vehicle that he is driving at the time his employment ceases with the Branch’ (the Car Resolution). The car he was driving on 18 July 2012 was cheap and not new. The car he was driving when his employment ceased on 12 July 2013 was one of the Ford F350s – very expensive and nearly new.

**The events of 24 July 2012**

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

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

17. On the same day, James McGiveron arranged for Debra Hodgson, an employee of the Branch, to pay $80,000 to Barbagallo by way of deposits on the two cars.\(^{16}\)

18. It was known at this time that the Ford F350s would not be arriving until early 2013. That is what James McGiveron told Debra Hodgson at the time of arranging for her to pay the deposit.\(^{17}\) It is also what James McGiveron said in oral evidence.\(^{18}\)

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

19. Although at the 18 July 2012 BCOM meeting James McGiveron foreshadowed that he and Richard Burton would resign in September 2012, the resignations did not take place until 9 October 2012. On that day a ‘special’ BCOM meeting took place. Amongst other matters, the minutes of that meeting record the following four events.

20. *First*, the BCOM authorised a leave of absence for James McGiveron until the end of 2012. This leave was said to have two purposes. One

\(^{15}\) Starr MFI-1, 11/5/15, p 228.

\(^{16}\) Starr MFI-1, 11/5/15, p 229; Debra Hodgson, witness statement, 11/5/15, paras 12-15; DH-1 [8]-[9].


\(^{18}\) James McGiveron, 12/5/15, T:139.3-29.
was to enable him to travel and continue his work on ‘achieving …
alliances’ with ‘unions across the globe’, but in particular in the United
States. The other was to allow him to organise members and promote
the interests of the TWU in remote mining areas of Australia.

21.  *Secondly*, James McGiveron and Richard Burton resigned from their
respective positions with effect from 31 December 2012.

22.  *Thirdly*, Richard Burton was appointed Branch Secretary with effect
from 1 January 2013. No election was necessary because James
McGiveron had held office for long enough to create a casual vacancy.

23.  *Fourthly*, James McGiveron was appointed Special Projects Officer.
The terms and conditions were the same as applied to his then
employment as Branch Secretary. The appointment was with effect
from 1 January 2013. His responsibilities were described in the
minutes as ‘ensuring that the TWU develops and implements the best
possible strategies in the resources and mining sector of our economy,
with a view to ensuring the TWU’s membership interests are
maximised in the sector’.

The arrival of the Ford F350s

Burton and James McGiveron each signed an application to obtain
licences for the Ford F350s. Those applications stated their

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19 Starr MFI-1, 11/5/15, pp 14-16.
20 Burton MFI-1, 13/5/15; McGiveron MFI-5, 12/5/15.
Respective names. And those applications gave their respective home addresses. Receipts for the payment of licence fees (in the amount of about $4,500 per car) were issued to Richard Burton and James McGiveron, naming their home addresses. Yet it was the TWU, not the officials, which owned the cars.

25. On 26 March 2013, Richard Burton signed two contracts to buy Ford F350s from Barbagallo. These contracts were apparently required by Barbagallo to replace the previous contracts executed by James McGiveron. That requirement may have arisen because since July 2012 extras had been added to the Ford F350s (at a cost of around $20,000 per car). The total purchase price for each Ford F350 was $154,275, with $114,275 outstanding. Although Richard Burton signed both contracts, one identified James McGiveron as the purchaser, and gave his home address. The other identified Richard Burton as the purchaser and gave his home address. The contracts were false documents in the sense that the officials were not the purchasers. The TWU was the purchaser.

26. On 2 April 2013, payment of the remaining monies owing for both vehicles ($228,550) was electronically transferred from the Branch to Barbagallo. Debra Hodgson made the payment at the direction of Richard Burton.

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James McGiveron’s redundancy

27. James McGiveron’s term as National President expired on 20 May 2013.24

28. Ten days later, Richard Burton, in his capacity as Branch Secretary, wrote two letters to James McGiveron.

29. The first letter announced that James McGiveron’s position as Special Projects Officer had been made redundant, with effect from 12 July 2013. It referred to the Redundancy Policy Resolution that James McGiveron had introduced at the meeting of 18 July 2012. It attached calculations of the amount to be paid to James McGiveron under that policy: $477,294.57 gross and $373,191.23 net.25 That amount was paid to James McGiveron in July 2013.26

30. The second letter that Richard Burton wrote to James McGiveron on 30 May 2013 referred to the Car Resolution passed by the BCOM on 18 July 2012. The letter then informed James McGiveron that in keeping with the Car Resolution he would be granted, on 12 July 2013, personal ownership of the Ford F350 currently in his possession.27

31. On 6 August 2013, the BCOM passed a resolution endorsing the payment to James McGiveron of redundancy money and the transfer to

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26 Starr MFI-1, 11/5/15, p 209.
him of a car identified by the number plate 1ECY 231. That transfer purported to be made pursuant to the Car Resolution. The BCOM did not know at this time that that car was a Ford F350 as distinct from the much cheaper type of vehicle James McGiveron had been driving before March 2013.

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

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

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

29 Starr MFI-1, 11/5/15, p 60.
33. A special resolution at a BCOM meeting urgently convened on the same day accepted his resignation. The minutes do not record any thanks to the ruined Secretary for his past work. Nor do they record any expression of goodwill for his future. An extraordinary meeting of BCOM immediately after the special meeting elected Tim Dawson to fill the casual vacancy.

34. The other BCOM members (with one exception) were unaware that the Branch had purchased either of the F350s until April 2014.

35. Richard Burton sold his Ford F350 shortly after April 2014. He remitted the proceeds of sale to the Branch. James McGiveron sold his Ford F350 in September 2014. He also remitted the proceeds to the Branch. But in exchange he was given ownership of one of the Branch’s Mazda BT-50s, a car costing around $50,000.

C – THE ISSUES IN OUTLINE

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

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30 Starr MFI-1, 11/5/15, p 60.
32 Paul Aslan was aware of the existence of the F350 that was used by James McGiveron from about 30 May 2013, but unaware of the other F350 until April 2014: Paul Aslan, witness statement, 11/5/15, para 9.
33 Kevin Starr, witness statement, 11/5/15, para 48; Paul Aslan, witness statement, 11/5/15, para 10; Tim Dawson, witness statement, 11/5/15, para 10; Mark Bebich, witness statement, 11/5/15, paras 10-11; Ray McMillan, witness statement, 12/5/15, para 8; Deborah Dunbar, witness statement, 12/5/15, para 8; Bruce Spaul, witness statement, 12/5/15, paras 6-7; John Davis, witness statement, 12/5/15, paras 7; Peter Elliott, witness statement, 12/5/15, paras 8-12.
37. First, did James McGiveron and Richard Burton breach their duties as officers of the Branch in connection with the purchase of the Ford F350s?

38. Secondly, did James McGiveron and Richard Burton breach their duties as officers of the Branch in connection with the passing of the Car Resolution and the transfer of ownership of one of the Ford F350s to James McGiveron?

39. Thirdly, did Richard Burton dishonestly conceal the purchase of the Ford F350s from the BCOM?

40. Fourthly, were James McGiveron and Richard Burton entitled to receive car allowances of around $11,000 per annum?

41. Fifthly, did James McGiveron and Richard Burton breach their duties as officers of the Branch in connection with the redundancy payment made to James McGiveron?

42. This Chapter deals first with the purchase of the Ford F350s and the transfer of one of them to James McGiveron. Then it deals with car allowances. Finally it deals with the redundancy payment. It is convenient to proceed by setting out the submissions of counsel assisting, interrupting where it is necessary to consider particular criticisms which senior counsel for James McGiveron and senior counsel for the TWU made of them.
D – PROCEDURAL BACKGROUND

43. First, however, it is desirable to set out the unusual way in which this case study came to the Commission.

44. The following events took place after the Branch discovered the purchase of the Ford F350s.34

45. The TWU engaged a financial management and consulting firm known as Matrix on Board to review the policies and procedures of the Branch, and to improve governance and accountability within it. In addition to other changes introduced by Tim Dawson, steps were taken to act on the Matrix on Board report.35

46. On 6 June 2014, the TWU engaged the services of the Hon Wayne R Haylen, QC, as Acting Ombudsman for the TWU, to investigate some of the matters considered in this Chapter, and other matters.36 Mr Haylen is a very experienced industrial lawyer who served for 12 years as a judge of the Industrial Relations Commission of New South Wales. On 28 August 2014, Mr Haylen sent the TWU a report adverse to Richard Burton. It should be said in passing that careful, detailed and useful though that report is, the Commission has carried out an analysis of the circumstances which is independent of Mr Haylen’s

34 Tim Dawson, witness statement, 11/5/15, para 24.
35 Tim Dawson, 11/5/15, T:94.8-24, 95.9-38.
36 Starr MFI-1, 11/5/15, p 326-331.
work. The report was not tendered to establish the truth of its conclusions.\footnote{Kevin Starr, 11/5/15, T:14.34-40.}

47. The TWU referred the matter to the Fair Work Commission.

48. On or about 10 September 2014, the TWU commenced proceedings in the Federal Court of Australia against Richard Burton. It applied for declarations that Richard Burton had contravened s 286(1) and s 287(1) of the FW(RO) Act, and an order that Richard Burton pay compensation for damage suffered as a result of the contraventions.\footnote{Starr MFI-1, 11/5/15, pp 268-277.}

49. The TWU did not start proceedings against James McGiveron.

50. Finally, the TWU referred the matter to this Commission. It made Mr Haylen’s report available to the Commission, together with other materials. It cooperated fully with the Commission in relation to this particular case study. Its conduct in these respects is commendable and unique. However, it did seem to be much more critical of Richard Burton than of James McGiveron. For example, its senior counsel cross-examined the former with great force, the latter not at all. But in submissions it did not defend James McGiveron.

51. The public hearings of the Commission took three days. The TWU and James McGiveron were legally represented. So was Richard Burton, though his representative was not present for the whole three days. And the solicitors for Richard Burton informed the Commission that they were not instructed to file any submission. None was filed.
52. The first duty of a trustee is to obey the terms of the trust.\textsuperscript{39} Part of that first duty involves a duty to ascertain those terms. Similarly, part of the first duty of a fiduciary must be to ascertain the terms governing the fiduciary relationship. One category of fiduciary comprises trade union officials. Part of their first duty must be to acquaint themselves with the rules of their union. Having done that, they have a duty to comply with those rules. The National Rules of the TWU, and the Branch Rules, are very detailed and sophisticated. They appear to have been composed very carefully.

53. Counsel assisting submitted that neither James McGiveron nor Richard Burton had any authority to make purchases of the F350s without BCOM approval. He submitted that in doing so they contravened rule 75(7)(d) of the National Rules and rule 36(i) of the Branch Rules. He submitted that those rules permitted expenditure of Branch funds only with the prior authorisation of BCOM. James McGiveron thus had no authority to pay the deposit for the two cars on 24 July 2012. Neither did James McGiveron have any actual authority to enter into the contracts to purchase the cars on behalf of the Branch on 24 July 2012. That was not within any of the enumerated powers conferred on the Secretary in rule 37(3) of the National Rules or rule 12 of the Branch Rules.

\textsuperscript{39} Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484 at [32].
54. Counsel assisting also submitted that the payment of the deposit was in breach of rule 75(7)(c) of the National Rules as it did not have a second authorisation by the Branch President, the Branch Vice-President or one Branch Trustee. The correctness of this last submission is plain. Senior counsel for James McGiveron offered no submission against it.

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

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

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

40 Submissions of James McGiveron, 19/6/15, para 28.
41 Submissions of the TWU, 17/6/15, para 34.
56. Senior counsel for James McGiveron also quoted evidence of a general practice which was ‘consistent with an application and construction of the rule that allows expenditure to be endorsed after it has occurred’.  

57. The last point can be put on one side at the outset. The issue is not what the general practice was. The issue is what the rules mean. A general practice does not establish what the rules mean. A general practice inconsistent with the rules is immaterial unless it is demonstrated that that practice has, conformably with criteria of legality, supplanted the rules. No demonstration of this kind was attempted.

58. What, then, do the relevant rules mean? In the National Rules, the relevant provisions are as follows:

75(7) The funds of the Union may only be expended as follows:

... 

(d) Subject to paragraph (e), the expenditure of Branch funds may only be made by a resolution of the [BCOM], and is subject to sub-rules 72(3) and 73(6); and

(e) (i) The salaries of Officers and other employees of the Union, and

(ii) regularly recurring expenses that have been authorised by the [BCOM];

may be paid without a specific resolution of the [BCOM].

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59. There are valid reasons for rejecting the construction of rule 75(7)(d) propounded by senior counsel for James McGiveron.

60. First, the word ‘by’ in rule 75(7)(d) suggests that the relevant resolution must precede the expenditure. The word ‘by’ implies that the resolution is the operative factor validating the payment. If the resolution came after the payment, the payment would not be ‘by’ the resolution, but ‘by’ something else. Contrary to what counsel for James McGiveron submitted, this construction does not render it impractical to manage the TWU. Considerations going to practicality of management are adequately catered for by rule 75(7)(e). Items not within rule 75(7)(e) require a prior resolution under rule 75(7)(d), and this requirement rests on criteria of prospectivity, not retrospectivity. If rule 75(7)(d) did not require a prior resolution, the legality of the expenditure would be left in limbo until a subsequent resolution was passed. And if rule 75(7)(d) did not require a prior resolution, it would be possible for a resolution seeking retrospective approval to fail, leaving the legality of the expenditure without any support and creating risks, including perhaps risks of personal liability, for those responsible for the expenditure. In short, rule 75(7)(d) contemplates antecedent permission, not subsequent absolution.

61. Further, the construction propounded by senior counsel for James McGiveron is negated by rule 75(7)(e). Rule 75(7)(e)(i) creates an exception to rule 75(7)(d) permitting ‘salaries of Officers and other employees of the Union’ to be ‘paid without a specific resolution’. And rule 75(7)(e)(ii) creates an exception to rule 75(7)(d) for certain ‘regularly recurring expenses that have been authorised by the [BCOM]’ to be ‘paid without a specific resolution’. These two
exceptional categories are quite distinct from other payments. Payment of salaries of Officers and other employees are likely to have been authorised in advance, whether by a specific resolution or not. That is either because the salaries of the relevant categories of Officers and other employees are established by contracts of employment which have been approved by BCOM or because there have been general resolutions. The payment of salaries also has a recurrent character, making it unnecessary to have a specific resolution before or even after each payment. The same is true of ‘regularly recurring expenses that have been authorised by the [BCOM]’ – they have been authorised in advance and they are regularly recurring. The existence of these exceptions in rule 75(7)(e) implies that but for the exceptions, the conduct they refer to would have fallen within rule 75(7)(d). If the exceptions deal with items that would ordinarily have been authorised in advance (rule 75(7)(e)(i)), or were expressly stated to have been authorised in advance (rule 75(7)(e)(ii)), it follows that the conduct not excised by the two exceptions will also have to be authorised in advance.

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

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

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

Provided that salaries of officers of the Branch and employees, together with regular recurring expenses or accounts which have been authorised
by the [BCOM] may be paid by cheques drawn without being so passed for payment. (emphasis added)

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

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

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

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

... 

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

(i) the Branch Secretary; and

(ii) either:

(A) the Branch President

(B) the Branch Vice-President, or

(C) 1 Branch Trustee ....

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

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43 Submissions of James McGiveron, 19/6/15, para 30.
that the words ‘signed or authorised by [the various officers]’ apply not only to payments by cheque but also to payments by Electronic Funds Transfer. The function of the rule is to create a safeguard against the fraudulent or careless loss of Branch funds by requiring consent evidenced by a signature or authorisation from the Branch Secretary and one other of the three named officials. It would be anomalous if that safeguard were only to apply to one form of transfer but not another – ie only to transfers by cheque but not transfers made by Electronic Funds Transfer.

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

The decision to purchase the Ford F350s

68. Counsel assisting submitted that independently of any breach of the TWU’s rules, both James McGiveron and Richard Burton had a material personal interest in the transactions they were entering into. He began with the decision to purchase the Ford F350s.

69. Both Richard Burton and James McGiveron agreed that the decision to buy the Ford F350s was made by James McGiveron on Richard Burton’s recommendation.44 Richard Burton recalled discussion about

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

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

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


\textsuperscript{46} McGiveron MFI-1, 12/5/15, para 15.

\textsuperscript{47} James McGiveron, 12/5/15, T:117.39-41.
72. James McGiveron in his signed statement to the Hon Wayne Haylen had said that he was approached by Richard Burton about purchasing the vehicles ‘between April and December 2012’ and that following those discussions, he ordered the Ford F350s ‘in approximately April/March 2012’. In oral evidence James McGiveron said he wished to correct the time periods just quoted to read ‘prior to 24 July 2012’. James McGiveron accepted that when he signed the statement provided to the Hon Wayne Haylen he was satisfied it was correct and appreciated it was important to give the Hon Wayne Haylen his honest recollection of events in relation to the Ford F350s.

73. Richard Burton’s evidence in his statement was that he had discussions with James McGiveron about the purchase by the Branch of vehicles for use in remote areas, and that he and James McGiveron agreed that F350s were appropriate. He said he did not recall precisely when his discussion or discussions with James McGiveron took place. In oral evidence Richard Burton said that to his recollection the discussions took place around May/June and before the 18 July 2012 meeting. He said that during these discussions he recommended to James McGiveron that the Branch purchase the two Ford F350s. He did not think during those discussions that James McGiveron had any objection to the purchase and he understood, prior to 18 July 2012, that

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49 James McGiveron, 12/5/15, T:119.21-120.4.
James McGiveron had accepted his recommendation.\(^{54}\) He later said that he was not ‘100 per cent’ sure that the Ford F350s were being purchased, and that he had not ‘got the green light’ from James McGiveron.\(^{55}\) The substance of his evidence, however, was that there was an expectation that the purchase would proceed by the time of this meeting.

74. It is likely that by the time of the 18 July 2012 meeting both James McGiveron and Richard Burton expected the purchase would proceed. That is so for three reasons.

75. *First*, it is unlikely that Richard Burton would have visited two car dealerships on the morning of 18 July 2012 if he did not think at that time that there was a strong likelihood that the Ford F350s would be purchased. Richard Burton could never have had an intention to purchase a Ford F350 with his own money. And on no view did he have authority to purchase the Ford F350s without (at least) James McGiveron’s consent.

76. *Secondly*, it is unlikely that the discussions which both Richard Burton and James McGiveron agree occurred in relation to the Ford F350s all took place in the period 18 July 2012 to 24 July 2012. It is also unlikely that they took place, as James McGiveron appeared to claim, on the one or two days before 24 July 2012.

\(^{54}\) Richard Burton, 13/5/15, T:221.22-37.

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

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

78. The ‘BCOM decision’ referred to must have been the decision of 18 July 2012. That is the resolution to which James McGiveron refers in the second paragraph of the same letter. The only other BCOM decision regarding the car was its decision of 6 August 2013.57 James McGiveron was not present at this meeting. By the time of that meeting he had already been given ownership of the car, with effect from 12 July 2013, pursuant to Richard Burton’s letter of 30 May 2013.

79. In oral evidence James McGiveron initially claimed that, in referring to the ‘BCOM decision’, he was referring to the meeting of 6 August 2013.58 He then suggested that he was intending to convey that he was humbled ‘by the letters I received from the Branch Secretary gifting me the vehicle’.59 A little later he accepted that he was humbled by the resolution passed regarding the car on 18 July 2012, but not because he

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

80. That reading is further supported by the statement James McGiveron gave the Hon Wayne Haylen in which he said: ‘When my retirement was announced BCOM resolved that I be given an F350 as a gift in recognition of my 28 years of service to the branch.’\textsuperscript{61}

81. Again, the only resolution to which James McGiveron is referring must be the BCOM meeting in which he was present on 18 July 2012.

82. Thus the better view of the evidence is that James McGiveron and Richard Burton expected, at the time of the 18 July 2012 meeting, that the purchase of the Ford F350s would proceed.

83. The submissions of counsel assisting about the decision to buy the F350s were not challenged in any way by senior counsel for James McGiveron or senior counsel for the TWU. They are sound. They are accepted.

\textsuperscript{60} James McGiveron, 12/5/15, T:133.13-27.

\textsuperscript{61} McGiveron MFI-1, 12/5/15, para 17.
F – JAMES MCGIVERON’S FORD F350

84. These dealings concerning James McGiveron’s Ford F350 raise two questions. Did he breach his duties as an officer of the Branch by exercising his powers as an officer for his own benefit? And did Richard Burton breach his duties as an officer of the Branch by exercising his powers as an officer for the benefit of someone else and not the Branch?

85. It is necessary to examine the position at six different points in time. The first is 18 July 2012 when the Car Resolution was proposed and passed. The second is 24 July 2012 when James McGiveron contracted to purchase the Ford F350s and arranged for the payment of deposits of $40,000 for each Ford F350. The third is March 2013 when James McGiveron took delivery of ‘his’ Ford F350. The fourth is April 2013 when Richard Burton paid for that Ford F350. The fifth is 30 May 2013 when Richard Burton wrote to James McGiveron granting him ownership of ‘his’ Ford F350 pursuant to the Car Resolution. The sixth is 6 August 2013 when the BCOM passed a resolution to similar effect.

18 July 2012

86. It is quite plain that none of the other members of the BCOM appreciated at the 18 July 2012 meeting that Ford F350s were to be purchased. Nor did they appreciate that the Car Resolution might result in the gifting to James McGiveron of a Ford F350.
If, as has been found, James McGiveron and Richard Burton expected at the time of the meeting that the purchase of the F350s would go ahead, then counsel assisting submitted that they were duty bound to do several things.

First, they were required to disclose the intended purchase, and its purpose, to the meeting. As discussed above, the rules in any event required a BCOM resolution prior to the purchase of the Ford F350s. Even if the rules did not require this, the fact is that a BCOM resolution was proposed – the Car Resolution. That was not a resolution approving the purchase of the Ford F350s. But it was a resolution relevant to the purchase of the Ford F350s. For that reason the disclosure of plans to purchase the F350s at the meeting was necessary. Both Richard Burton and James McGiveron claimed that one of the Ford F350s was to be allocated to James McGiveron in his capacity as Special Projects Officer. The position as at 18 July 2012 was thus that James McGiveron and Richard Burton expected that James McGiveron would move to a Special Projects Role later in 2012 and that a Ford F350 would be purchased for him to use in that capacity. The Car Resolution therefore had the potential, at the very least, to result in a transfer to James McGiveron of a Ford F350 – a very expensive vehicle. That was a matter which it was relevant for the BCOM members to know in making their decision as to whether to pass the Car Resolution.

Secondly, in voting on the Car Resolution, James McGiveron was acting in a position where his interests and his duties conflicted. He

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

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

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

64 See para 196.
more acute and the breach of duty more egregious. Paul Aslan typed up the Car Resolution prior to the meeting. Paul Aslan’s evidence was that he did so because he was asked to.\textsuperscript{65} He said that he was asked to type up the Redundancy Policy Resolution as well, by either or both of James McGiveron and Richard Burton.\textsuperscript{66} It is to be inferred that either or both of James McGiveron and Richard Burton asked him to type up the Car Resolution. Neither James McGiveron nor Richard Burton would accept that they asked Paul Aslan to type up the Car Resolution.\textsuperscript{67} But there are no other likely candidates. Having regard to this evidence, and to the unsatisfactory nature of James McGiveron’s evidence regarding the typing up of the Redundancy Policy Resolution,\textsuperscript{68} the most probable inference is that he asked Paul Aslan to type up the Car Resolution as well. That was Richard Burton’s assumption based on past practice.\textsuperscript{69} This is also consistent with Ray McMillan’s evidence about what ‘would have’ happened at the meeting.\textsuperscript{70}

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

\textsuperscript{65} Paul Aslan, 11/5/2015, T:68.11-15, 69.20-42.

\textsuperscript{66} See Paul Aslan, 11/5/15, T:67.18-19.

\textsuperscript{67} James McGiveron, 12/5/15, T:129.6-26; Richard Burton, 13/5/15, T:231.10.

\textsuperscript{68} See paras 161-199.

\textsuperscript{69} Richard Burton, 13/5/15, T:231.1-232.11.

\textsuperscript{70} Ray McMillan, 12/5/15, T:109.9-22.
the contrary. However, Richard Burton did give evidence of past practice to the contrary. It may not have been direct evidence, but it was evidence. Of course, the testimony of both James McGiveron and Richard Burton is under a cloud because of their self-interest. But that cannot be said of Ray McMillan. He too gave evidence of past practice to the contrary. Further, on this and other issues the force of the available circumstantial evidence tends to outweigh self-interested testimony to the contrary. The surrounding circumstances concerning James McGiveron’s knowledge and discussion with Richard Burton about the Ford F350s and his position as Secretary make it more probable that he did ask Paul Aslan to type up the Car Resolution. Once it is accepted that either Richard Burton or James McGiveron procured Paul Aslan to type up the Car Resolution, and once it is accepted that James McGiveron was deeply involved in the genesis of the Redundancy Policy Resolution, it is likely that James McGiveron procured Paul Aslan to type up the Car Resolution as well.

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

71 Submissions of James McGiveron, 19/6/15, para 16.
two of them concerned fees, and the printed documents were stuck in the red book with sticky tape. The concluding handwritten passages of the minutes for 18 July 2012 in the red book are as follows.73

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

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

R Dunn thanked.

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

Moved R Dunn Sec. M Bebich.

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

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

73 Hodgson MFI-1, 11/5/15.
specifically within the field of interest of James McGiveron, it is likely that he directed Paul Aslan to type up the Redundancy Policy Resolution, and also the Car Resolution. In addition, James McGiveron’s general demeanour in testimony was unimpressive, and this is particularly true of the denial on which his counsel relied.

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

74 See paras 238-250.
allocated to him as Special Projects Officer, and once the Car Resolution had been passed, it was in James McGiveron’s power to obtain ownership of the Ford F350 at any time after its arrival. In fact the submission that James McGiveron and Richard Burton had an expectation that the former’s position would be made redundant is correct, for reasons given below.75

24 July 2012

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

75 See paras 161-250.
96. James McGiveron had the Car Resolution in mind when he entered into the contracts to purchase the Ford F350s on 24 July 2012. He said that he did not ‘want it to appear from the resolution of [18 July 2012] that [he] was buying these vehicles, or the vehicle, with respect to [that resolution] about the gifting of a vehicle’. But, if James McGiveron was not in fact doing that, why did he not disclose to the BCOM members the fact that he was going to enter into the contracts and pay the deposits and explain that this had nothing to do with the resolution? Disclosure could have been made by summoning a special meeting or circulating appropriate correspondence. Either of these methods would have been the best way to dispel the appearance James McGiveron claims to have been concerned about. Indeed, why did he not disclose that he had entered the contracts and paid the deposits – a step which might have enabled the TWU to negotiate its way out of the contracts?

March 2013

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

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76 James McGiveron, 12/5/2015, T:136.43-137.3.
77 Richard Burton, witness statement,13/5/15, para 21; McGiveron MFI-1, 12/5/15, para 23.
78 Burton MFI-2, 13/5/15.
Instead of following the invariable Branch practice, James McGieveron registered the Ford F350 in his own name, and Richard Burton executed a contract for the purchase of that Ford F350 in James McGieveron’s name. Counsel assisting submitted that this suggests that James McGieveron and Richard Burton believed that James McGieveron would become redundant shortly. The point for present purposes, however, is that Richard Burton’s conduct may have been in contravention of ss 285-287 of the FW(RO) Act. James McGieveron had ceased by this time to be an officer of the Branch.

May 2013

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

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

80 See paras 220-259.
6 August 2013

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

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

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

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

G – RICHARD BURTON’S FORD F350

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

83 See footnote 33.
Failure to inform BCOM or Finance Committee

104. Richard Burton failed at any point to notify the BCOM about the purchase of either Ford F350. He had numerous opportunities to do so. It was his duty to inform the BCOM not just because the rules required BCOM approval prior to the purchases, but because the cost of the Ford F350s was about three times the cost of the cars normally purchased by the Branch and because one of the vehicles had been earmarked for his use. The latter circumstance gave him a material personal interest in the purchase which required disclosure. His failure to notify the BCOM at any time may have been a breach of his fiduciary and statutory duties as an officer of the Branch.

105. Was this omission innocent? That possibility is diminished by a number of matters.

106. First, Richard Burton’s explanation for it was unsatisfactory. He said that in the period prior to his becoming Secretary, it was not his job: ‘It’s got nothing to do with me’. That is no explanation at all. His duties arose because he was an officer with a material personal interest in, and knowledge of, a proposed purchase that had not been disclosed to the BCOM. After he was appointed Acting Branch Secretary, Richard Burton’s explanation was that he had no duty to tell the BCOM ‘because it was a follow-up of what another Secretary had

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already done. It had been agreed on”. That too, self-evidently, is no explanation at all.

107. Secondly, at a number of BCOM meetings resolutions were passed regarding the updating of the Branch car fleet. At the 9 October 2012 meeting, the ‘BCOM [authorised] an assessment, in January 2013, of the union’s fleet of vehicles with a view to updating and disposing of currently owned vehicles as deemed necessary by the Branch Secretary.’

108. That would have been an obvious time to inform the meeting about the proposed purchase of the F350s – either to clarify that they were being purchased as part of this process, or to explain that they were not.

109. Richard Burton gave another report on the same process at the 4 December 2012 meeting but again failed to mention the Ford F350s.

110. At the 13 February 2013 BCOM meeting, the question of updating the fleet arose again. The BCOM approved a net increase in the fleet of vehicles operated by the Branch by two vehicles. Again, this would have been an obvious time to raise the purchase of the Ford F350s. But Richard Burton chose not to. The effect of the purchase of the two vehicles was a net increase of four vehicles, two of which were of a vastly different type from the vehicles that had been sold. They were also apparently to be used for an entirely different purpose. It could not

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86 Starr MFI-1, 11/5/15, p 16.
87 Starr MFI-1, 11/5/15, p 23.
be said that the purchase of these vehicles was part of any ‘updating’\textsuperscript{88} or ‘changeover’\textsuperscript{89} of the fleet of vehicles operated by the Branch.

111. At the BCOM meeting on 23 April 2013, a resolution purportedly approving the purchase of the two Ford F350s was carried. The F350s were identified only by their number plates, as was the Branch practice. Richard Burton did not provide the BCOM with any information regarding these vehicles. That resolution was carried after Richard Burton provided a report recorded thus:\textsuperscript{90} ‘The Secretary spoke about the branch fleet and that the last two vehicles purchased have now arrived.’

112. Richard Burton made similar comments regarding the vehicles at a Finance Committee meeting that occurred before the BCOM meeting on 23 April 2013.\textsuperscript{91}

113. Richard Burton’s conduct at these two meetings was grossly misleading. The F350s were characterised as the ‘last’ vehicles purchased as a part of the process of updating the fleet when, in fact, they were no part of that process at all. Richard Burton must have known the BCOM members would have been led to think that the vehicles identified were Mazda BT-50s or similar, and that they cost no more than $50,000. He must have known that the BCOM members would not have expected them to be $150,000 vehicles.

\textsuperscript{88} Starr MFI-1, 11/5/15, p 16.
\textsuperscript{89} Starr MFI-1, 11/5/15, p 19.
\textsuperscript{90} Starr MFI-1, 11/5/15, p 28.
\textsuperscript{91} Richard Burton, 13/5/15, T:288.34-289.4; Starr MFI-1, 11/5/15, p 88.
114. *Thirdly*, on 4 December 2012, whilst Richard Burton was Acting Branch Secretary, accounts that included a reference to an $80,000 payment to Barbagallo were before the Finance Committee and the BCOM. Richard Burton did not draw this to the attention of the meeting. No questions were asked about the payment. There was, in addition, a discussion at this meeting about the fleet changeover. Richard Burton must have appreciated that no-one at the meeting realised that the $80,000 payment was for Ford F350s and unrelated to the fleet changeover. His attempts to explain his conduct in oral evidence were unsatisfactory.  

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

A. Mr Bebich did, yes.

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

A. There would have been, yes.

Q. By you?

A. Yes.

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

A. No.

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

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A. The Branch - the Finance Committee or Branch Committee of Management perused all these records. This is a contract that my predecessor or still the Secretary had entered into. This was in December. That was already done back in July.

Q. However that may be --

A. It has never been --

Q. Were they not entitled to know?

A. It has never been my responsibility to do that and the Secretary should have done that, not me.

Q. But you were the Secretary?

A. Acting Secretary in name only.

Q. There was no other Secretary there. [James] McGiveron wasn't there?

A. No, I understand that.

Q. You were the person?

A. I understand that. No.

Q. Did you not think it was your duty to inform them?

A. No. No, I did not.

Q. Was it not the truth that you decided to conceal the purpose so that you could get one of the vehicles and [James] McGiveron get the other one?

A. No.

115. Fourthly, there was a BCOM meeting on 26 March 2013, on the evening of the day Richard Burton applied to register one of the
116. *Fifthly*, there was a Trustees’ meeting and BCOM meeting on 23 April 2013. The accounts before that meeting omitted any mention of the payment of the balance of the purchase price of $228,000 to Barbagallo on 2 April 2013. This appears to have been a result of an innocent mistake by Debra Hodgson in her use of the accounting software system. The payment of this money must have been fresh in Richard Burton’s mind at this meeting. He must have known it was a highly significant matter for the Trustees to consider. Their failure to make any mention of it must have surprised him. Yet he made no mention of it. Richard Burton’s explanation was that he failed to notice the absence at the time. However, even if he did not notice the absence of the payment in the accounts, he must have noticed the failure of anyone at the meetings to comment on the amount paid. An amount of $228,000, had it been there to be noticed, was too significant a sum not to have drawn comment. He denied thinking it strange that no-one referred to the matter.

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

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94 Marius Van der Merwe, witness statement, 12/5/15, Annexure 7.
95 Debra Hodgson, 11/5/15, T:51:17-44.
was a Ford F350. Although this was very late in the day, it was a final opportunity for Richard Burton to draw the purchase of the Ford F350 to the BCOM’s attention. He did not take it.

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

Registration of the Ford F350s

119. Another matter that suggests Richard Burton deliberately tried to conceal the purchase of his Ford F350 is his decision to register it at his personal address.

120. Richard Burton signed an application form for the registration of one of the Ford F350s on 6 March 2013.\textsuperscript{99} It is apparent from that application form that it originally contained details of the Branch’s address and post office box but that these were crossed out and replaced with Richard Burton’s own personal details. Richard Burton denied striking through the Branch address and replacing it with his address, but he said that he expected the application to be at his address anyway.\textsuperscript{100} When asked whether he remembered at the time he affixed his signature what the form of the document was, he said: ‘I was signing that the vehicle was to be registered in my name and I believed

\textsuperscript{99} Burton MFI-1, 13/5/15.

\textsuperscript{100} Richard Burton, 13/5/15, T:187.21-31.
at my address’. The striking through of the Branch address is initialled, twice, with the letters ‘RB’. Richard Burton denied that these initials were his handwriting.

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

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

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

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101 Richard Burton, 13/5/15, T:188.47-189.1  
103 Richard Burton, 13/5/15, T:189.31-36.  
105 Burton MFI-2, 13/5/15.  
106 Burton MFI-2, 13/5/15.
in his personal name, nominating the street address and the post office box of the Branch as the address.\textsuperscript{107}

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

**Personalised number plates**

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

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

\textsuperscript{107} Burton MFI-2, 13/5/15.
The personal number plates were a gift to me from my family. I had my F250 for sale for some time. It was always my intention that if the car was sold, I would take those plates off. I had a buyer that was interested. I took those plates off prior. The F350 was garaged, it wasn't allotted to anybody, and I put those plates on it. It meant nothing to me except to keep the plates, otherwise I've got to hand those plates back in.

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

Richard Burton’s use of the Ford F350

127. There is a further aspect of Richard Burton’s conduct suggestive of concealment. It concerns his actual use of the Ford F350. After it was purchased it was only ever driven by Richard Burton for non-Branch related business. He used it to travel about 10,000km.\(^{113}\) Otherwise it was stored in a Branch-owned storage shed in a Perth suburb.\(^{114}\)

128. According to Richard Burton, the Ford F350 was bought for the use of organisers. It was to be based in the north-west and used to tow a


\(^{114}\) Richard Burton, 13/5/15, T:245.42-246.6; 248.45-249.3.
129. It never did these things.\textsuperscript{115} Michael Connolly, an organiser in the North-West, never had use of the Ford F350. He was never told about it.\textsuperscript{116} He used a Mazda BT-50.\textsuperscript{117} Richard Burton said that the vehicle was never used for that purpose because ‘circumstances changed’ and the purchase of a property in Karratha meant that an organiser no longer needed the vehicle.\textsuperscript{118} He gave the following evidence:\textsuperscript{119}

\begin{quote}
Q. What was wrong with Michael Connolly having an F350 for organising in that region?
A. It would have been a waste of a vehicle.
Q. You left it in a storage facility, didn’t you?
A. Yes.
Q. Wasn’t that a waste of a vehicle?
A. Yes.
\end{quote}

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

\begin{footnotes}
\item[\textsuperscript{115}] Richard Burton, 13/5/15, T:273.37-274.5.
\item[\textsuperscript{116}] Richard Burton, 13/5/15, T:274.7-19.
\item[\textsuperscript{117}] Michael Connolly, 12/5/15, T:111.37-112.9.
\item[\textsuperscript{118}] Richard Burton, 13/5/15, T:244:5-245.9.
\item[\textsuperscript{119}] Richard Burton, 13/5/15, T:245:38-46.
\end{footnotes}
What Richard Burton told others about the Ford F350

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

\textsuperscript{120} Kevin Starr, witness statement, 11/5/15, para 49; Glen Barron, witness statement, 11/5/15, paras 7, 11; Michael Connolly, witness statement, 11/5/15, paras 8-11.

\textsuperscript{121} Richard Burton, 13/5/15, T:199.36-200.15, 202.10-203.10.

\textsuperscript{122} Richard Burton, 13/5/15, T:200.17-44.

\textsuperscript{123} Ray McMillan, witness statement, 12/5/15, para 13.
131. Richard Burton also misrepresented the position to the auditors during the audit of the 2012 accounts. When asked about the $80,000 deposit, Richard Burton told Marius Van der Merwe on 26 March 2013 that the purchase of the F350s was ‘part of the … replacement of the fleet’.\footnote{Marius Van der Merwe, witness statement, 12/5/15, paras 26-27.} This was a false statement. It can only have been designed to prevent the auditors investigating the purchase further. It is apparent from Marius Van der Merwe’s evidence, however, that this misleading statement did not have any significant operative effect. Marius Van der Merwe made a mental note to follow up the completion of purchase in the 2013 audit. When he did so, he was dissatisfied. Ultimately he required a statutory declaration to be executed.\footnote{Marius Van der Merwe, witness statement 12/5/15, paras 29-46.} This in turn led to Ray McMillan discovering the purchase.\footnote{Ray McMillan, witness statement, 12/5/15, para 15, RM-1 [3] – [4].}

132. Richard Burton initially said he had no recollection of the conversation with the auditor. But then he said that the conversation took place at the beginning of 2013 and was considering expenditure from the previous financial year. He emphasised that that was a time when he was not the Secretary.\footnote{Richard Burton, 13/5/15, T:203.46-204.41.} He later denied that a conversation in those terms took place. However there is no reason to reject the evidence of Marius Van der Merwe, who was not required for cross-examination. The conduct of Richard Burton as described by Marius Van der Merwe is consistent with his other conduct.\footnote{Richard Burton, 13/5/15, T:288.16-32.}
Other possible explanations for the above conduct

133. The nature and extent of the above conduct strongly suggests that Richard Burton deliberately attempted to conceal the purchase of the Ford F350 from the Branch, with a view to treating it as his own. But are there any circumstances that point in another direction?

134. One such circumstance is that Richard Burton disclosed the purchase to Debra Hodgson when he asked her to make the payment of $228,000. There is no indication in the evidence that Debra Hodgson’s error in leaving the $228,000 payment out of the accounts to be presented to the 23 April 2013 meetings was brought about by Richard Burton. Further, he enlisted Debra Hodgson’s assistance in transferring personalised number plates to the Ford F350.  

135. It is not easy to assess the significance of the above conduct. In one sense Richard Burton had little choice but to inform Debra Hodgson of the $228,000 payment. If he had not done so, she would inevitably have noticed the withdrawal of the funds when preparing the accounts for the next meeting. What would Richard Burton have done if Debra Hodgson had not made a mistake and he had been asked by the Finance Committee or BCOM to explain the $228,000 payment? It is probable that he would have attempted to explain away the purchase as part of the updating of the Branch fleet. That is exactly what he in fact did at the same meeting by describing the purchase of the Ford F350s by reference to their number plates and without reference to their make or cost.

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136. The above conduct does not, however, counsel assisting submitted, sufficiently militate against the other aspects of Richard Burton’s conduct identified above.

137. It is more than usually important to be cautious about the submissions of counsel assisting in relation to issues affecting only Richard Burton summarised in the preceding paragraphs. That is because Richard Burton filed no submissions. It is also because it was not in the interests of James McGiveron and the TWU to refute the submissions of counsel assisting against Richard Burton. Indeed, the TWU positively supported many of those submissions. However, the submissions of counsel assisting are correct. Richard Burton deliberately and dishonestly concealed the purchase of his Ford F350 from the BCOM. In so doing he may have breached his fiduciary and statutory duties as an officer of the Branch.

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

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

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130 See paras 101-136.
131 Submissions of the TWU, 17/6/15, paras 7-15.
132 See paras 68-94.
139. On 24 July 2012, James McGiveron may have breached the National Rules and Branch Rules, may have breached his fiduciary duty not to act in a position of conflict between his self-interest and his duty to act in good faith and for proper purposes in advancing the interests of the Branch, and may have contravened ss 285-287 of the FW(RO) Act by failing to seek BCOM approval prior to entering into contracts for the purchase of the Ford F350s and instructing Debra Hodgson to make a payment of $80,000 by way of deposit on those cars.133

140. Richard Burton may have breached his fiduciary duty not to act in a position of conflict between his self-interest and his duty to act in good faith and for proper purposes in advancing the interests of the Branch, and his statutory duties under ss 285-287 of the FW(RO) Act by failing to disclose to the BCOM the proposed purchase of the F350s and its purpose.134

141. Richard Burton may have breached the National Rules and Branch Rules, may have breached his fiduciary duty not to act in a position of conflict between his self-interest and his duty to act in good faith and for proper purposes in advancing the interests of the Branch, and may have contravened ss 285-287 of the FW(RO) Act by failing to seek BCOM approval prior to entering into contracts for the purchase of the Ford F350s and instructing Debra Hodgson to make a payment of $228,000 to Barbagallo to complete the purchase of the Ford F350s.135

133 See paras 95-96.
134 See paras 103-137.
135 See paras 103-137.
142. Richard Burton may have breached the National Rules and Branch Rules, may have breached his fiduciary duty not to act in a position of conflict between his duty to advance James McGiveron’s interests and his duty to act in good faith and for proper purposes in advancing the interests of the Branch, and may have contravened ss 285-287 of the FW(RO) Act by failing to seek BCOM approval prior to notifying James McGiveron that he had been granted ownership of a Ford F350 in May 2013.\textsuperscript{136}

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

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

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

\textsuperscript{136} See paras 103-137.
\textsuperscript{137} See paras 103-137.
\textsuperscript{138} Hodgson MFI-4, 11/5/15; Burton MFI-5, 13/5/15.
allowance. Counsel assisting put the following submissions on the subject of these car allowances.

145. Car allowances appear to have been paid to employees and/or officials of the Branch from around 2000. At the BCOM meeting of 19 February 2004, the BCOM noted that five Branch employees were receiving motor vehicle allowances: ‘to cover costs associated with the provision of their own motor vehicles’. It was resolved that all employees currently in receipt of the motor vehicle allowance could claim reimbursement for ‘vehicle maintenance, replacement tyres and any repairs that are required due to the nature of work being performed at the time’ (emphasis added).

146. The above resolution suggests that the cars for which allowance was claimed needed to be involved in Branch ‘work’. It also suggests that the purpose of the policy was to avoid the Branch having to purchase and maintain fleet vehicles.

147. There appears never to have been any written policy regarding the allowance. Was there an unwritten policy? Different versions were given in evidence. James McGiveron’s position was that there was a category of employees (which by 2012 comprised only him and Richard Burton) who were entitled to a car allowance if the employees in question used their own cars for work purposes at least some of the

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140 Starr MFI-1, 11/5/15, p 3.
141 Starr MFI-1, 11/5/15, p 3.
time, even if they also used Branch cars for work purposes.\textsuperscript{142} As James McGiveron accepted in oral evidence, this policy allowed for the payment of the car allowance even if an employee predominantly used Union cars and not personal cars for work purposes.\textsuperscript{143}

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

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

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

\textsuperscript{142} James McGiveron, witness statement, 12/5/15, para 23 (as amended), James McGiveron, 12/5/15, T:174.30-175.11.

\textsuperscript{143} James McGiveron, 12/5/15, T:174.30-175:11.

\textsuperscript{144} Richard Burton, witness statement, 13/5/15, paras 34-35.


\textsuperscript{146} Tim Dawson, witness statement, 11/5/15, para 20.
to a car allowance. The Branch has not commenced proceedings against James McGiveron to recover the payment of the car allowance paid to him. The explanation for that is not apparent, at least so far as the position after the arrival of the F350s is concerned.

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

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

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

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

J – THE REDUNDANCY PAYMENT MADE TO JAMES MCGIVERON

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

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

\(^{150}\) Belhaven and Stenton Peerage (1875) 1 App Cas 278 at 279. Counsel assisting’s reference to this case can be reinforced: R v Hillier (2007) 228 CLR 618.
The Redundancy Policy

157. The minutes of the 18 July 2012 BCOM meeting record that James McGiveron gave a report to the BCOM regarding a redundancy policy.151 It would appear that this policy was one formulated prior to the meeting for the purpose of seeking the BCOM’s approval. It was something distinct from any existing policy. It is the recollection of most of the BCOM members that prior to 18 July 2012, there had been no redundancy policy at all.152

158. What did James McGiveron report to the BCOM on the subject of redundancy? The minutes of 18 July 2012 do not make this clear. Ray McMillan recalled discussion that the policy proposed to the BCOM was a ‘standard policy’.153 Mark Bebich also described the policy as a ‘standard redundancy policy’.154 Paul Aslan said that James McGiveron advised the meeting that a ‘review’ had been conducted and the proposed policy was formulated based on that review.155 James McGiveron said in his statement that the BCOM ‘felt that’ the redundancy policy ‘should reflect an industry standard redundancy policy’.156

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

160. The terms of the policy approved by the BCOM were as follows (the Redundancy Policy):\textsuperscript{159}

1. The redundant employee will be paid three weeks pay, inclusive of allowances, for each year of continuous service, calculated to completed half years.

2. Redundant employees will receive a payment equal to 50\% of their accumulated unused sick leave on termination, taxed at the appropriate rate.

3. Long Service will be paid on a pro-rata basis for completed years of service where an employee has completed at least 5 years’ service.

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

\textsuperscript{157} See paras 161-199.

\textsuperscript{158} Hodgson MFI-1, 11/5/15; Starr MFI-1, 11/5/15, p 8. See paras 92-93.

\textsuperscript{159} Starr MFI-1, 11/5/15, p 13.
A need for a Redundancy Policy?

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

(a) At this time there was no proposal to make anyone redundant.\textsuperscript{160}

(b) Prior to 18 July 2012, according to Debra Hodgson, only one person had previously been made redundant.\textsuperscript{161} At that time Tim Dawson was unaware of any previous redundancies in the Branch’s history.\textsuperscript{162}

(c) A redundancy policy was unlikely to have any practical application outside clerical and administrative staff.\textsuperscript{163} Most of the important work done at the Branch was done by elected officials. The only elected officials whose positions could be made redundant (without a change in the rules) were organisers. An organiser would only be made redundant if the Branch’s finances were poor and there was no work for

\textsuperscript{160} James McGiveron, 12/5/15, T:144:3-8.
\textsuperscript{161} Debra Hodgson, 11/5/15, T:59.21-46.
\textsuperscript{162} Tim Dawson, 11/5/15, T:90.23-30.
\textsuperscript{163} Richard Burton, 13/5/15, T:240.21-34.
the organiser. There was no suggestion that that situation was thought likely to occur at this time.

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

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164 Richard Burton, 13/5/15, T:239.31-34.
165 Starr MFI-1, 11/5/15, p 5; James McGiveron, 12/5/15, T:145.32-146.10.
166 Sections 61, 119-123.
167 Starr MFI-1, 11/5/15, pp 133-143.
(e) There were at this time no written policies about employment (other than the severance policy) in existence, such as parental leave policies, and no written contracts of employment.\footnote{169}

162. In his statement, James McGiveron chose not to explain whether or why there was a need for a redundancy policy. In oral evidence, he gave this explanation: \footnote{170}

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

163. James McGiveron later in his oral evidence said that in July 2012 ‘[w]e had a … pile of policies from other branches that were being looked at for implementation. In the time frame, I believe that had to be done by June of 2013’. \footnote{171}

164. These explanations are unsatisfactory.

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

\footnote{169}{James McGiveron, 12/5/15, T:144.10-28.}
\footnote{170}{James McGiveron, 12/5/15, T:144.31-36.}
\footnote{171}{James McGiveron, 12/5/15, T:144.46-145.2.}
those standards, but did not need to have a policy. No other witness suggested that the Fair Work Commission required the Branch to have any kind of employment policy.

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

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

168. The origins of James McGiveron’s witness statement lay in an invitation by the Commission to give a statement on various topics. One was the formulation of the Redundancy Policy.\footnote{McGiveron MFI-7, 13/5/15.} He chose to address that topic in the following way. First, he said: ‘Prior to 2012, the Union did not have a formal redundancy policy.’ Then he said: ‘The Union’s BCOM felt that the Union should implement a redundancy policy for the employees of the Union, and that that redundancy policy should reflect an industry standard policy.’\footnote{James McGiveron, witness statement, 12/5/15, paras 13-14.}

169. One might infer from this evidence that James McGiveron had no role in crafting the terms of the Redundancy Policy, and that it sprang from BCOM, or unnamed members of BCOM, or at least some source other than him. However it is plain that that was not the position. Paul Aslan’s evidence was that prior to the meeting he was asked to prepare a motion in regard to a redundancy policy that he understood James McGiveron and Richard Burton had decided upon after a review which they had conducted before the meeting of 18 July 2012.\footnote{Paul Aslan, 11/5/15, T:1-19.} He identified that motion as the motion that appears on p 9 of the Annexures to Kevin Starr’s statement.\footnote{Paul Aslan, 11/5/15, T:68.7-9.} It is identical with the typed document attached to the handwritten version of the minutes.\footnote{Hodgson MFI-1, 11/5/15.} He could not recall whether it was Richard Burton or James McGiveron,
or both, who asked him to type up the motion. Richard Burton credibly denied having anything to do with asking Paul Aslan to type up the motion.

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

178 Richard Burton, 13/5/15, T:231.4-31.
179 Dawson MFI-1, 11/5/15.
180 James McGiveron, 12/5/15, T:120.33-121.12, 121.39-42.
181 James McGiveron, 12/5/15, T:120.41-43.
182 James McGiveron, 12/5/15, T:121.9-12.
183 James McGiveron, 12/5/15, T:121.44-122.29.
184 James McGiveron, 12/5/15, T:122.45-123.1.
changed tack again and appeared to suggest, for the first time, that he got the Redundancy Policy from the Branch’s ‘industrial section’.

171. The most likely conclusion on the evidence is that James McGiveron crafted the policy himself, and that he was unwilling to be frank about that.

172. How did James McGiveron arrive at the terms of the Redundancy Policy?

173. James McGiveron claimed to have looked at the terms of a National Foods EBA prior to the 18 July 2012 meeting. His initial explanation was that he gave Paul Aslan the National Foods EBA and that he did so ‘[b]ecause the conditions were what I believed to be good conditions after the Union had negotiated and should be applied to staff at the Branch’. Later in his evidence, however, his explanation for giving Paul Aslan the National Foods EBA was: ‘this was the one that I decided to give [Paul] Aslan at that time to go through so if we ever had any criticism of the redundancy policy, we could point out something that was far greater’. Thus, on this version, the National Foods EBA was merely a justification for the generous terms of the Redundancy Policy.

186 Dawson MFI-1, 11/5/15. It was negotiated in 2007 with a nominal expiry date of 2010, but its redundancy provisions were similar to those of its successor. See submissions of James McGiveron, 19/6/15, para 25.
188 James McGiveron, 12/5/15, T:121.15-17.
174. The latter explanation is more likely. A comparison of the redundancy provisions of the National Foods EBA and the Redundancy Policy shows more differences than similarities. In particular:

(a) the National Foods EBA provides for the payment of 4 weeks per year capped at 104 weeks whilst the Redundancy Policy provides for the payment of 3 weeks per year without any cap;

(b) the National Foods EBA provides for an additional cap in that payments are limited to the number of weeks up until normal retirement age but the Redundancy Policy contains no such cap;

(c) the National Foods EBA does not provide for the payment of allowances in addition to normal pay, whilst the Redundancy Policy includes allowances;

(d) the National Foods EBA contains a provision entitling a redundant employee to ‘Outplacement and financial support’ to the value of $1,500 whilst the Redundancy Policy contains no such term.

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

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

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

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

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

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

179. Secondly, it is difficult to see why, in any event, it could have been appropriate simply to pluck out a redundancy provision from an EBA and apply it to the Branch. The terms of employment in an EBA are negotiated together, in light of the nature of employment in question and the needs of the employer and employees. No doubt an employer, in deciding whether to agree to a redundancy clause of the nature of the one contained in the National Foods EBA, would give careful consideration to its potential exposure. An employer with few long standing employees might have less qualms about agreeing to a generous redundancy clause than one with many long standing employees. Other considerations would no doubt be relevant. What was appropriate from the point of view of one employment relationship may not be appropriate for another. James McGiveron did not explain why the employment relationship for National Foods was analogous to the employment relationship for the Branch.

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

\textsuperscript{193} James McGiveron, 12/5/15, T:124.29-30.
\textsuperscript{194} James McGiveron, 12/5/15, T:124.28.
\textsuperscript{195} James McGiveron, 12/5/15, T:124.13-35.
\textsuperscript{196} See Starr MFI-1, 11/5/15, p 176 cl 29(3)(c).
\textsuperscript{197} Centennial Northern Mining Services Pty Ltd v CFMEU (No 2) [2015] FCA 136 at [52].
straightforward. But it is not necessary to determine the question here.198

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

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

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

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


200 McGiveron MFI-2, 12/5/15, tab 6, p 33.
redundancy. Those entitlements, in summary, were two weeks ordinary pay per year to completed half years subject to a cap of 26 weeks. Unlike the Redundancy Policy there was no provision for sick leave or the inclusion of allowances over and above ordinary pay.

(b) On 11 September 2012 James McGiveron signed a single Enterprise Agreement applicable to employees of Skywest Airlines. The National Union was the bargaining representative of the employees bound under that Agreement. Clause 21 of that Agreement set out the entitlements to be paid on redundancy. Those entitlements, in summary, were capped at 12 weeks’ pay at ordinary time for employees of 10 or more years. Unlike the Redundancy Policy there was no provision for sick leave or the inclusion of allowances over and above ordinary pay.

(c) The national union also executed an enterprise agreement with Nalco Australia in October 2012. Richard Burton, as Assistant Secretary, signed that agreement on behalf of the Branch. The redundancy payments in that agreement were capped at 52 weeks’ pay (see clause 24(g)). There was no provision for payment of sick leave entitlements.

(d) The national union executed an enterprise agreement with Elgas Ltd in February 2011. The Branch did not execute

201 McGiveron MFI-2, 12/5/15, tab 5, p 17.
203 McGiveron MFI-2, 12/5/15, tab 3.
the agreement, although it applied to workers in Western Australia. The redundancy provisions in that agreement were capped at 46 weeks’ pay (see clause 21). There was no provision for the payment of sick leave entitlements.

(e) The national union executed an enterprise agreement with Serco Australia Pty Ltd in June 2011.204 Richard Burton executed the agreement on behalf of the Branch. The redundancy provisions in that agreement were capped at 16 weeks (clause 12). There was no provision for the payment of sick leave entitlements.

(f) In his oral evidence, James McGiveron said that he ‘had a look at a number of EBAs’ and ‘would have looked at some of the majors’ such as Toll Holdings. But he was unable to identify either any particular EBA or any particular redundancy provision specifically.205 It may be that James McGiveron was referring to the Toll Group and Transport Workers Union Fair Work Agreement 2011-2013.206 That agreement was executed by representatives of the National Union on 15 August 2011. Clause 26 of that agreement provided for a redundancy payment of 3 weeks’ base rate of pay per year up to a maximum of 52 weeks. It is thus unlikely that James McGiveron had any regard to this EBA in July 2012. If he did have regard to it, it is not apparent why he rejected it as a model for the Branch’s policy.

204 McGiveron MFI-2, 12/5/15, tab 2.
(g) Although not an EBA, the 2006 Salaries Determination contained a redundancy clause that provided for an entitlement in substantially the same terms as the entitlement under the Toll Holdings EBA. ²⁰⁷ That Determination was applicable to federal office employees. James McGiveron did not give consideration to these provisions and did not think it appropriate to draw the policy to the attention of the BCOM. ²⁰⁸

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

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

²⁰⁸ James McGiveron, 12/5/15, T:146.36-147.19.
respective types of employment and its conditions. Nonetheless, anyone who claimed to embark on a disinterested formulation of a policy for the Branch that was thought to reflect ‘industry standards’, and who believed that redundancy provisions in other EBAs were a useful reference point in determining those standards, would have given some consideration to these, and no doubt other, EBAs. James McGiveron did not.

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

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

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

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209 Tim Dawson, 11/5/15, T:87.36-88.6.
210 AG2014/3548.
(b) James McGiveron formulated the Redundancy Policy himself, at a time when he would soon cease to be Branch Secretary and would become an employee whose position could be made redundant.

(c) There was no attempt to formulate any other employment policies at this time, notwithstanding that there were no written contracts of employment and, apart from a severance policy, no other written policies of employment.

(d) The terms of the Redundancy Policy were favourable (for someone in James McGiveron’s position) as compared with the provisions of other EBAs recently executed by the Branch and Union, and with the redundancy policy applicable to federal office employees.

(e) In formulating the Redundancy Policy, James McGiveron had no regard to the provisions of those other EBAs (with the possible exception of the Toll Holdings EBA which, if taken into account at all, was inexplicably rejected as a model for the Branch).

(f) To the extent that James McGiveron adopted any other EBA or other policy as a model for the formulation of the Redundancy Policy, it was the terms of redundancy provisions which were not adopted verbatim. Instead a cap that would have reduced the entitlements of a person of James McGiveron’s age was deleted.
188. The most probable inference to be drawn is that James McGiveron formulated the Redundancy Policy to serve his own interests (and not the interests of the Branch) in anticipation of his being made redundant.

189. What other possible explanations are there for James McGiveron’s formulation of the Redundancy Policy? It would have been logically possible for someone in James McGiveron’s position, acting in the best interests of the Branch and on a wholly disinterested basis, to have believed the Branch needed a redundancy policy and to have taken steps towards formulating one. One can imagine such a person proceeding on the basis that it was in the interests of members for the union to attract and retain staff with a high level of competence. Part of attracting and retaining such staff, one could fairly say, is the ability to offer conditions of employment that are sufficiently attractive. Having a redundancy policy that entitles staff to a redundancy payment above the minimum provided under the FW(RO) Act would, one could also fairly say, be a component of such conditions of employment. The significance of a redundancy policy in this regard should not be overstated. Redundancy entitlements are but one component in an overall salary package and the most important work at the Branch was done by elected officials whose positions could not be, or were highly unlikely to be, made redundant. Nonetheless, the situation just outlined is conceivable.

190. But, whilst conceivable, that situation is not remotely probable on the evidence. First, James McGiveron was not prepared to give any substantive testimonial account of how he came to formulate the Redundancy Policy. That is impossible to understand if the above
scenario in fact obtained. Secondly, there was no particular need for the Redundancy Policy to be formulated in isolation, as distinct from preparing a complete set of written conditions and policies of employment. A person acting on a wholly disinterested basis would have embarked on a broader approach. Thirdly, a person acting on a wholly disinterested basis, and purporting to formulate what was thought to reflect an ‘industry standard’, would have embarked on a wide ranging review of policies in the industry at the time. James McGiveron did not embark on anything like a wide ranging survey of policies in the industry at the time.

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

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

211 Submissions of the TWU, 17/6/15, para 29.
dominate their BCOMs. If BCOM business were conducted with more notice of important proposals, documents explaining the pros and cons of the more complex decisions, and adequate time for reflection, it might enable the more timorous spirits to make up their minds free of the potentially rather overbearing influence of the senior officials.

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

195. Particular criticism can be made of particular elements of these arguments. Thus, for example, to take the second argument, whether or not a severance policy necessarily applies to redundancy is immaterial to the TWU severance policy which applied to ‘termination

212 Submissions of James McGiveron, 19/6/15, para 24.
of employment’ – ie termination for any reason. And, for example, to take the fifth point, the proposition that written contracts of employment are ‘not the norm’ is a highly controversial one. They may not be compulsory but they are very common and they reflect good practice.

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

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

214 James McGiveron gave evidence that it was actually his personal situation that was causing difficulties: James McGiveron, 12/5/15, T:161.37-42. But if the minutes are correct, the message conveyed to the meeting concerned his health situation.
give up a job which could not be made redundant and move to a new job which could, particularly since the Secretary had served for two decades and had been alluding to ill health? Was it a coincidence that the Car Resolution was introduced without notice and passed at a time when the car to which, in James McGiveron’s case, it applied was not the modest car he had been driving, but the luxury car he was to begin driving in 2013? Was it a coincidence that the new car was gifted to James McGiveron only about three months after he took possession of it? Even if each of these events taken by itself could be seen as a coincidence, was their concurrence in time only a coincidence?

197. Senior counsel for James McGiveron made other criticisms of counsel assisting’s arguments. They centre on the differences between the Redundancy Policy and particular EBAs. Senior counsel for James McGiveron said the differences were irrelevant; that the Redundancy Policy was broadly connected with industry standards; and that there was no need to conduct a survey or seek independent advice. It was submitted that there was no need to replicate a clear discriminatory age cap on redundancy payments: while the Branch Rules provided for retirement at 65, the National Rules did not, and the age cap and the Branch Rules ‘is not relevant to the federal entity in which, on our instructions, the finances [are] held.’215

198. The submission relying on the ‘instructions’ given by James McGiveron must be rejected. ‘Instructions’ are weightless unless they rest on some material evidentiary or constructional consideration. These ‘instructions’ lack support in the evidence and in the Rules.

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

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

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217 James McGiveron, 12/5/15, T:122.21-35.
example, the Hon Francis Marks.219 He repeatedly and unsatisfactorily refused either to accept that aspects of his conduct involved a conflict of interest or that he should not have been present during the presentation of and voting on the Redundancy Policy Resolution and the Car Resolution on 18 July 2012.220 For those reasons the arguments advanced by senior counsel for James McGiveron do not invalidate the contentions of counsel assisting. The conclusions of counsel assisting are adopted. In anticipation of his being made redundant, James McGiveron devised the Redundancy Policy to serve his own interests over those of the Branch.

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

**Submissions of counsel assisting**

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

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220 See para 276.
221 TWU WA Rules Bundle, 11/5/15, National Rules r 57(1).
222 TWU WA Rules Bundle, 11/5/15, National Rules r 92 and Annexures A and B.
201. The employment of James McGiveron as Special Projects Officer was thus very much in his interests. It enabled him to keep drawing the same salary (together with allowances) that he drew as Secretary. It enabled him to retain the honorary role of National President until the expiry of his term. It also, of course, moved him to a position that was capable of being made redundant. It therefore put him within reach of the generous Redundancy Policy that he had formulated.

202. James McGiveron suggested to the BCOM at the 9 October 2012 meeting that he be appointed Special Projects Officer.\textsuperscript{223} He ultimately accepted that one reason he proposed that he take up the role of Special Projects Officer was to enable himself to remain as National President after his resignation as Branch Secretary.\textsuperscript{224} James McGiveron must be taken to have participated in the resolution appointing him Special Projects Officer, since the minutes do not record his abstention or opposition.\textsuperscript{225}

203. Was the Special Projects Officer role anything more than a device to enable James McGiveron to remain, in effect, as a paid National President? ‘No’, said counsel assisting, for the following reasons.

204. \textit{First}, the position was made redundant shortly after he ceased being National President. For the reasons set out below,\textsuperscript{226} the asserted reason for making the position redundant is implausible. The fact that

\textsuperscript{223} James McGiveron, 12/5/15, T:160.31.
\textsuperscript{225} Starr MFI-1, 11/5/15, p 16.
\textsuperscript{226} See paras 220-250.
an event happens need not, but can, support a conclusion that it was always intended to happen.

205. Secondly, the descriptions of the position are vague. In the 18 July 2012 BCOM minutes it is described as ‘Gas and Mining Officer’. In the 9 October 2012 BCOM minutes it is described as ‘Special Projects Officer’. The only content given to the rights and obligations that James McGiveron was to have in that role is the statement in the latter minutes that that employment was to be on the same terms and conditions as James McGiveron’s employment as Branch Secretary but ‘with full responsibility for ensuring that the TWU develops and implements the best possible strategies in the resources and mining sector of our economy, with a view to ensuring the TWU’s membership interests are maximised in the sector’.

206. At times in the oral evidence, both Richard Burton and James McGiveron appeared to seek to confine the scope of the Special Projects role to the James Price Point project in Browse Basin. James McGiveron said that that was what he was ‘focusing on’. He then said that the position was ‘solely concerned with new projects’. He then accepted that the role extended beyond new projects to advancing the union’s interests in Australia’s oil, gas and mining industries. James McGiveron had no clear and consistent concept of what the role involved.

228 Starr MFI-1, 11/5/15, p 16.
231 James McGiveron, 12/5/15, T:171.5-11.
207. *Thirdly*, Richard Burton told Marius Van der Merwe during the audit process on 26 March 2013 that James McGiveron was ‘going to retire later this year’. He said that James McGiveron was ‘staying on to act as support for me for 12 months’.  

208. James McGiveron does not appear to have performed any work, or any significant work, in his capacity as Special Projects Officer. James McGiveron and Richard Burton had been asked to address in their statements the question of what work James McGiveron did in this role. Neither did.

209. James McGiveron’s evidence was as follows:

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

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

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

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

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232 Marius Van der Merwe, witness statement, 12/5/15, para 70.
210. In his oral evidence, however, James McGiveron claimed that in fact he did do work in this capacity. He claimed to have ‘covered’ or ‘mapped’ ‘industrial agreements, particularly about the Browse Point’. He claims to have done work ‘by gathering information’. James McGiveron could not explain why these matters did not appear in his statement. One possible conclusion is that he did not do any of these things. Another is that he did them, but that they were insignificant in scale: so insignificant that they were not worth including in his statement, and so insignificant that their non-inclusion did not render the statement misleading.

211. Richard Burton, too, was asked to address the question of what work James McGiveron did in his role as Special Projects Officer. Like James McGiveron, Richard Burton did not refer in his statement to any work being done. Also like James McGiveron, Richard Burton attempted in oral evidence to take a different position. Richard Burton went so far as to suggest that James McGiveron had travelled in that capacity – something even James McGiveron did not claim to have done. Richard Burton said he thought that James McGiveron went up to the north-west in his capacity as Special Projects Officer, that he went to a project in Queensland and that he went to another in South Australia. Richard Burton's evidence cannot be accepted on this point. It transpired that the South Australian project he referred to was

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236 Richard Burton, witness statement, 13/5/15, paras 26-29.
238 Richard Burton, 13/5/15, T:257.45-258.4.
the Olympic Dam project, which had been shelved in August 2012. He could not name the project in Queensland. According to Michael Connolly, in 2012 and 2013 the only other people who went up to the North-West were Richard Burton and Glen Barron, on one occasion in October 2013 after James McGiveron’s job had ceased.

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

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

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239 Richard Burton, 13/5/15, T:258.6-23.
240 Michael Connolly, 12/5/15, T:111.19-35.
241 Counsel assisting relied on the following. Notice to produce 762 sought, amongst other things, ‘All documents recording claims for travel expenses made by [James] McGiveron in his capacity as SPO’, ‘All documents recording any consideration or approval of claims by [James] McGiveron in his capacity as SPO for travel expenses’ and ‘All logs for any car driven by [James] McGiveron in his capacity as SPO’, with SPO defined as meaning the role held by Mr James McGiveron for the period 1 January 2013 to 30 June 2014 described variously as ‘Special Projects Officer’, ‘Oil and Gas Special Projects Officer’ and ‘Gas and Mining Officer. Notice to produce 852 sought, amongst other things: ‘Documents recording the payment of any travel expenses (including airfares, vehicle, petrol, accommodation, food expenses) incurred by James McGiveron in relation to travel in the period 1 October 2012 – 6 August 2013 (including payments made before or after this period)’ and ‘documents identifying the nature of any travel expenses (including airfares, vehicle, petrol, accommodation, food expenses) incurred by James McGiveron in relation to travel in the period 1 October 2012-6 August 2013’. Neither the Notices to Produce nor the extent of production in answer to them are in evidence, but the TWU, James McGiveron and Richard Burton did not take any objection to the submission based on that point.

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

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

243 See paras 220-250.


215. Richard Burton’s evidence at times suggested such an arrangement. He said in oral evidence said that the National President’s role and the Special Projects role went ‘hand in hand’. He said that the Special Projects role ‘was a combination of both. You know, if you’re rolling out the President of the National TWU, it carries a bit of weight on projects [than] as being an organiser’. He also said ‘Special Projects Officer was not only for the West Australian Branch but also for the National Office. That’s his role as that President’.

216. On this approach, the role was a genuine one but not one which was capable of being made redundant in May 2013. James McGiveron’s employment was, in effect, for a fixed period and was always expected to terminate at that time.

217. The TWU pointed out that there is no evidence of any decision of the National Committee of Management linking the roles. On that ground the TWU submitted that any connection between the Special Projects Officer position and James McGiveron’s role as National President could only have rested on a private conversation between James McGiveron and Richard Burton. That is probably correct. The evidence of Richard Burton referred to above does support a private understanding to that effect, but insufficiently to justify a positive finding.

246 Richard Burton, 13/5/15, T:263.35.
249 Submissions of the TWU, 17/6/15, para 23.
Submissions of James McGiveron

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

\textsuperscript{250} Submissions of the TWU, 17/6/15, para 22.
\textsuperscript{251} James McGiveron, 12/5/15, T:178.2-41. Emphasis has been added to the previous four sentences.
\textsuperscript{252} James McGiveron, 12/5/15, T:162.9-16.
\textsuperscript{253} James McGiveron, 12/5/15, T:178.43-47.
practice for organisers to make written reports to the Branch Secretary.\textsuperscript{254} But his substantive status was much more than that of an organiser. In fact Richard Burton specifically denied that he was only an organiser.\textsuperscript{255} The ‘work’ he did had the air of being only a makeweight. It was not ‘work’ which justified payment at anything like the level of the Secretary’s salary. So far as it was work, it was work which was either insignificant work or little more than insignificant. What useful work James McGiveron did do appears to have been work as National President.

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

\textsuperscript{254} James McGiveron, 12/5/15, T:178.43-47.
\textsuperscript{255} Richard Burton, 13/5/15, T:263.24-27.
L – THE DECISION TO MAKE THE SPECIAL PROJECTS OFFICER REDUNDANT

The reason given for the redundancy

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

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

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

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

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

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

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

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

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

257 Starr MFI-2, 11/5/15.
258 Paul Aslan, 11/5/15, T:71.17-42.
260 This submission of counsel assisting is not supported by evidence of either the notices to produce or the answer to them. However, the TWU, James McGiveron and Richard Burton did not take any point against counsel assisting in this respect.
227. *Fourthly*, the demise of the James Price Point project, although described in the letter as a mere example of the downturn, is in fact the only project that Richard Burton or James McGiveron could point to as indicating the downturn in the industry to which the letter referred. That was peculiar in light of Richard Burton’s suggestions in oral evidence – admittedly non-credible – that James McGiveron visited projects in Queensland and South Australia.\(^{261}\) It was also peculiar in another way. Richard Burton appeared to accept in oral evidence that there were other projects up and running at this time. However, he suggested that these were projects covered by Michael Connolly. If so, they were not within the scope of James McGiveron’s role.\(^{262}\) However the James Price Point expansion project, being in Broome, was also in this area.\(^{263}\) Thus, it is unlikely that the shelving of the James Price Point project had anything to do with making James McGiveron redundant. It appears to have been seized on by Richard Burton as a convenient explanation or pretext for that decision.

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

\(^{261}\) See para 211.

\(^{262}\) Richard Burton, 13/5/15, T:263.47-264.15.


\(^{264}\) Burton MFI-4, 13/5/15.

\(^{265}\) Richard Burton, witness statement, 13/5/15, paras 26-29.
In oral evidence he suggested that the redundancy was as much to do with James McGiveron’s poor performance as with any downturn. He said that the claimed downturn was only ‘part of’ the reason for making James McGiveron redundant. The other part was:266

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

He went on to say:267

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

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

266 Richard Burton, 13/5/15, T:261.4-20.
267 Richard Burton, 13/5/15, T:262.30-34.
268 Richard Burton, 13/5/15, T:262.41-46.
Burton’s only explanation for not referring to this in his letter of 30 May 2013 was ‘Jim McGiveron’s been around a long time and I didn’t want to put words in there about that he is just not being able to perform that job’.269 The true position is that Richard Burton, in oral evidence, was inventing an additional reason for James McGiveron’s redundancy because he knew that the reason given in the 30 May 2013 letter was false.

232. Richard Burton’s claim that James McGiveron’s poor performance was a reason for the redundancy is also unacceptable for the following reason. Richard Burton’s position earlier in his evidence had been that it was not possible for James McGiveron to perform as Special Projects Officer in a BT-50 a vehicle and that he needed a Ford F350 to be Special Projects Officer.270 However, James McGiveron had only obtained his Ford F350 in late March 2013. Richard Burton had decided to make James McGiveron redundant a week or a fortnight prior to 18 May 2013.271 Expecting ‘delivery’ of matters such as an increase in membership numbers after so brief a time in possession of a supposedly essential tool of the position would have been entirely unrealistic. This was one of many unsatisfactory aspects of Richard Burton’s evidence.

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

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270 Richard Burton, 13/5/15, T:250.30-251.42.
redundant.272 No such claim had been made in his statement. None of the members of the BCOM recalled being consulted.273 Nor is there any record in the minutes of any such consultation. He later accepted in cross-examination by senior counsel for the TWU that he did not inform the BCOM until after the event.274 Notices to produce were issued to the Branch seeking, amongst other things: ‘Any Document recording communications regarding the making of [the position of SPO, as defined] redundant’,275 and ‘All documents recording any consideration of whether to make [James] McGiveron’s position as SPO [as defined] redundant’.276 No documents were produced in response to those notices.277

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

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272 Richard Burton, 13/5/15, T:265.7-266.5.
273 For example, see Kevin Starr, witness statement, 11/5/15, para 61; Paul Aslan, witness statement, 11/5/15, para 16; Tim Dawson, witness statement, 11/5/15, paras 16-17; Mark Bebich, witness statement, 11/5/15, para 16, Ray McMillan, witness statement, 12/5/15, para 20; John Davis, witness statement, para 15; Bruce Spraul, witness statement, para 12; Peter Elliot, witness statement, para 14; Deborah Dunbar, witness statement, 12/5/15, para 16.
275 Notice to produce 852.
276 Notice to produce 762.
277 These matters are not in evidence, but there was no objection to counsel assisting’s reliance on them.
this and said that his being a shadow was merely ‘one of the reasons’ and that the ‘main reason’ was that Woodside pulled out of the James Price Point project. He accepted, however, that he thought that what Richard Burton was really doing was using the redundancy as an excuse to remove him from the Branch’s affairs.

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

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

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

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

The true explanation for the redundancy

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

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

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

\(^{286}\) See para 234.
National President, and the absence of any reasonable explanation as to the reasons for the redundancy by those who one would have expected to be in a position to give such an explanation. This possibility is also supported by Richard Burton’s oral evidence regarding the connection between the Special Projects Officer role and the role of National President, and by Richard Burton’s statement to Marius Van der Merwe that James McGiveron was going to retire later in 2013.287

241. There is, in addition, the following matter that supports this possibility. Both Richard Burton and James McGiveron took steps in March 2013 to ensure that one of the Ford F350s was registered in James McGiveron’s name. The Branch practice was for cars to be registered in the name of the Branch Secretary. That is what James McGiveron did during his time as Secretary.288 And that is what Richard Burton did when he came to purchase a new fleet of BT-50s.289

242. The departure of James McGiveron and Richard Burton from this practice in relation to James McGiveron’s Ford F350 indicates that both men expected at this time that that vehicle would become James McGiveron’s in the near future.

243. Neither James McGiveron nor Richard Burton gave satisfactory evidence on this topic. James McGiveron said in oral evidence that it did not occur to him at all at the time of delivery of the Ford F350 that one day the car would be his, and that he did not know that the vehicle

287 See para 207.
288 McGiveron MFI-1, 12/5/15, para 23.
289 Burton MFI-2, 13/5/15.
was registered in his name.\textsuperscript{290} He was then shown a licence application signed by him on 6 March 2013.\textsuperscript{291} He recognised his signature on it but said he could not recall signing it.\textsuperscript{292} That application was for the Ford F350 to be registered in his name, at his address. A receipt for the payment of the registration fee was sent to James McGiveron’s address shortly afterwards.\textsuperscript{293} The application for registration indicates that, contrary to his earlier oral evidence, James McGiveron must have known, at the time he took delivery of the Ford F350, that it was registered in his name. It also indicates that James McGiveron expected at the time of signing the document that that car would become his own in the near future, and that he believed Richard Burton shared that expectation. There is no other reasonably plausible explanation for not registering the Ford F350 in the name of the Branch Secretary.

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

\textsuperscript{290} James McGiveron, 12/5/15, T:172.2-27.
\textsuperscript{291} McGiveron MFI-5, 12/5/15.
\textsuperscript{292} James McGiveron, 12/5/15, T:172.29-36.
\textsuperscript{293} Starr MFI-1, 11/5/15, p 236.
\textsuperscript{294} Starr MFI-1, 11/5/15, p 231.
the contract was that he was just re-signing the contracts that James McGiveron had executed in 2012. He said:295

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

245. The above explanation is implausible. Richard Burton was signing fresh contracts. It was up to him to ensure that his name as Branch secretary, together with Branch details, appeared on both contracts. The explanation is also belied by the fact that on 26 March 2013, Richard Burton executed a second contract, for the purchase of the other Ford F350. This contract had his own name and details at the top.296 But if Richard Burton had really believed he was just ‘re-binding’ the union to something James McGiveron had already done, he would have ensured that both contracts had James McGiveron’s name and personal details on them.

246. As Branch Secretary, Richard Burton ought to have ensured that James McGiveron’s Ford F350 was registered as a Branch vehicle. That is what he had done with the Mazda BT-50s earlier in the year. Instead, Richard Burton took no steps at all to ensure that the Ford F350 was registered as a Branch vehicle. That was because he took the view that the Ford F350 was to become James McGiveron’s in the very near future.

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

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

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

298 Submissions of James McGiveron, 19/6/15, para 19.
The consequences of making the position redundant

251. Counsel assisting submitted, without being controverted, that the consequences for James McGiveron of being made redundant (rather than simply having his employment terminated) were significant.

252. On 11 July 2013 James McGiveron was paid $373,191.23 net ($477,294.57 gross).\(^\text{299}\) This amount included annual and long service leave entitlements that he would have received in any event. The component exclusively attributable to the Redundancy Policy was $304,895.8 net ($348,396.15 gross).

253. As the redundancy calculations performed by the Branch reveal, treatment of the payment as a redundancy payment, and not merely a payment on termination, had favourable taxation implications. The sum of $138,718 was tax free, and $180,000 of his payout was taxed at a rate of 16.5% (rather than 46.5%).\(^\text{300}\) Only $29,678.15 was taxed at a rate of 46.5%.

254. Had James McGiveron’s employment terminated otherwise than by reason of redundancy, he would have received severance pay of two weeks’ pay for each year of service under the 2011 Branch policy.\(^\text{301}\) This would have entitled him to a gross payment of two weeks’ pay for his approximately 28 years of service to the Union: $159,010.88.\(^\text{302}\)

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\(^{299}\) Starr MFI-1, 11/5/15, p 208.

\(^{300}\) Starr MFI-1, 11/5/15, p 209.

\(^{301}\) Starr MFI-1, 11/5/15, p 205.

\(^{302}\) Starr MFI-1, 11/5/15, p 209 ($2839.48 x 2 x 28).
Taxed at 46.5%, that would have resulted in a net payment of $85,070.88 – some $219,824 less than the net payment that resulted from the application of the Redundancy Policy.  

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

Richard Burton’s conduct

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

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

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

305 cf. TWU WA Rules Bundle, National Rules, r 37(3).

306 See para 233.
of the Ford F350s, did Richard Burton have any power, absent prior BCOM approval, to make or procure the payment of some $373,191.23 to James McGiveron on 11 July 2013 or authorise the disposal to him of one of the Ford F350s.

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

307 Submissions of the TWU, 17/6/15, para 27.
respectively do not apply. Rendering James McGiveron redundant was an act which involved expenditure. That expenditure could not be made without a BCOM resolution in advance of the actual payment on 12 July, and the event giving rise to the duty to pay it on 30 May 2013, namely the letter making James McGiveron redundant.\textsuperscript{308} There was a BCOM resolution on 6 August 2013 endorsing the application of Redundancy Policy Resolution to James McGiveron, but that was after the event. The better view is that references to ‘expenditure’ in the National Rules and ‘disbursement’ in the Branch Rules include conduct creating a legal entitlement to be paid money, not merely its actual payment.

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

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

\textsuperscript{308} See para 220.
question of whether the position was truly redundant: Richard Burton seems almost automatically to have assumed the position was redundant once James McGiveron’s term as National President had expired.

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

Conclusions in outline

260. Above the Report records a substantial acceptance of the arguments of counsel assisting. The following conclusions flow from that acceptance.

261. On 12 July 2013 James McGiveron received what was in effect a termination package to the cost of the Branch of over $600,000. About that the members of the BCOM knew nothing (with the possible exception of Paul Aslan, who typed the letters of 30 May 2013). That is an extraordinary state of affairs. The BCOM did not know about the purchase of the Ford F350 at all. The BCOM did not know that it had been given to James McGiveron. The BCOM did not know that he had been made ‘redundant’, until well after the event. The BCOM did not know that the ‘redundancy’ had resulted in a gross payment by the Branch of $477,294.57.

262. Both James McGiveron and Richard Burton denied that they had any expectation in July 2012 that James McGiveron would be made
redundant after he ceased to be National President. In other words, they denied anticipating at that time what occurred some 10 months later. However, the various aspects of their conduct in the period over that 10 months that led to the making of the redundancy payment and the gifting of the Ford F350 make it difficult to avoid the conclusion that James McGiveron’s redundancy was pre-ordained. In particular:

(a) In July 2012 there was no particular need for a Branch redundancy policy, yet James McGiveron decided to formulate and recommend to the BCOM one with terms that would be very beneficial to a person in his position. He did so at the same meeting at which he announced his intention to retire from a position that could not be made redundant and move to a position that could be made redundant.

(b) Shortly after the passing of a resolution which would confer ownership on him of the car he was driving at the time of the termination of his employment, James McGiveron entered into a contract for the purchase of the Ford F350 that, in fact, he was driving at the time of being made redundant.

(c) James McGiveron and Richard Burton appreciated that it was necessary to invent the position that was made redundant in order to enable James McGiveron to remain as National President.

(d) No significant work seems to have been done by James McGiveron as Special Projects Officer over and above any
work he did as National President. The role was a device to enable James McGieveron to remain as National President.

(e) When James McGieveron’s Ford F350 arrived in March 2013 it was assumed by him and Richard Burton that the car should be registered in his name, without any reference to the Branch. Senior counsel for James McGieveron contended that the proposition that James McGieveron assumed that the vehicle would be registered in his name was unsupported by evidence. But there is actually a lot of evidence for that proposition. James McGieveron must have known that the car was registered in his name, contrary to past practice. He took no steps to alter the registration.

(f) James McGieveron was in fact purportedly made redundant shortly after his term as National President concluded.

(g) The reason given by Richard Burton in his letter of 30 May 2013 for making James McGieveron redundant was a mere pretext. The absence of any documents recording any consideration or communications regarding James McGieveron’s redundancy suggests that Richard Burton did not embark on any serious consideration of whether to make the role redundant at this time.

(h) James McGieveron tamely acquiesced in Richard Burton’s decision to make him redundant despite Richard Burton’s

309 Submissions of James McGieveron, 19/6/15, para 21.
310 See paras 243, 247.
lack of power to make it. Senior counsel for James McGiveron disputed that proposition.\textsuperscript{311} He pointed to James McGiveron’s evidence that he asked that Richard Burton be allowed to stay until the end of the year.\textsuperscript{312} But someone in James McGiveron’s position who was really resisting the departure would have protested to the BCOM or to the officials with whom he had been working for many years. In the witness box he revealed himself to be a forceful and independent-minded man. His popularity among the union officials had been revealed by the Car Resolution on 18 July 2012. His force of personality had been revealed by his capacity to obtain consent (in substance) for all his future plans and secure the passage both of the Redundancy Policy Resolution and the Car Resolution on that date. Yet James McGiveron never attempted to resist Richard Burton. The meekness of his reaction suggests he was very happy about what had happened, and that he had expected it to happen.

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

263. This is a situation where the ‘known coincidence of circumstances [is] prone to give each individual circumstance greater significance than it would have had by itself’.\textsuperscript{313} The ‘united force of all of the

\textsuperscript{311} Submissions of James McGiveron, 19/6/15, para 17.
\textsuperscript{312} James McGiveron, 12/5/15, T:164.17-32.
\textsuperscript{313} Seeley International Pty Ltd v Jeffrey [2013] VSCA 288 at [43].
circumstances put together suggests that what occurred on 30 May 2013 was what both James McGiveron and Richard Burton had been expecting to occur since July 2012.

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

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

314 Belhaven and Stenton Peerge (1875) 1 App Cas 278 at 279 (quoted in Seeley International Pty Ltd v Jeffrey [2013] VSCA 288 at [46]).
315 See paras 223-227.
James McGiveron ceased to be National President? In addition, if this possibility is correct, then the position was not truly redundant and James McGiveron was not entitled to a payment under the Redundancy Policy.

266. If James McGiveron expected the position to be made redundant, that was a matter of critical importance. It ought to have been made known to the BCOM at the time of the motion regarding the Redundancy Policy at the 18 July 2012 meeting. And it ought to have been made known to the BCOM at the time of the appointment of James McGiveron as Special Projects Officer at the 16 October 2012 meeting. These decisions made by the BCOM created a situation which soon resulted in the expenditure of over $600,000 in Branch funds: the BCOM ought to have been fully appraised of that at the time of the decisions in question. James McGiveron, in recommending and participating in these decisions, was in a position of acute and undisclosed conflict. As a result, he may have breached his fiduciary duties and may have contravened ss 285, 286 and 287 of the FW(RO) Act by formulating, proposing and voting on the Redundancy Policy; and may have breached his fiduciary duties and may have contravened ss 286 and 287 of the FW(RO) Act by recommending and voting on the proposal to appoint him Special Projects Officer at the 16 October 2012 meeting.

267. Richard Burton also had a material personal interest in the resolutions proposed because they facilitated his becoming Secretary. Whilst that may have been known to some or all of the members of the BCOM, Richard Burton ought to have appreciated that the expected redundancy of James McGiveron, and its financial consequences, was
material to both of these resolutions and ought to have been disclosed. In failing to make that disclosure Richard Burton may have breached his fiduciary duties not to act in a position of conflict and contravened ss 285 and 287 of the FW(RO) Act.

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

Submissions of James McGiveron

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

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

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

318 Submissions of James McGiveron, 19/6/15, para 12.
319 Astway Pty Ltd v Council of the City of the Gold Coast (2008) 159 LGERA 335 at [43]-[45].
would have been a very significant beneficiary and the latter quite a
significant beneficiary of the misapplied TWU assets.

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

272. He submitted that the BCOM endorsed the Redundancy Policy on 18
July 2012, the $80,000 deposit payment on 4 December 2012, the
redundancy package and the gifting of the Ford F350 to James
McGiveron on 6 August 2013, and the giving of the replacement
vehicle to James McGiveron when he handed over the proceeds of sale
of his Ford F350 to the Union on some date on or after September
2014.320 He also submitted that the Finance Committee approved the
$80,000 payment on 4 December 2012.321 But none of these instances
of consent except possibly the approval of the gifting of the
replacement vehicle on or after September 2014 – very late in the day,
after the Haylen Report – could be described as fully informed consent.
And the replacement vehicle episode was in effect a method of giving
restitution to the Union and ensuring that the damage it had suffered in
relation to the Ford F350 was to some extent compensated: if there
were to be a Car Resolution, the replacement vehicle was the type of
car within its contemplation.

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

320 Submissions of James McGiveron, 19/6/15, para 27.
was made to the rule in *Browne v Dunn*.\(^{322}\) It was also said that counsel assisting had not put to James McGiveron the pattern of facts now relied on as being incapable of explanation as coincidences. And it was said that reliance on the Branch Rules caused surprise: ‘for all intents and purposes the finances of the [Branch] are not and were not at the relevant times found in the state registered union but this matter was not addressed in evidence because [counsel assisting] did not raise it as an issue’.\(^{323}\)

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

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

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


\(^{323}\) Submissions of James McGiveron, 19/6/15, paras 3-5.
Richard Burton were considering purchasing two Ford F350s. He denied this.\textsuperscript{324} He was asked whether he accepted that he should have told the BCOM meeting of 18 July 2012 that the Car Resolution would have the likely result of him being gifted a Ford F350. He denied this.\textsuperscript{325} He was asked whether he accepted that he should have left the meeting while the BCOM was considering the Car Resolution. He denied this.\textsuperscript{326} He was asked whether he accepted that when he authorised Debra Hodgson to pay the deposit, he was preferring his own interests to the interests of the members. He denied this.\textsuperscript{327} He was asked whether he accepted that before he signed the contracts with Barbagallo, he should have sought BCOM approval. He denied this.\textsuperscript{328} He was asked whether he accepted that he should have obtained BCOM approval before paying the $80,000 deposit. He denied this.\textsuperscript{329} He was asked if he accepted that he proposed the Redundancy Policy with a view to ensuring that if he were made redundant, he would receive a significant payment of money from the Branch. He denied this.\textsuperscript{330} He was asked whether he accepted that he ought to have excused himself from the meeting while the Redundancy Policy Resolution was being considered. He denied this.\textsuperscript{331} He was asked if he accepted that it was inappropriate of him to propose the Redundancy Policy at all at the 18 July 2012 BCOM meeting. He

\begin{itemize}
\item \textsuperscript{324} James McGiveron, 12/5/15, T:133.38-42.
\item \textsuperscript{325} James McGiveron, 12/5/15, T:133.44-47.
\item \textsuperscript{326} James McGiveron, 12/5/15, T:134.2-4.
\item \textsuperscript{327} James McGiveron, 12/5/15, T:138.13-16.
\item \textsuperscript{328} James McGiveron, 12/5/15, T:138.18-21.
\item \textsuperscript{329} James McGiveron, 12/5/15, T:136.26-28.
\item \textsuperscript{330} James McGiveron, 12/5/15, T:143.14-17.
\item \textsuperscript{331} James McGiveron, 12/5/15, T:143.14-17.
\end{itemize}
denied this.\textsuperscript{332} He was asked whether he accepted that in voting on the Redundancy Policy Resolution, he was preferring his own interests to the interests of the members. He denied this.\textsuperscript{333} He was asked to agree that he had not given any serious consideration as to whether the Redundancy Policy Resolution was in the best interests of the Branch. He denies this in saying that he thought it was, and that it was also in the best interests of the employees of the Branch.\textsuperscript{334} He was asked whether he proposed the Redundancy Policy Resolution because he thought it was in his interests. He denied this.\textsuperscript{335} He was asked whether he accepted that he should have excused himself from the meeting during consideration of the resolution to appoint him Special Projects Officer. He denied this.\textsuperscript{336} Counsel assisting, instead of being accused of having failed to question James McGiveron adequately, might have been thought to overemphasise the obvious points he put to him. The questions might not have referred specifically to ‘fiduciary duty’ or to the terms of the statutory provisions. But they did refer to the key conceptions underlying those rules of law. It is not appropriate for counsel assisting to debate with lay witnesses the content of rules of law and their specific application to the evidence of the witnesses. Further, counsel assisting in his opening put plainly all the material facts from which, if they were established, inferences of possible breaches of the law could be drawn.\textsuperscript{337} Incidentally, all these denials, indicative of a type of moral obliviousness or blindness as they are,

\textsuperscript{332} James McGiveron, 12/5/15, T:143.23-25.
\textsuperscript{333} James McGiveron, 12/5/15, T:143.30-32.
\textsuperscript{334} James McGiveron, 12/5/15, T:143.39.44.
\textsuperscript{335} James McGiveron, 12/5/15, T:143.46-147.1.
\textsuperscript{336} James McGiveron, 12/5/15, T:161.6-10.
\textsuperscript{337} 11/5/15, T:2.3-7.2.
were terribly damaging to James McGiveron’s credit, and to any claim that he was a man who accurately perceived what professional standards apply to trade union officials in his position.

277. The submission on behalf of James McGiveron that his legal representatives had not conducted themselves at the hearing on the basis that they were dealing with allegations of breaches of fiduciary and statutory duty was not coupled with a submission that they would have called further evidence had they thought they were dealing with those allegations. Counsel assisting, in his written submissions in reply, invited James McGiveron to indicate within a fortnight whether, in order to meet the allegations made against him by the written submissions of counsel assisting, he wished to be recalled so as to answer any allegations alleged not to have been put to him and whether he wished further evidence to be tendered (including evidence tendered through other recalled witnesses), and, if so, what. (None of these procedures would have been at James McGiveron’s expense.) Counsel assisting also indicated that he would be proceeding on the basis that if James McGiveron had been asked whether he breached his duties in the terms alleged by counsel assisting, he would have denied it. Counsel assisting’s invitation was not accepted.

278. There is no basis for any complaints by James McGiveron that either the rule in *Browne v Dunn* was breached, or, if it was, that any irremediable harm has been caused.

279. Finally, senior counsel submitted on behalf of James McGiveron that counsel assisting was not proceeding in accordance with the correct
standard of proof – that associated with *Briginshaw v Briginshaw*. Both the submissions of counsel assisting and the findings made above were made in conformity with *Briginshaw v Briginshaw*.

**Submissions of the TWU**

280. Senior counsel for the TWU submitted:

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

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

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

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338 (1938) 60 CLR 336.


340 Submissions of the TWU, 17/6/15, para 6.
question of James McGiveron’s redundancy only to a limited extent. It was directed to an allegation, said to have been made by Richard Burton, that James McGiveron received a payment of $700,000 on his retirement.\textsuperscript{341} The Haylen Report found that the payment was not $700,000 but rather an amount calculated in accordance with the Redundancy Policy. The Hon Wayne Haylen was not asked to, and did not, investigate in which the Redundancy Policy was formulated or the circumstances in which James McGiveron was made redundant. Most of the material considered during the Commission on this issue was not before the Hon Wayne Haylen. No criticism of the Hon Wayne Haylen is intended in saying this. Nor is any criticism of the TWU intended, for the underlying facts would not have been easy to assemble in a short period of time.

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

\textsuperscript{341} Starr MFI-1, 11/5/15, p 330.

\textsuperscript{342} Submissions of the TWU, 17/6/15, para 34.

\textsuperscript{343} Letter to the Editor, \textit{Australian Financial Review}, 22/6/15.
had not been possible for the TWU and the Hon Wayne Haylen to assemble. It is deplorable that the TWU’s otherwise commendable and responsible conduct should have been marred in this way.\textsuperscript{344}

**N – RECOMMENDATION**

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

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

\textsuperscript{344} Tony Sheldon’s statement is as inaccurate as the other point made in his letter: ‘The Australian Competition and Consumer Commission found the royal commission was wrong to allege an agreement between Toll and the TWU to set up a fund on training, safety, auditing and education was anti-competitive’. The Interim Report made no allegation of this kind. All that it did was to note that the ACCC had announced on 21 October 2014 that it was conducting an investigation, and state that this was an appropriate course: *Royal Commission into Trade Union Governance and Corruption, Interim Report* (2014), Vol 1, ch 7.2, p 998, para 55. It is unfortunately necessary also to draw attention to a false statement in the following part of a letter to the Editor of *The Australian*, published on 26 November 2015: ‘The Transport Workers Union was forced to spend time and resources answering questions at the Commission. We have been vindicated at every turn.’ Quite apart from the findings made against the Transport Workers’ Union in this Chapter, of which Tony Sheldon would have been ignorant at the time of writing his letter, it is not true that as at 26 November 2015 the Transport Workers’ Union and its officials ‘have been vindicated at every turn’. See the criticisms made in the Interim Report (Vol I, ch 4.2, 4.4, 6.2 and in particular 10.2 concerning the deceitful membership numbers supplied by the Transport Workers’ Union to the Australian Labor Party with a view to boosting the Transport Workers’ Union delegate strength at New South Wales State Labor Conferences, and Tony Sheldon’s knowingly false evidence on that subject).
PART 3

CHAPTER 3.1

ELECTRICAL TRADES UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH

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A – INTRODUCTION AND OVERVIEW

1. This is a lengthy case study. Primarily it concerns three issues. They are interlinked sufficiently to make it convenient to treat them as part of a single case study, not three separate ones. The three issues concern loans by trade unions, abuse of process in the Federal Court of Australia, and governance within the ETU Officers’ Fund.

Loans and breach of rules

2. In December 2010 certain loans were made by unions to the New South Wales Branch of the Australian Labor Party (ALP NSW). The ALP NSW borrowed $500,000 from the Electrical Trades Union of New South Wales (ETU NSW). It borrowed $1,000,000 from the Transport Workers’ Union of Australia (TWU). And it borrowed $1,500,000 from Unions New South Wales (Unions NSW). The loans were made to assist the ALP NSW in an impending State general election. At that time the ALP NSW was finding it difficult to pay for day-to-day operating expenses. It also had to obtain funds to pay for election campaign expenses. The loans were required urgently. The ALP NSW requested them with a view to overcoming limitations that would be contained in amendments to electoral funding legislation to come into effect on 1 January 2011. Primary attention is given to the loan made by the ETU NSW (ETU Loan). Some attention is given to the loan made by Unions NSW (Unions NSW Loan). An interesting contrast with the ETU Loan and the Unions NSW Loan can be drawn from a short description of the loan from the TWU (TWU Loan).
3. It is concluded that:

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

(b) Bernard Riordan, then Secretary of the ETU NSW, omitted to make any commercial assessment of the capacity of the NSW ALP to repay the loan, the need for security, the appropriate interest rate or the necessary parties to the loan agreement. Yet the ETU Loan was often referred to as a ‘commercial transaction’ or an ‘investment’. That is what its many defenders within the ranks of the ETU NSW called it. Had it in truth been a commercial transaction or an investment, Bernard Riordan’s omissions may have placed him in breach of his duties to the ETU NSW. But in truth the ETU Loan, and his role in arranging it, were not to be judged by those standards. The ETU Loan was a transaction designed to assist the wider labour movement. Because it had that character, Bernard Riordan was not in breach of his duties to the ETU NSW. The same is true of relevant officials in Unions NSW in relation to the Unions NSW Loan.

(c) Paul Sinclair, Assistant Secretary of the ETU NSW, was victimised by his colleagues for giving evidence to the Royal

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1 Bernard Riordan was appointed Commissioner of the Fair Work Commission with effect from March 2012. For convenience, and without any disrespect, the Report will continue to refer to Commissioner Riordan as Bernard Riordan. Incidentally, counsel for Bernard Riordan went out of his way to submit that no criticism could be made of the appointment (Submissions of Commissioner Riordan, 13/7/15, paras 2-3). This is surprising. Counsel assisting did not suggest any criticism. No affected person did so. Certainly this Report does not do so.
Commission which they seem to have perceived to have been unsatisfactory. In one sense this is the most disturbing aspect of the whole case study.

(d) An investigation of the ETU Loan by New Law was not wholly satisfactory, largely because of conditions imposed on the investigation by Steve Butler, Bernard Riordan’s successor. However, the conduct of neither Steve Butler nor the investigator can be described as being in breach of any relevant duty.

Abuse of Federal Court process

4. In 2011-2012, Dean Mighell was the Secretary of the Victorian Branch of the Electrical Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). In 2011, he instituted proceedings in the Federal Court of Australia (the First Federal Court Proceedings). The respondents were three officers of the New South Wales Branch of the Electrical Division of the CEPU. They were Bernard Riordan, Paul Sinclair and Neville Betts. The proceedings were funded by the CEPU. They involved significant expenditure. Had the claims gone to trial and been upheld, millions of dollars would have been returned to the CEPU. Then in February 2012, Bernard Riordan was offered an appointment to the Fair Work Commission. He told Dean Mighell that the appointment could not proceed while the First Federal Court Proceedings were on foot. Dean Mighell thereupon discontinued the proceedings on the second day of the hearing. The principal issue is whether Dean Mighell misused Branch resources in bringing the
proceedings for the purpose of assisting him in union elections. A further and similar issue arises in connection with subsequent proceedings of the same nature (the Second Federal Court Proceedings). They were brought by Gary Carruthers, then President of the Branch, against Paul Sinclair and Neville Betts.

5. It is concluded that:

(a) Dean Mighell commenced and conducted the First Federal Court proceedings for the purposes of advancing his own political interests and not the interests of the Branch;

(b) the First Federal Court Proceedings were an abuse of the processes of the Federal Court of Australia;

(c) as a result Dean Mighell may have breached his duties as an officer of the Branch by permitting himself to be used merely as the tool of others;

(d) the conduct of Bernard Riordan and his solicitor in relation to the First Federal Court Proceedings is not open to criticism; and

(e) Gary Carruthers in commencing the Second Federal Court Proceedings also may have breached his duties as an officer of the Branch.
ETU Officers’ Fund

6. The ETU Officers’ Fund was a fund to which contributions were made by officers of the ETU. It had the purpose of funding election campaigns. It is concluded that there were two governance problems in the fund.

B – THE STRUCTURE AND RULES OF THE CEPU AND THE ETU

7. So far as Section B draws on the submissions of counsel assisting, it is not understood to be controversial.

8. The ‘CEPU’ comprises three divisions. In turn, each division incorporates various State Divisional branches.

9. The rules of the CEPU (CEPU Rules) have been registered under the Fair Work (Registered Organisations) Act 2009 (Cth).²

10. Rule 4.3 of the CEPU Rules defines ‘Division’ as follows:³

Division shall mean a division of the Union established under the rules of the Union. There shall be an Electrical, Energy and Services Division, a Plumbing Division and a Communications Division.

² Wilson MFI-2, 28/4/15, tab 4, CEPU Rules as at 16 September 2011. The rules referred to in this section are the rules as in force at 16 September 2011.
11. Rule 4.4 defines ‘Divisional Council’ as follows:\textsuperscript{4}

Divisional Council refers to the supreme governing body in each division, which in the case of the Communications Division is the Divisional Conference.

12. Rule 4.7 defines a ‘Divisional Branch’ as ‘a Branch of a division of the Union established in accordance with the rules of the Union’.\textsuperscript{5}

13. Rule 4.13 is headed ‘Rules of the Union’ and provides as follows:\textsuperscript{6}

The Rules of the Union means all of the Rules of the amalgamated union read and construed in totality and includes the Divisional Rules and Divisional Branch rules.

14. Rule 6 is headed ‘Divisions’. It provides that the ‘Divisions of the Union shall be established in accordance with the rules of the Union’.\textsuperscript{7}

15. Rule 6.2.1 provides:\textsuperscript{8}

Each division shall have the autonomy to decide matters which do not directly affect the members of another division.

16. Rule 6.3 provides that the rules of the Electrical, Energy and Services Division, the Plumbing Division and the Communications Division

\textsuperscript{4} Wilson MFI-2, 28/4/15, tab 4, p 20.
\textsuperscript{5} Wilson MFI-2, 28/4/15, tab 4, p 20.
\textsuperscript{6} Wilson MFI-2, 28/4/15, tab 4, p 21.
\textsuperscript{7} Wilson MFI-2, 28/4/15, tab 4, p 22, rule 6.1.1.
\textsuperscript{8} Wilson MFI-2, 28/4/15, tab 4, p 23.
shall be those set out in sections B, C and D respectively of the CEPU Rules."9

17. Rule 7 is headed ‘National Council’. Rule 7.1.1 provides:10

The National Council of the Union shall have exclusive power to deal with matters affecting more than one division and the general control and conduct of the business and affairs of the Union having regard to the requirements of divisional autonomy provided for in these rules.

18. Conformably with the provisions of the CEPU Rules, the Electrical, Energy and Services Division (‘Electrical Division’) has promulgated its own rules. They are section ‘B’ of the CEPU Rules (Electrical Division Rules).11

19. Rule 1.1 of the Electrical Division Rules provides as follows:12

The name of this Division shall be the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical, Energy and Services Division. The Division shall also be known as the Electrical Trades Union Division.

20. Rule 7.1 provides as follows:13

Subject to these Divisional Rules, the control of the Division shall be vested in a Divisional Council which shall consist of the Divisional Secretary and delegates from each branch of the Division.

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21. Rule 7.2 is headed ‘Powers of Divisional Council’. Rule 7.2.1 provides:  

The Divisional Council shall be the supreme governing body of the Division, and subject to the provisions of any State Trade Union Act so far as members of the Divisional Branch to which such Act applies, its decision on all matters, whether specifically provided for by these Rules or not, shall be final and binding on all members, subject to any referendum that may be conducted pursuant to rule 17 “Control of Divisional Council and Executive by Members”.

22. Rule 7.2.3.2 provides in effect that the Divisional Council shall have the power to decide upon the policy of the Division in all matters affecting the members.

23. There are branches of the Electrical Division in a number of states, including New South Wales, Victoria and Queensland. These branches are not legal entities separate from the CEPU. The ETU NSW, however, is a separate legal entity. It is registered under the Industrial Relations Act 1996 (NSW). It has a separate set of rules registered under that Act.

24. The ETU NSW and the NSW Branch of the Electrical Division of the CEPU overlap significantly. In particular, the Branch and the ETU NSW share the same officers and employees. They do not, however, share assets. The ETU NSW has significant assets. The Branch does not. The relationship between the ETU NSW and the Branch is now

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16 Wilson MFI-2, 28/4/15, tab 3, ETU of NSW Record of Registration of Rules.
regulated by an agreement dated 27 November 2014.\textsuperscript{17} That agreement reduces to writing the terms of ‘a relationship that has existed for many years’.\textsuperscript{18} The agreement provides for the allocation of expenses and the provision of services as between the ETU NSW, the CEPU and the Branch. It also provides for the sharing of entrance fees and subscriptions. Recital G to the agreement provides that the officers and employees of the ETU NSW are also officers and employees of the Branch. Recital F provides that members of the ETU NSW are also members of the Branch.

25. To describe this complex and subtle structure as worthy of the Abbé Sieyès is to be unfair to the memory of that earnest French statesman. But it is not unfair to call it ‘Byzantine’. Certainly the structure was a matter of concern to the Victorian Branch of the Electrical Division in general and Dean Mighell in particular. So was the influence exercised by the NSW Branch of the Electrical Division at a Divisional and National level within the CEPU. There is no legislation in Victoria that enables the separate registration of a union. Thus, in effect the assets of the New South Wales Branch of the Electrical Division were solely controlled by that Branch because they were held by the ETU NSW. But the assets of the Victorian Branch of the Electrical Division were largely subject to the control of the Electrical Division and the National Council. It was this state of affairs which motivated Dean Mighell to institute the First Federal Court Proceedings discussed below.

\textsuperscript{17} Sinclair MFI-1, 27/4/15, tab 6.
\textsuperscript{18} Sinclair MFI-1, 27/4/15, tab 6, recital J.
C – THE ETU LOAN

26. Not all the submissions of counsel assisting on the subjects discussed in this Chapter are accepted. So far as they have been accepted, they were as follows. Particular submissions to the contrary made on behalf of affected persons are considered at appropriate places.

Summary of relevant facts

27. In February 1998 Bernard Riordan became the Secretary of the ETU NSW. He held that office until 2012. He became President of the ALP NSW in 2006. He ‘resigned’ from the latter position with effect from 3 December 2010.

28. A State election was to take place in New South Wales in March 2011. This was a matter of acute interest in political and public circles by December 2010. The ALP NSW was in financial difficulties. One of the difficulties concerned meeting campaign expenses. As the then General Secretary of the ALP NSW, Sam Dastyari\(^{19}\) said: ‘the ALP NSW required funds to assist with its cash-flow in the lead up to the 2011 NSW State election. At the time, the ALP NSW was finding it difficult to pay for day-to-day operating expenses and also required funds to pay for election campaign expenses, including advertising.’\(^{20}\)

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\(^{19}\) Sam Dastyari, subsequent to the events described below, was appointed on 21 August 2013 to fill a vacant Senate seat. For convenience and without any disrespect, he will be referred to simply by his name.

29. Consequently the ALP NSW through Sam Dastyari commenced soliciting loans from various unions.

30. At that time, it was known that amendments to the *Election Funding and Disclosure Act 1981* (NSW) were due to come into effect on 1 January 2011. These amendments appear to have generated a perception, at least within the ALP NSW, that any loans to the ALP NSW would need to be received prior to 31 December 2010.

31. On 20 December 2010 Bernard Riordan met Sam Dastyari and Christopher Minns, Assistant Secretary of the ALP NSW. At the meeting Sam Dastyari requested a loan of $500,000 from the ETU NSW. Bernard Riordan told Sam Dastyari that he would put the proposal to the ETU NSW Executive that evening.\(^{21}\)

32. But was this the first time that the ETU knew of the impending ETU Loan? In answer to a notice to produce documents to the Commission, the ALP NSW produced a letter dated 25 November 2010, addressed to Bernard Riordan and signed by Sam Dastyari.\(^{22}\) That letter requested a loan from the ETU NSW of $1,500,000 to be made before the Christmas break.\(^{23}\) The letter proposed a schedule of repayments on the same dates as ultimately adopted. It proposed the payment of interest at the same rate, 8.5%.\(^{24}\) The letter concluded: ‘I would

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\(^{21}\) Bernard Riordan, witness statement, 4/5/15, para 48. Christopher Minns is now a member of the Legislative Assembly of New South Wales, but will be referred to simply by his name without any intended disrespect.

\(^{22}\) Riordan MFI-3, 4/5/15, pp 1-4. The text of the signed letter has been obscured but its terms are apparent from an unsigned draft version at pp 1-2.

\(^{23}\) Riordan MFI-3, 4/5/15, p 1.

\(^{24}\) Riordan MFI-3, 4/5/15, pp 1, 3.
appreciate it if you and your Executive could consider this matter at your earliest convenience’. The date of this letter is around the time when Sam Dastyari began the negotiations which led to the TWU Loan.

33. Sam Dastyari said that he had no reason to believe the letter was not sent to Bernard Riordan. However the ETU NSW did not produce this letter in answer to a notice to produce issued by the Commission. Further, Bernard Riordan had no recollection of receiving it. It seems likely that the letter was either not sent or not received. But it does not matter what the actual position was. The key events began with Bernard Riordan’s meeting with the ALP NSW officials on 20 December 2010.

34. A meeting of the ETU NSW State Council was specially summoned for 4.45pm on 20 December 2010. Its purpose was to consider whether the ETU NSW should donate ‘up to $150,000 towards candidates who support this Union in the upcoming State Election’. Below that is called ‘the $150,000 Donation’. There was no quorum. The meeting was therefore closed 15 minutes later, at 5pm. But under the ETU NSW Rules, in the event of a lack of quorum at a State

25 Riordan MFI-3, 4/5/15, pp 1, 3.
26 Sam Dastyari, witness statement, 5/6/15, para 24.
28 Sinclair MFI-2, 27/4/15, p 47.
Council meeting, the Executive had the power to determine the matters that were to be before that State Council.30

35. At 5pm on 20 December 2010 a meeting of the ETU’s State Council Executive commenced. The minutes of this meeting make no reference to the ETU Loan.31 What, if anything, was said and done in connection with the ETU Loan at this meeting? On that subject there were extraordinary testimonial disputes, reminiscent of Rashomon. Similar disputes exist in relation to several subsequent meetings of the relevant ETU NSW organs.32

36. On 22 December 2010 the ALP NSW opened a new cheque account. The apparent purpose was to receive the proceeds of the ETU Loan, the Unions NSW Loan and the TWU Loan.33

37. The ETU Loan was effected by a loan agreement (ETU Loan Agreement). Bernard Riordan did not see a copy until after 20 December 2010.34 It was probably created on 22 December 2010.35 It was signed by Sam Dastyari on behalf of the ALP NSW on 22 December 2010. It was signed by Bernard Riordan on behalf of the ETU NSW on 23 December 2010.36

30 See para 94.
32 See paras 109-220.
34 Bernard Riordan, 4/5/15, T:532.47.
38. Among the terms of the ETU Loan Agreement were the following.

(a) By clause 2, the ETU ‘must’ make a loan of $500,000 to the ALP not later than 31 December 2010.

(b) Clause 3.1 regulated the repayment of the loan and interest and specified that the ALP had to repay the loan over a two and a half year period in four instalments:

(i) 31 December 2011 an amount of $100,000;

(ii) 30 June 2012 an amount of $100,000;

(iii) 31 December 2012 an amount of $150,000; and

(iv) 30 June 2013 an amount of $150,000.

(c) Interest was payable on the monies lent at the rate of 8.5% per annum. Pursuant to clause 3 the total amount of interest payable on the ETU Loan was $78,625.37

39. On 23 December 2010, $500,000 was transferred from the ETU’s Business Classic account at the ANZ branch into the cheque account opened by the ALP NSW on 22 December 2010.38 The TWU Loan and the Unions NSW Loan were also paid into it on 22 and 23 December 2010 respectively.

40. The banking procedures of the ETU NSW at this time required that EFT transfers be authorised by two persons. The transfer of the ETU Loan was effected by Bernard Riordan in conjunction with Joanne Crowder. Joanne Crowder at that time was employed by the ETU NSW in the accounts department. She was also acting as an administrative assistant.\(^{39}\) According to her, the usual practice was that when transfers of funds out of ETU NSW accounts took place a ‘pink slip’ was generated.\(^{40}\) This was a piece of paper describing the transaction which ultimately went to the Executive for approval. Ought the transfer of the $500,000 to the ALP NSW to have generated a ‘pink slip’? Paul Sinclair’s view was that a pink slip was required.\(^{41}\) Bernard Riordan’s view was that pink slips were only required for ‘expenditure’, and that the loan was not expenditure.\(^{42}\) Joanne Crowder’s view was that EFT transfers always required pink slips.\(^{43}\) But she also said that Warwick Penfold would be more likely to know the position than she would.\(^{44}\) She said that Warwick Penfold was looking for, and asked her for, a pink slip for the loan in January 2011.\(^{45}\) Warwick Penfold said he may have said something like that to her, or perhaps ‘Where is the document?’\(^{46}\) Warwick Penfold said that the three loans that occurred in his time at the ETU NSW had not had pink slips. Instead paper trails were generated by way of a loan


\(^{42}\) Bernard Riordan, 4/5/15, T:591.20-44.


\(^{44}\) Joanne Crowder, 27/4/15, T:117.2-5.

\(^{45}\) Joanne Crowder, 27/4/15, T:112.11.35.

\(^{46}\) Warwick Penfold, 5/6/15, T:891.11-25, 892.5-6.
document shown as approved in the minutes of the Executive. Counsel for Bernard Riordan submitted that there was no credible evidence that a pink slip was required for the ETU Loan. Paul Sinclair’s evidence, however, is perfectly credible.

41. But it is not necessary to resolve these conflicts. Whether the ETU NSW’s practice was that described by Warwick Penfold, or that described by Bernard Riordan, or that described by Paul Sinclair, it was not followed in this case.

42. On 10 January 2011 the ETU NSW Executive met. Among other things, it resolved to confirm the Executive Meeting minutes from 20 December 2010.

43. On 21 February 2011 the ETU NSW State Council met. It resolved that the minutes of the Executive meetings of 20 December 2010 and 10 January 2011 be endorsed. The minutes of this State Council meeting make no reference to the ETU Loan. There is a dispute, discussed below, as to what, if anything, was said and done in regard to the ETU Loan at this meeting.

44. The ALP NSW did not repay the ETU Loan at the times required by the ETU Loan Agreement. Ultimately, however, it was repaid.

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48 Submissions of Commissioner Riordan, 13/7/15, para 122(a).
49 See para 40.
52 See paras 121-124.
45. On 31 December 2011 the first instalment under the ETU loan was due. The first instalment was in the sum of $100,000 plus interest of $42,500. In breach of contract, the ALP NSW failed to make this payment. There is no evidence that the ETU NSW wrote to the ALP NSW concerning the fact that the ALP NSW was in default. There was, however, evidence that a conversation took place between Bernard Riordan and Christopher Minns.\textsuperscript{53} The former did not remember the conversation but gave evidence that he assumed he had contacted the ALP NSW to ask why it had missed the payment date.\textsuperscript{54}

46. On 16 January 2012 Christopher Minns wrote to the ETU NSW. He requested an opportunity to renegotiate the repayment dates for the ETU Loan.\textsuperscript{55} At a meeting of the Executive of the same day Bernard Riordan reported this request to the Executive. The Executive authorised him to renegotiate the terms of the loan agreement and report back to the Executive.\textsuperscript{56}

47. On 6 February 2012 Christopher Minns wrote a similar letter. But this time he proposed an amended repayment schedule.\textsuperscript{57} The Executive meeting of 13 February 2012 approved that proposal.\textsuperscript{58} This was recorded in item 6 of the minutes. However, that item of the Executive minutes was deleted at the State Council meeting of the same day. The

\textsuperscript{53} Bernard Riordan, witness statement, 4/5/15, BR-11.
\textsuperscript{54} Bernard Riordan, 4/5/15, T:588.27-35, 592.2-14.
\textsuperscript{55} Bernard Riordan, witness statement, 4/5/15, BR-11.
\textsuperscript{56} Bernard Riordan, witness statement, 4/5/15, BR-14.
\textsuperscript{57} Bernard Riordan, witness statement, 4/5/15, BR-12.
\textsuperscript{58} Sinclair MFI-2, 27/4/15, p 116.
minutes record that the Secretary’s report on that issue was noted.\textsuperscript{59} It would thus seem that, at this time, it was felt that there was no agreement to Christopher Minns’ repayment schedule. In any event, the first date for repayment under Christopher Minns’s proposed schedule was 30 June 2012. The ALP NSW did not repay any amount on that day. Nor, again, did anyone from the ETU NSW attempt to contact the ALP NSW about this in writing.

48. On 23 July 2012 the ALP NSW wrote to the ETU NSW requesting further amendments to the payment schedule in section 3.1 of the ETU Loan. The first repayment of principal was to be on 30 April 2013. The second and final repayment was to be on 30 April 2014.\textsuperscript{60}

49. On the same day Sam Dastyari, and the new Assistant Secretary of the ALP NSW, Jamie Clements, attended a meeting of the ETU NSW State Council Executive. They supported the proposed amendments.\textsuperscript{61} The meeting of the ETU NSW Executive resolved to accept the ALP NSW revised repayment plan. The meeting referred the issue to the next meeting of the ETU NSW State Council on 13 August 2012.\textsuperscript{62} At the latter meeting the State Council endorsed the acceptance of the revised repayment plan.\textsuperscript{63}

\textsuperscript{59} Bernard Riordan, witness statement, 4/5/15, BR-15.

\textsuperscript{60} Bernard Riordan, witness statement, 4/5/15, BR-13.

\textsuperscript{61} Bernard Riordan, witness statement, 4/5/15, BR-16, para 2.


\textsuperscript{63} Sinclair MFI-2, 27/4/15, p 167.
50. The first repayment made by the ALP NSW under the ETU Loan Agreement was by way of interest in the amount of $71,609.59 on 29 August 2012.\(^{64}\)

51. On 28 March 2013 the ALP NSW made a loan repayment of $250,000 in principal.\(^{65}\)

52. On 24 July 2013 the ALP NSW made a further loan repayment of $250,000 in principal and $32,214.62 in interest. That paid out the ETU Loan in full.\(^{66}\)

The ALP NSW as a party to the ETU Loan Agreement

53. Sam Dastyari signed the ETU Loan Agreement ‘for and on behalf of the Australian Labor Party (NSW Branch)’. The ALP NSW is and was in 2010 an unincorporated association.\(^{67}\) Like any unincorporated association, the ALP NSW had no separate legal existence from its members. In this respect it stood in contrast with a corporation or an incorporated association. Did Sam Dastyari’s signature on the ETU Loan Agreement bind the members of the ALP NSW? Sam Dastyari said in evidence that he believed it did.\(^{68}\)

\(^{64}\) Sinclair MFI-1, 27/4/15, tab 20.

\(^{65}\) Sinclair MFI-1, 27/4/15, tab 20.


\(^{67}\) Riordan MFI-6, 4/5/15, rules A.1 and A.3, p 6; Sam Dastyari, witness statement, 5/6/15, para 8.

\(^{68}\) Sam Dastyari, witness statement, 5/6/15, para 17.
54. In principle, it is possible for the rules of an unincorporated association to authorise one of its members to subject other members to liabilities. But there was nothing relevant in the rules of the ALP NSW to this effect. In these circumstances, Sam Dastyari’s signature on the ETU Loan agreement could not have bound the ALP NSW members as a whole either at the time of signature or from time to time thereafter.\(^{69}\)

55. Further, in principle, it would be possible for the members of the ALP NSW to be bound by the ETU Loan Agreement by ratification. However there is no evidence that the ETU Loan agreement was ratified. It is extremely likely that it was not ratified.

56. So the members of the ALP NSW were not liable under the ETU Loan Agreement to repay the ETU Loan. Who, if anyone, was liable?

57. Under the ALP Rules, three trustees are required to hold all of the property of the Party on trust (rule K.1 and K.2).\(^{70}\) There is however no power given to them to borrow money.

58. Nor did Sam Dastyari, as General Secretary, have any power to borrow funds on behalf of the Trustees (or any other person or bodies in the party).

59. Were the members of the Administrative Committee personally liable to repay the money borrowed? That appeared to be Mark Lennon’s view in relation to a similar problem about the Unions NSW Loan.\(^{71}\)

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\(^{69}\) Cf Peckham v Moore [1975] 1 NSWLR 353 at 357, 369.

\(^{70}\) Riordan MFl-6, 4/5/15, p 39.

\(^{71}\) Mark Lennon, 6/5/15, T:779.15-19.
Sam Dastyari said that it was customary for the Administrative Committee to delegate the ability to negotiate and enter into agreements to the Secretary.\footnote{Sam Dastyari, witness statement, 5/6/15, para 12.} However he did not say that this custom was followed in the case of the ETU Loan.\footnote{Sam Dastyari, witness statement, 5/6/15, paras 14, 18.} A notice to produce was issued to the ALP NSW seeking documents in connection with the ETU Loan, including:\footnote{Notice to Produce 771, paras 4-6.}

- Any Documents recording or concerning the decision by the Party to enter into the [ETU Loan Agreement]…
- Minutes of any meeting of any executive, governing or finance committee of the Party referring to or concerning the [ETU Loan Agreement].

No document was produced recording any decision of the Administrative Committee (or any other Committee or organ of the ALP NSW) to enter into the ETU Loan Agreement, or to authorise anyone else to do so. Thus it is unlikely that the members of the Administrative Committee could be said to have had any liability under the ETU Loan Agreement.

60. It would therefore seem, on the evidence, that Sam Dastyari was solely liable for the debts incurred under the ETU Loan agreement. By clause 5(a) of the ETU Loan Agreement, each ‘party’ warranted to the other that it created legal, valid and binding obligations, ‘enforceable against the relevant party’\footnote{Sinclair MFI-2, 27/4/15, p 56.}. At best, from the ETU NSW’s perspective, this amounted to a warranty by Sam Dastyari that the loan was enforceable.
against the members of the ALP NSW. It could not have bound those members.

61. Sam Dastyari, of course, did not repay the ETU Loan with his own monies. The monies used to repay the loan were probably withdrawn from ALP NSW bank accounts after resolutions were passed in keeping with rule K.11.76 There is no impediment in the ALP NSW Rules to monies held in bank accounts operated by the Party being used in this way. The present point, though, is that the repayment of the ETU Loan in this way was purely voluntary. It was not something that the ETU NSW could have compelled by suing on the ETU Loan Agreement.

Consequences of ALP NSW registration as a political party

62. It is now necessary to deal with a number of matters that arose in the course of the hearing.

63. *First*, it was said that the ALP NSW is a political party registered under Part XI of the *Commonwealth Electoral Act 1918* (Cth).77 Registration under that Part does not, however, confer corporate personality on the Party. Registration has a variety of consequences under that Act. It is, for example, a pre-condition to printing the name of a political party adjacent to the name of a candidate on a ballot paper.78 None of the consequences of registration under that Act is

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76 Riordan MFI-6, 4/5/15, p 40.
78 *Commonwealth Electoral Act 1918* (Cth), s 169.
relevant for present purposes. In particular, it is not a consequence of registration that the members of a political party are bound by loan agreements purportedly executed on their behalf. Nor is it a consequence of registration that members of a political party may be sued under a loan agreement in proceedings purportedly brought against that political party. The position is the same with respect to registration under Part 4A of the Parliamentary Electorates and Elections Act 1912 (NSW).

64. Secondly, at common law an unincorporated association cannot sue or be sued in its own name because, among other reasons, it does not exist as a juridical entity. In Australian jurisdictions, Rules of Court in South Australia and Tasmania allow unincorporated associations to be sued in the association’s name. However, those rules merely facilitate proceedings being brought against the members of an unincorporated association without joining each and every one of the association’s members. If members of an unincorporated association are not otherwise liable under a loan agreement, these procedural rules do not make them liable.

65. Thirdly, Mark Lennon (Secretary of Unions NSW) was asked, by counsel for Bernard Riordan, about his knowledge of Tudehope v Liberal Party of Australia and other cases in which the Liberal Party had been sued in its name. Mark Lennon is neither a lawyer nor a

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79 Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis (2007) 70 NSWLR 565 at [46]-[52].

80 See Supreme Court Civil Rules 2006 (SA), r 87 and Supreme Court Rules 2000 (Tas), r 322.


82 Mark Lennon, 6/5/15, T:787.2-33.
member of the Liberal Party. Hence it is not surprising that he was unaware of these cases. The questions appeared to suggest that the ALP NSW, too, could be sued. The suggestion is not supported by either Tudehope’s case or any of the cases it refers to. Tudehope’s case was an ex tempore decision. An interlocutory injunction restraining the holding of a meeting of the selection committee for the State Electoral Conference for Baulkham Hills was refused. The application was made at 3pm on the day of the proposed meeting. The question of whether the Liberal Party itself was the proper defendant is not canvassed at all in the judgment. It may be that the Rules of that Party provided for a mechanism for the determination of disputes of this nature. However, there is no reference in the judgment to any rules at all.

Reference was made in Tudehope’s case to Coleman v Liberal Party of Australia, New South Wales Division (No 2). That too was an urgent application disputing a decision of a selection committee. It too was decided ex tempore. It too contains no discussion of the question of whether it was possible to join the Liberal Party as a defendant. Perhaps the question may have been thought irrelevant: the solicitor appearing for the Liberal Party informed the Court that the Party submitted to the orders of the Court. The plaintiff’s application was opposed by counsel representing two individual members, described as ‘Intervenors’, with a particular interest in the outcome. Another explanation may be that the application originally was made ex parte,

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83 Mark Lennon, 6/5/15, T:787.7.
84 (2007) 212 FLR 271.
85 Coleman v Liberal Party of Australia, New South Wales Division (No 2) (2007) 212 FLR 271 at [4]-[7].
and Palmer J required notice to be given to the Party. Whatever the position, the case provides no authority for the proposition that proceedings could have been commenced against the ALP NSW for monies owing under the ETU Loan Agreement.

67. Fourthly, counsel for Bernard Riordan cited Baker v The Liberal Party of Australia (SA Division) and Clarke v ALP (SA Branch). He submitted that they showed that there are serious questions to be tried in a court arising out of the recognition and registration of the ALP NSW and of the Commonwealth Electoral Act 1918 (Cth). He gave three examples of those questions:

(a) Has it been established that statutory recognition of registered political parties, and the conferral of statutory rights and obligations under the Commonwealth Electoral Act 1918 (Cth) imbues them [with] sufficient legal personality to allow their affairs to be justiciable?

(b) Registered political parties have clearly identifiable public identities are [sic] eligible to receive significant public funding. Do such characteristics, when taken together with the rights and obligations conferred through the process of registration, result in political parties being taken “beyond the ambit of mere voluntary associations”?

(c) Is there significant public interest in political parties being seen as having distinct legal personality?

68. The submissions did not endeavour to demonstrate how those questions arose out of the two authorities cited. It would be for a court

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86 Coleman v Liberal Party of Australia (New South Wales Division) [2007] NSWSC 655 at [2].
88 [1999] SASC 365 at [80]-[82].
89 Submissions of Commissioner Riordan, 13/7/15, para 123.
to say whether those questions are ‘serious’. In truth they seem less serious than interesting. But even their interest is diminished by the fact that the answers are pretty clear. These submissions do not dispel the grave doubts about the capacity of the ETU to enforce the ETU Loan Agreement against the ALP NSW.  

69. Is it possible for any member of the ALP NSW to borrow money other than in his or her own name or names or as agent for another? Is it possible for an organ of the ALP NSW to borrow money other than in the name or names of a member or members constituting that organ? These questions do not need to be resolved here. But it is interesting that the rules do not appear to contemplate that it would be necessary for the ALP NSW to borrow funds at all. Although there are a variety of rules dealing with the expenditure of money and the making of investments, no express powers are conferred on any office holder or committee, or to the Trustees, to borrow funds. It is relevant to wonder whether this is because those who made the rules assumed money could always be raised by fundraising. By rule K.1 all property, including funds, books, furniture, equipment and other assets of the Party are held in the names of three Trustees. By rule D.1(a) the Administrative Committee is ‘responsible for the management and administration of the Party between Annual Conferences’. It is possible that this power of the Administrative Committee is sufficiently wide to enable it authorise the Trustees in that capacity to execute a loan agreement. If so, and if the Trustees acted on that

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90 Those doubts are supported by legal advice obtained by Unions NSW: see paras 319-322.
92 Riordan MFI-6, 4/5/15, p 39.
93 Riordan MFI-6, 4/5/15, p 21.
authority and borrowed funds in their capacity, then they would be liable to repay those funds. They would also have a right of indemnity in respect of that liability out of the trust assets. It is unnecessary to pursue this possibility further here. The Trustees did not execute the ETU Loan Agreement. And the Administrative Committee did not purport to authorise them to do so.

70. For present purposes the point is that officials at the ETU NSW were advancing a significant amount of members’ money to a ‘borrower’ without giving any consideration to some critical questions. One was what the legal status of that ‘borrower’ was. Another was how the ETU Loan Agreement could be enforced.94

Was the ETU Loan a loan to ETU NSW members?

71. Rule 32(g) of the ETU NSW Rules as at 12 June 2012 provided:95

No portion of the funds shall be lent to members and any officer doing so shall be held personally responsible and shall be suspended for at least three months and may also be expelled from the Union.

72. There was some overlap between membership of the ETU NSW and membership of the ALP NSW. At the very least, Bernard Riordan, James Macfadyen, Mark Buttigieg, Phillip Oswald and Colin Harris were members. No doubt there were many more. A question arose whether this overlap meant that a loan to the members of the ALP

94 See paras 53-61.
NSW would also have been a loan ‘to members’ within the meaning of rule 32(g) and thus expressly prohibited. It is not necessary to resolve that question.

The requirements of the ETU NSW Rules regarding loans: the Rules

73. As at December 2010, rule 5 of the ETU NSW Rules of 5 July 2007 provided:96

The **funds** of the Union shall be **expended** only for lawful means and in connection with the carrying out of the Objects as set out in Rule 3 and for expenses of Management. No **loan, grant or donation** can be made to any person or organisation except in accordance with these Rules. (emphasis added)

74. Rule 32 of the ETU NSW Rules provided:97

32. CONTROL OF PROPERTY AND FUNDS

(a) The Secretary of the Union or officer in charge of a regional office shall as directed by the Executive deposit all money accruing to the Union in a bank to the credit of the Union at least daily. The property and funds of the Union shall be subject to any directions of the Executive. The Secretary shall also be responsible for the custody of all books, documents and securities of the Union.

(b) Except for the petty cash current account referred to in this subrule, all withdrawals shall be by cheque, which shall bear the signatures of the Secretary, Treasurer, and the President, and in the absence of either the Treasurer or President, the Vice President, who shall be the only persons authorised to operate on the Union’s banking accounts.

Except the petty cash current accounts referred to in this subrule, no officer shall sign a cheque until same has been passed by the

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96 Wilson MFI-2, 28/4/15, tab 1, p 5.
97 Wilson MFI-2, 28/4/15, tab 1, pp 33-34.
Executive Committee; provided that the Executive may confer a general authority upon the Secretary and officers authorised to sign cheques for ordinary business expenditure such as weekly salaries as they become due, postage stamps, witnesses' expenses, etc., without waiting for a meeting of the Executive.

The State Council may authorise the operation of current accounts for petty cash purposes, for a limited amount to be decided by the Executive from time to time. Such accounts shall be operated on the imprest system of banking and cheques shall bear the signature of the Secretary or such other officer as the State Council may decide.

(c) Except in cases of extreme urgency all proposals to commit the Union to new expenditure shall be referred to the Executive Committee for report.

(d) No sum of money in excess of $1000.00 shall be voted for any purpose other than such expenditure as may be required to meet management expenses unless notice of motion has been given at a previous State Council Meeting of the Union and the members notified by summons setting forth the exact terms of the motion which must include the amount of the sum proposed to be expended.

75. Rule 32(d) was reinforced by rule 18(c)(iii). It provided that it is ‘necessary to summon State Council Meetings as prescribed for’ purposes including: ‘To vote any sum of money for any purpose other than Management expenses exceeding $5,000.00. The amount to be voted must be stated on the notice summoning the meeting.’

76. Rule 20(a)(i) of the ETU NSW Rules provided that the Union shall be governed by the State Conference, State Council and State Council Executive.

77. The State Conference had the power to alter rules and to formulate policy. It was obliged to meet at least every two years.

98 Wilson MFI-2, 28/4/15, tab 1, p 15.
78. Rule 20(c)(i) of the ETU NSW Rules provided: ‘The government of the Union shall be vested in the State Council subject to powers reserved to State Conference.’\textsuperscript{101}

79. Rule 20(d)(i) of the ETU NSW Rules provided: ‘The State Council Executive shall conduct all business between State Council meetings and their decisions, with the exception of recommendations to State Conference, shall be subject to the endorsement of State Council.’\textsuperscript{102}

The requirements of the ETU NSW Rules regarding loans: three possibilities

80. Which rule or rules applied to the making of a loan? There appear to be three main possibilities.

(a) The loan was a ‘sum of money’ which was ‘to be voted’ within the meaning of rule 18(c)(iii) and rule 32(d) and required the approval of State Council (Counsel assisting’s view).

(b) A second view is that rule 32(d) applies only to ‘expenditure’, and that loans are not ‘expenditure’ (the second view). On this second view, the Executive may authorise the making of loans under rule 20(d)(i) as part of ‘conduct[ing] all business’ between meetings of the State Council. The authorisation would be subject to the endorsement of State Council. It

\textsuperscript{100} Wilson MFI-2, 28/4/15, tab 1, p 16, rule 20(b)(i).
\textsuperscript{101} Wilson MFI-2, 28/4/15, tab 1, p 17.
\textsuperscript{102} Wilson MFI-2, 28/4/15, tab 1, p 19.
would appear that, on this view, endorsement by State Council can be given retrospectively. This view was propounded by counsel for Bernard Riordan.

(c) A third view was that rule 20(d)(ii) gave the Executive power to approve the ETU Loan on 20 December 2010 (the third view). This view was advocated by senior counsel for the ETU NSW.

The requirements of the ETU NSW Rules regarding loans: the first view considered

81. Counsel for Bernard Riordan attacked counsel assisting’s view. In particular he criticised reliance on rule 18(c)(iii). He submitted that it did not impose any restriction on other rules, and is limited to specially summoned meetings. That submission gives no weight to the requirement that it is necessary to summon State Council meetings for the purpose of voting money. It gives no weight to the consistency (except as to amount) of rule 18(c)(iii) with rule 32(d). Counsel assisting’s construction was said to be ‘absurd, irrational, unreasonable and capricious because so many sums of money would need to be subject to a “specially summoned meeting” with the associated costs and time on each occasion being incurred by the Union due to the steps detailed in rule 18(a).’

82. To this there are three answers. The first is that whatever informalities are permitted in the procedures adopted by union organs and whatever amplitude applies to the construction of union rules, tight control over

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103 Submissions of Commissioner Riordan, 13/7/15, para 71.
expenditure, and solemnity in relation to its approval, is as vital in a union context as in any other. It is to be expected that the rules of a trade union would reflect those values. Counsel assisting’s view is compatible with them. The second answer is that each ‘specially summoned meeting’ could deal with many items of expenditure: the allegations of wasted time and costs are overblown. The third answer is that there is no requirement of a specially summoned meeting where management expenses are concerned.

83. Counsel for Bernard Riordan also complained that his client had not been put on notice before counsel assisting’s submissions had been received that reliance was to be placed on rule 18(c)(iii). He submitted that if there had been notice, ‘evidence could have been led that … Officer and Staff salary increases were dealt with by a specially summoned meeting. Placing or rolling over a term deposit was not.’

104 This puts things the wrong way around. The construction of the Rules depends ultimately on their language, read as a whole, bearing in mind that they are union rules, not Deeds drafted in technical fashion by lawyers. The meaning derived from that process must govern the practice of the union. The subsequent practice of the union cannot control the meaning of antecedently created rules, save in very special circumstances not made out here.

The requirements of the ETU NSW Rules: the second view

84. It is necessary now to turn to the second view of the Rules.

104 Submissions of Commissioner Riordan, 13/7/15, para 71.
The first question it raises is: did rule 32(d) have no application to advancing funds by way of loan? That is an unlikely construction of the rule. On the second view, rule 32(d) concerned expenditure in the sense of paying out or disbursing money. On that second view, the ETU Loan did not pay out or disburse money, because it was provided on condition of being returned: it was a loan, not expenditure. But the following factors are against the second view. First, the rule began ‘[n]o sum of money in excess of $1000.00 shall be voted for any purpose…’. That unambiguously referred to a proposal to deal with any sum in excess of $1,000 in any way. The final word of the rule was ‘expended’. That does not confine the scope of the opening words: it is merely a convenient way to refer back to them. Secondly, rule 18(c)(iii) imposed the same requirement as rule 32(d) (but with a cap of $5,000) and did not use the word ‘expended’ or ‘expenditure’. It would be nonsensical to read rule 32(d) as confined to a narrow form of ‘expenditure’ when rule 18(c)(iii) was not so confined. Thirdly, if the ‘expenditure’ were confined to some more narrow class of transaction than a ‘sum of money … to be voted’, it would be expected that the rules would have contained some further definition of what amounted to expenditure, and what did not. They did not. Fourthly, loans are a form of ‘expenditure’. The advance of the loan monies created an asset. The asset is the chose in action comprising a debt and the related bundle of rights obtained under the ETU Loan Agreement. In that sense, the advance of the monies purchased an asset. The making of a loan is not, in this sense, relevantly different from expending money in purchasing a parcel of shares or taking an assignment of a debt. Fifthly, the evident function of the rule is to

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105 Submissions of Commissioner Riordan, 13/7/15, paras 8-9.
ensure that the State Council is the organ of the ETU NSW with the final decision-making power in relation to significant financial transactions. It would be bizarre in the extreme if the rule applied to the purchase of, say, a $1,500 laptop but not to the making of a speculative $10,000,000 loan. Yet that is the result of the second view.

86. There is a second question that arises on the second view. If rule 32(d) did not apply, did rule 20(d)(i) apply? It is necessary, on this construction, for the making of a loan to amount to ‘conduct[ing] all business’ within the meaning of rule 20(d)(i). That is an unlikely construction. Lending money was not part of the business of the ETU NSW – in contrast to, say, the negotiation of bargaining agreements on behalf of employees.

87. Assuming, however, that the making of a loan would fall within ‘conduct[ing] all business’, a third question arises. Would rule 20(d)(i) have authorised the making of a loan prior to State Council endorsement? That, again, is an unlikely construction. Rule 20(d)(i) made the ‘decision’ of the Executive ‘subject to’ the endorsement of the State Council. The better construction is that the decision of the Executive was not a decision of the ETU NSW unless and until it was endorsed by State Council. On the assumption that loans could have been made under rule 20(d)(i), it would make no sense if the rule had authorised someone to commit to a loan agreement, or to advance funds under such an agreement, after a decision of the Executive but prior to that decision being endorsed by the State Council. If that were the position, the safeguard to be found in the requirement for State Council endorsement would be practically useless. If that were the position, the proposition that a decision of the Executive was ‘subject
to’ the endorsement of State Council would be devoid of meaningful content. How, on this approach, would matters proceed if the State Council declined to endorse a decision to make a loan that had already been advanced? The funds could not be clawed back. The loan agreement with the borrower could not be rescinded.

88. The requirement of State Council endorsement prior to the decision of the Executive being acted on was reinforced by rule 20(d)(ii). It provided:106

In the event of the State Council lapsing for want of a quorum, the State Council Executive shall have full power to finalise all business on the agenda and to give effect to any decision of the State Council Executive in connection therewith. (emphasis added)

89. It follows from the above rule and from rule 20(d)(i) that the Executive lacked ‘full power … to give effect to any decision’ it made unless either State Council endorsement was obtained or rule 20(d)(ii) applied. Rule 20(d)(ii) was not confined to ‘expenditure’. It applied to every decision of the Executive. Indeed, it is the sub-rule that immediately followed rule 20(d)(i), which, on the second view, authorised the ETU Loan.

90. An example of how rule 20(d)(ii) operated took place on 20 December 2010. The Executive decided to approve the $150,000 Donation. That decision, however, was not sufficient to enable it to be made. What was necessary was the endorsement of that decision by the State Council. That is why there was a specially summoned State Council meeting on the same day. The meeting lapsed for want of quorum. After its lapsing, the Executive, pursuant to rule 20(d)(ii), stood in the

shoes of the State Council and approved the $150,000 Donation. Once that had been done, it could be made.

91. There is oral evidence that significant inconvenience would arise if payments approved by the Executive had to wait in ‘abeyance’\textsuperscript{107} for State Council approval.\textsuperscript{108} The example was given of payments like wages and bills.\textsuperscript{109} However, the asserted inconvenience is illusory for a number of reasons. First, it was competent for the State Council to endorse a decision of the Executive to pay each week or each fortnight the wages of ETU NSW staff (or other recurring expenditure). Weekly endorsement was not required.\textsuperscript{110} What had to be endorsed is a ‘decision’, not each particular payment. Secondly, if the ‘decision’ concerned ‘management expenses’ within the meaning of rule 32(d), then no notice of motion was required. Thirdly, to the extent any difficulty arose, it was always possible to specially summon a State Council meeting. If no quorum was obtained, then, as stated above, rule 20(d)(ii) empowered the Executive to act. That is exactly what occurred in relation to the $150,000 Donation authorised on 20 December 2010.

92. Counsel for Bernard Riordan contended that rule 5 provided a context supporting the second view. He stressed the words ‘funds … expended’ and ‘expenses of Management’ in the first sentence and

\textsuperscript{107} Bernard Riordan, 4/5/15, T:550.18.
\textsuperscript{108} Bernard Riordan, 4/5/15, T:550.26-36.
\textsuperscript{110} For an express rule to this effect, see rule 75(7)(e) of the National Rules of the TWU: Vol 2, ch 2, para 58.
‘loan, grant or donation’ in the second.\textsuperscript{111} He submitted that the ETU Loan was different from ‘funds expended’. The argument smacks rather of the technical lawyers’ approach which, in other contexts, counsel for Bernard Riordan said was on the authorities inappropriate for trade union rules. The argument is that ‘funds … expended’ in the first sentence must be different from ‘loan’ in the second. If so, a ’grant’ or ‘donation’ would not be ‘funds … expended’ either. That is absurd. And, if the argument is correct, loans, grants and donations could also be made otherwise than ‘for lawful means and in connection with the carrying out of the Objects’. That, too, is absurd.

A further submission by counsel for Bernard Riordan appealed to two presumptions.\textsuperscript{112} One was a presumption in favour of honesty and against fraud. But there is no suggestion of dishonesty on the part of any ETU (NSW) official connected with the ETU Loan. The other was a presumption that everything is rightly and duly performed – that that is in order which appears to be in order. But does the ETU Loan appear to be in order – that is, does the presumption arise in a manner adverse to the contentions of counsel assisting? It does not appear to be in order if the much-approved minutes are said to be wrong. It does appear to be in order if they are accepted at face value. That is, the presumption here operates in favour of the stance adopted by counsel assisting, not against it. And even if the presumption does arise in a way favourable to the critics of counsel assisting, it may be rebutted. The state of the much-approved minutes is strong rebuttal evidence.

\textsuperscript{111} Submissions of Commissioner Riordan, 13/7/15, para 63.

\textsuperscript{112} Submissions of Commissioner Riordan, 13/7/15, para 76, citing Kingham v Sutton [2002] FCAFC 107 at [115]-[117].
Thus, the second view of the rules is inconsistent with their terms. A proposal to advance monies by way of loan was a proposal to which rule 32(d) applied. Even if it did not so apply, rule 20(d)(i) would not have authorised the entry into a loan agreement or the advancing of funds pursuant to such an agreement prior to State Council endorsement.

The requirements of the ETU NSW Rules regarding loans: the third view

It is necessary now to deal with the third view of the Rules, which was propounded by the ETU. Its contention was that where a Council meeting lapsed for want of a quorum, rule 20(d)(ii) provided that the Executive had ‘full power to finalise all business on the agenda and to give effect to any decision of the State Council Executive in connection therewith.’ (emphasis added) The ETU submission continued:

On 20 December 2010 the Executive effectively exercised the powers of the Council, including the power to approve loans. To the extent the Loan was approved by the Executive on that day, it was validly made.

This appeal to rule 20(d)(ii) is unsuccessful. Rule 20(d)(ii) applied only to the business of the State Council ‘on the agenda’. The making of the ETU Loan was not ‘on the agenda’. The State Council meeting had been specially summoned to deal with the $150,000 Donation – the proposal donation ‘of up to $150,000 towards candidates who support this Union in the upcoming State Election’, not to deal with

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113 Submissions for the ETU, 10/7/15, para 22.
any proposed loan to the ALP NSW.\textsuperscript{114} Hence the State Council meeting did not approve the ETU Loan.

96. While a misunderstanding of the Rules, leading to a breach, may be a venial lapse, as it was here, the question of what the Rules mean is important. But the ETU submission on the whole construction question is, with respect, feckless. It treats the meaning of the Rules as unimportant. It sees the Rules as going merely to questions of form. It negates the significance of complying with them. The ETU submitted:\textsuperscript{115}

\[\text{On any view, the Loan was known to Council members by no later than February 2012.}\textsuperscript{116} Council subsequently received reports on the topic and approved a number of variations to the repayment schedule\textsuperscript{117} with no opposition.\textsuperscript{118} Although there is evidence of some debate regarding the process for approval of the Loan,\textsuperscript{119} there is no evidence that any Council member objected to the Loan \textit{per se}. Most of those who were on the Executive and many of those on Council at the time the Loan was entered into gave evidence. To the extent they gave evidence about the merits of the Loan they were in favour of it. None of them suggested they opposed the Loan at the time (or would have opposed it). In other words, it is very likely that the Council, if properly consulted, would have approved the Loan.

97. Not one of these considerations causes the ETU Loan to conform with the Rules. In particular, the proposition that though the Rules were not complied with, there would have been consent to the ETU Loan if they

\textsuperscript{114} Sinclair MFI-2, 27/4/15, p 48, item 3.
\textsuperscript{115} Submissions for the ETU, 10/7/15, para 9.
\textsuperscript{116} Russell Wilson, witness statement, 27/4/15, para 5.
\textsuperscript{117} See, for example, Steve Butler, witness statement, 30/4/15, paras 32, 41.
\textsuperscript{118} Neville Betts, witness statement, 30/4/15, para 18.
\textsuperscript{119} Steve Butler, witness statement, 30/4/15, para 41.
had been, cannot justify or annihilate the breach of the Rules, if there was one.

98. For those reasons, counsel assisting’s view of the Rules is correct. The ETU Loan required the approval of State Council.

An example of how the Rules operated: the Chifley purchase

99. At about the same time as the ETU Loan, the ETU NSW made an investment in Chifley Financial Services (‘Chifley’). It illustrates how the rules operated in relation to investments, and how they were understood by all concerned to operate at the time. In late 2010 the ETU NSW agreed to purchase a 1/6 share in Chifley for $346,000. The minutes of meetings of the Executive and State Council in 2010 and 2011 record a relatively elaborate process of consideration by both bodies of that investment. In summary, those minutes record the following:

(a) On 24 May 2010 Bernard Riordan declared a conflict of interest as a director of Chifley. He recommended that Brad Storey, the acting CEO of Chifley, be invited to the next Executive meeting to discuss an opportunity for the ETU NSW to invest in Chifley.

120 Riordan MFI-7, 4/5/15, pp 3-23.
121 Riordan MFI-7, 4/5/15, p 3, item 7.
(b) On 31 May 2010 Brad Storey attended a meeting of the Executive and tabled a report about investing in Chifley.\textsuperscript{122}

(c) On 30 August 2010 Bernard Riordan reported to the Executive on his discussions with Unions NSW concerning the proposed investment.\textsuperscript{123}

(d) On 27 September 2010 Bernard Riordan reported to the Executive on correspondence with Unions NSW. He recommended that an independent valuation of the shares be obtained. The Executive authorised him to obtain that valuation.\textsuperscript{124}

(e) On 8 November 2010 Bernard Riordan reported to the Executive on the progress of the proposed purchase. He advised that he would report back next week.\textsuperscript{125}

(f) On 22 November 2010 Bernard Riordan reported to the Executive that he intended to table a proposal to purchase a 1/6 share in Chifley at the next executive meeting.\textsuperscript{126}

(g) Item 8 of the minutes of the Executive meeting of 29 November 2010 records that Brad Storey again attended the meeting and spoke to a proposal to purchase a 1/6 share in

\textsuperscript{122} Riordan MFI-7, 4/5/15, p 6A, item 8.
\textsuperscript{123} Riordan MFI-7, 4/5/15, p 7, item 9.
\textsuperscript{124} Riordan MFI-7, 4/5/15, p 8, item 6.
\textsuperscript{125} Riordan MFI-7, 4/5/15, p 11, item 9.
\textsuperscript{126} Riordan MFI-7, 4/5/15, p 13, item 9.
Chifley. Bernard Riordan declared a conflict and left the meeting. The Executive resolved to proceed with the purchase and to refer the proposal to the next State Council meeting for consideration.127

(h) The amended minutes of the State Council meeting of 13 December 2010 record that the State Council deleted item 8 of the minutes of the Executive of 29 November 2010 and, following discussion, resolved to endorse the purchase of a 1/6 share in Chifley.128 These minutes were amended to reflect an accurate account of what occurred in relation to the Chifley proposal following previous resolutions of the Executive and State Council noting inaccuracies in the original minutes.129

100. The purchase of a 1/6 share in Chifley was, according to Bernard Riordan, an ‘investment’.130 He described the decision he said the Executive made on the ETU Loan as ‘an investment decision’.131 Bernard Riordan nonetheless sought to distinguish the Chifley ‘investment’ from the ETU Loan in oral evidence. He did so, first, by saying that ‘The union didn’t buy a share of the ALP’.132 Next, he denied that the ETU Loan was an investment.133 Then, he agreed that

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127 Riordan MFI-7, 4/5/15, p 14, item 8.
131 Bernard Riordan, witness statement, 4/5/15, paras 55, 57-58.
132 Bernard Riordan, 4/5/15, T:577.3.
133 Bernard Riordan, 4/5/15, T:577.5-16.
he regarded the loan as a form of investment but added ‘but it’s a loan’. Then he sought to say that the Chifley investment was ‘a totally different scenario’, explaining:

One was a guaranteed return with a fixed interest rate by way of a loan agreement with the ALP and this was the actual purchase of a share in a financial services company … [I]f the union had purchased a share in the Labor Party, if that was at all possible, it would fall within that same gamut but that wasn’t the scenario here. This was purchasing a share in a company compared to a commercial loan; totally different, in my view.

101. The differences to which Bernard Riordan pointed in oral evidence do not explain why the ETU NSW Rules applied to the Chifley investment in a different way from the way they applied to the ETU Loan. There is no good explanation.

The significance of the Industrial Relations Act 1996 (NSW), s 243(1)

102. As the ETU admitted, the Rules in force at the time the ETU Loan was made did not comply with s 243(1) of the Industrial Relations Act 1996 (NSW). The problem had gone unnoticed by everyone, including the Industrial Registrar. Section 243(1) required union rules to incorporate detailed provisions regarding the making of loans. Section 243 had been in force since the commencement of the Act in 1996. Section 243(1) provided:

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135 Bernard Riordan, 4/5/15, T:578.19.
136 Bernard Riordan, 4/5/15, T:578.27-36.
137 Submissions for the ETU, 10/7/15, para 7.
138 Bernard Riordan, 5/5/15, T:639.35-641.4; Riordan, 5/5/15, MFI-11.
(1) The rules of a State organisation must provide that a loan, grant or donation of an amount exceeding $1,000 must not be made by the organisation unless the committee of management\textsuperscript{139} of the organisation:

(a) has satisfied itself:

(i) that the making of the loan, grant or donation would be in accordance with the other rules of the organisation, and

(ii) in the case of a loan—that, in the circumstances, the security proposed to be given for the repayment of the loan is adequate and the proposed arrangements for the repayment of the loan are satisfactory, and

(b) has approved the making of the loan, grant or donation.

103. Before Russell Wilson made his complaint about the ETU Loan to Steve Butler in 2012, Bernard Riordan had begun a process which led to the Rules being amended to comply with s 243.\textsuperscript{140}

104. Counsel for Bernard Riordan submitted that s 243 did not create direct obligations on ETU NSW officials.\textsuperscript{141} The present point, however, is simply that though s 243 did not apply directly to ETU officials, rules conforming with it would do no more than spell out what would, in any event, be required of an officer considering whether to make a loan in the exercise of his duty of due care and diligence.

105. Senior counsel for the ETU pointed out that on 15 June 2012, the ETU Rules were amended to provide that a loan may only be made on the

\textsuperscript{139} ‘committee of management’ is defined in the Dictionary to the Act to mean ‘the group or body of persons (however described) that manages the affairs of the organisation’. In the case of the ETU NSW, that was the State Council.

\textsuperscript{140} Bernard Riordan, 4/5/15, T:579.6-9; 5/5/15, T:639.23-38, 641.6-642.4.

\textsuperscript{141} Submissions of Commissioner Riordan, 13/7/15, para 93.
authority of the Council if it had satisfied itself of various matters.\textsuperscript{142} He submitted that any ‘ambiguity’ in the earlier Rules had been resolved. He also submitted that any failure to comply was only an ‘ad hoc’ failure. He further submitted that there was no reason to think there would be any future repetition of non-compliance with the Rules. And he said the circumstances in which the ETU Loan was made were of only ‘historical’ and ‘academic’ interest.\textsuperscript{143} But there was nothing ambiguous in the Rules. And the failure to comply with the standards set by the former Rules and by the legislature in s 243(1) was not merely ad hoc. That is revealed by the ETU’s defence of what happened as not causing loss, as being profitable, and as assisting the ALP NSW, which is supported by the ETU on the ground that it advances the industrial interests of ETU members. In similar vein, many of the Executive and Council members who gave evidence defended the ETU Loan as a ‘commercial decision’ or a ‘good investment’.\textsuperscript{144} But the desirability of making a profit or assisting the ALP NSW cannot justify inattention to the legal requirements to be satisfied before the profit could be made or the ALP NSW could be assisted.

**Did Bernard Riordan obtain Executive or Council approval for the ETU Loan?**

106. It was concluded above that the Rules required the ETU Loan to be approved by the State Council. Great energy has been put into

\textsuperscript{142} Submissions for the ETU, 10/7/15, para 5.
\textsuperscript{143} Submissions for the ETU, 10/7/15, paras 4-6, 11, 23.
\textsuperscript{144} See para 264.
answering the next question: did the Executive and/or the State Council approve the ETU Loan? Behind that question lies another: what is ‘approval’? There was evidence that it was usual for resolutions at meetings of both bodies not to be passed by a formal ballot. Instead, where a decision on a question was required, the question was put to the meeting and it was assumed that, if a person was silent, that person agreed to the motion.\textsuperscript{145} Below a reference to the ‘approval’ by either meeting of the ETU Loan is a reference to an approval in this informal sense. That was the sense intended by witnesses who spoke about matters being ‘approved’ or ‘resolved’ or ‘voted on’ at meetings.

107. Notwithstanding this degree of informality, those present at meetings were still able to draw a key distinction. One limb of the distinction was merely discussing the ETU Loan (or raising it for ‘information’ only purposes). The other limb of the distinction was a decision by the meeting to approve it. It was not the case that every matter discussed at a meeting was a matter decided by the meeting if persons were silent during and after the discussion. Indeed no witness suggested this. Matters were reported to meetings regularly, for ‘information only’ purposes, without any decision being made on them. For the meeting to resolve to approve a matter, it was necessary for it to have been raised as a matter for decision, and the meeting brought to a perceived majority view in some way.

108. Decisions made on this informal basis were recorded in the minutes (and referred to by witnesses and the minutes themselves) as

\textsuperscript{145}Allan Reid, 29/4/15, T:291.8-13; Bernard Riordan, 4/5/15, T:585.29-586.42.
resolutions. Minutes record the highlights of the important issues of a meeting. If a decision was made at a meeting it would be recorded in the minutes. The question is whether there was a decision of this nature made about the ETU Loan by the Executive and/or State Council.

**Paul Sinclair’s notes of the meetings and the generation of typed minutes**

109. The appointed minute-taker at all of these meetings was the Assistant Secretary, Paul Sinclair. His practice in this capacity was to record the minutes as the meeting proceeded. He prepared the minutes of the 20 December 2010 meeting during it, contemporaneously with the events as they took place at the meeting. He provided them after the meeting to an administrative assistant, Debra Hodgson, for typing. The minutes of the Executive and Council meetings were typed up by her on the basis of Paul Sinclair’s notes. He then checked the typed up version. Upon checking the typed up minutes of the 20 December 2010 Executive meeting, Paul Sinclair regarded them as accurately summarising the central events of the meeting. He went through the same process in relation to the minutes of the State Council meeting of 21 February 2011.

146 Colin Harris, 29/4/15, T:371.19-372.10; Phillip Oswald, 30/4/15, T:474.18-25, 475.11-16.
151 Paul Sinclair, 27/4/15, T:34.11-17.
There is no reference in Paul Sinclair’s handwritten notes of the
meeting of the Executive of 20 December 2010 or of the State Council
meeting of 21 February 2011 to any discussion or decision concerning
the ETU Loan. A decision concerning an application for an urgent
loan of $500,000 is a matter that one would ordinarily expect to be
recorded by a minute-taker. The amount of money involved and the
urgency with which it was required were very significant matters for
the ETU NSW.

Paul Sinclair had no recollection of the ETU Loan being raised at the
20 December 2010 Executive meeting. He said that he would
remember the discussion if it occurred because it was a significant sum
of money.\footnote{Paul Sinclair, witness statement, 27/4/15, para 34.}
He said that if there had been any discussion of the loan
he would have recorded something about it in his handwritten notes.\footnote{Paul Sinclair, witness statement, 27/4/15, para 38.}
His evidence in relation to the 21 February 2011 State Council meeting
was to similar effect.\footnote{Paul Sinclair, 27/4/15, T:34.11-29.}
Thus in substance he denied that the ETU Loan was raised at the meetings.

The minutes and their approval

The practice was for the minutes typed up by Debra Hodgson and
checked by Paul Sinclair to be provided to members prior to the next
meeting.\footnote{Bernard Riordan, 4/5/15, T:584.26-39.}
At the latter meeting the members went through the
minutes and raised any objections or deletions before confirming them

\footnotesize
\begin{itemize}
\item[\footnote{152}] Paul Sinclair, witness statement, 27/4/15, para 34.
\item[\footnote{153}] Paul Sinclair, witness statement, 27/4/15, para 38.
\item[\footnote{154}] Paul Sinclair, 27/4/15, T:34.11-29.
\item[\footnote{155}] Bernard Riordan, 4/5/15, T:584.26-39.
\end{itemize}
as correct. After that approval was given, about a month later, James Macfadyen signed the minutes.

113. The minutes of the 20 December 2010 Executive meeting were approved at the Executive meeting of 10 January 2011. That was at a time when the events of 20 December 2010 would have been fresh in the memories of those present, even allowing for the Christmas break. Further, the minutes of the 20 December 2010 Executive meeting were endorsed at the 21 February 2011 State Council. The minutes of the 21 February 2011 State Council meeting were endorsed at the 14 March 2011 State Council meeting.

114. As a consequence, quite a number of those present at the 20 December 2010 meeting confirmed or endorsed relevant sets of minutes.

(a) James Macfadyen, Michael Brien, Allan Reid, Bill Maxwell, Colin Harris, Mary Stylli, Glen Potter and Phillip Oswald all confirmed the 20 December 2010 minutes on 10 January 2011 and endorsed those minutes on 21 February 2011.

(b) Bernard Riordan, Neville Betts, Trevor Russell, Paul Sinclair and Peter Henne endorsed the 20 December 2010 minutes at the State Council meeting of 21 February 2011.

158 Bernard Riordan, witness statement, 4/5/15, BR-6, item 3.
159 Bernard Riordan, witness statement, 4/5/15, BR-7, item 5.
160 Bernard Riordan, witness statement, 4/5/15, BR-8, item 3; Sinclair, 27/4/15, MFI-2, p 222.
Bernard Riordan, James Macfadyen, Michael Brien, Allan Reid, Neville Betts, Colin Harris, Bill Maxwell, Phillip Oswald, Mary Stylli, Peter Henne, Glen Potter and Trevor Russell all endorsed the 21 February 2011 State Council Minutes at the State Council meeting of 14 March 2011.

Thus, every person present at the 20 December 2010 meeting approved the 20 December 2010 minutes at least once. Eight persons present at that meeting approved them twice. If, as was contended by some persons who gave evidence, the ETU Loan was approved at both the Executive meeting of 20 December 2010 and State Council meeting of 21 February 2011, then seven persons on three separate occasions within the space of just over two months approved minutes that did not refer to the ETU Loan.

Significant weight must be attached to the confirmation and endorsement of the 20 December 2010 minutes. As the plurality in Australian Securities and Investments Commission v Hellicar said:

[The] minutes were more than just one of several pieces of evidence from whose united force ASIC sought to have the tribunal of fact draw an inference. The minutes were a formal and near contemporaneous record (adopted by the board as an accurate record) of the proceedings at the meeting.

Their Honours were speaking of the minutes of a meeting of company board directors. But similar significance must attach to the minutes of important organs of a trade union.

161 (2012) 247 CLR 345 at [138].
117. Counsel for Bernard Riordan submitted that there was a difference between the circumstances in *Hellicar’s* case and the present circumstances. That case concerned a positive statement in the minutes that a draft ASX announcement had been tabled and approved. The present circumstances did not involve any positive statement, but only an omission.\textsuperscript{162} However, inferences can be drawn from what is not stated in minutes as much as from what is. Negative evidence can be as convincing as positive. If the course of ordinary practice is to record events of a certain class, absence of a record can be evidence that an event of that class did not happen. The attempt to distinguish *Hellicar’s* case is rejected. It is not true to say, as the submission of counsel for Bernard Riordan did, that counsel assisting’s arguments ‘selectively and incompletely cite an authority, which does not stand for the contended [sic] proposition.’\textsuperscript{163}

118. The minutes of Executive Meetings of the ETU NSW had an additional significance. The process at subsequent Executive Meetings of confirming the minutes was not simply a matter of the members of the Executive checking, for their own benefit, to see that those minutes accurately recorded what happened at the previous meeting. The minutes of the Executive constituted a record of decisions that were to be presented to State Council for endorsement, including endorsement by numerous persons not present at the Executive meeting. Confirmation by the Executive of the accuracy of the previous meeting’s minutes was a centrally important aspect of its role. This background makes it highly unlikely, if there was more than a passing

\textsuperscript{162} Submissions of Commissioner Riordan, 13/7/15, paras 99-103.

\textsuperscript{163} Submissions of Commissioner Riordan, 13/7/15, para 100.
reference to the ETU Loan at the 20 December 2010 meeting, that the minutes of that meeting could have been confirmed at the 11 January 2011 meeting without someone noticing that they made no reference to the ETU Loan.

119. Similarly, the endorsement of Executive minutes at State Council level was an important process. The State Council was the ultimate decision making body of the Union. Other than motions on notice (which seem to have been unusual) the Council made decisions by endorsing previous decisions of the Executive. Those decisions were recorded in the minutes of Executive. Save where items were ‘deleted’ for specific discussion, the State Council endorsed those decisions by endorsing the minutes of meetings of the Executive. Where items were ‘deleted’ they were discussed specifically by the Council, and usually re-endorsed.\(^{164}\) The process of endorsement was not to be satisfied by merely skimming the minutes of the Executive meeting in question. It must have involved a reasonably careful perusal of them for the purpose of deciding whether to accept, reject or question those decisions. It is hard to conceive that, at the 21 February 2011 State Council meeting, all of those present at the 20 December 2010 executive meeting could have engaged in such a process and failed to notice that the Minutes were inaccurate in that they did not record any reference to the ETU Loan. By far the more likely explanation is that either the ETU Loan was not mentioned at the 20 December 2010 meeting, or it was mentioned merely for information, or otherwise in such an informal or fleeting or peripheral way that it did not appear to require minuting by Paul Sinclair or endorsement by State Council.

Counsel for Bernard Riordan submitted, citing authority, that ‘[i]t is not necessary … that any resolution by the board should have been expressed by a minute, although it ought to be so.’ He also correctly pointed to evidence that the minutes were never a transcript of what everyone said. But there is a fundamental difference between a transcript of what everyone said and a record of key decisions. The latter was the practice in the minutes recording meetings of the ETU NSW’s organs, even though it may not have been ‘necessary’.

No approval by State Council on 21 February 2011

Despite the evidence to the contrary discussed below, it seems very improbable that the ETU Loan was approved by the State Council on 21 February 2011. Bernard Riordan’s basic position was that, because he regarded himself as authorised by the Executive to enter into the ETU Loan, and because he expected that to be recorded in the minutes of the Executive of 20 December 2010, there was nothing further for him to do at State Council level. Thus, on his version of events, there was no need for him to mention the ETU Loan at all at the State Council meeting. He could not confirm or deny whether he mentioned the ETU Loan at the meeting. That is, he did not say that he did mention it. In general he conveyed the impression of being a very sincere witness. It is therefore probable that he did not mention it.

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165 H L Bolton Engineering Co Ltd v T J Graham and Sons Ltd [1957] 1 QB 159 at 171 per Denning LJ, quoting the trial judge.
166 Submissions of Commissioner Riordan, 13/7/15, paras 94-96.
167 Bernard Riordan, 4/5/15, T:549.2-16, 551.27-46.
168 Bernard Riordan, 4/5/15, T:512.40-47.
122. Nonetheless, a number of witnesses said that the ETU Loan was approved by the State Council on 21 February 2011, either by a vote or by a report followed by a discussion and/or lack of opposition. The process by which decisions of the Executive were endorsed, described above, points to a significant anomaly in their evidence. If the ETU Loan was approved, how did it actually come before the meeting? It was not in the Executive minutes. It was not the subject of any separate notice of motion. Some witnesses claimed that Bernard Riordan raised the ETU Loan. But how and why would that have come about? Bernard Riordan did not think he had any reason to raise it, and cannot recall doing so. The most obvious way in which a matter like the ETU Loan would have been raised would have been by way of ‘deletion’ of a matter in the Executive minutes of 20 December 2010. But that, of course, could not have occurred. For there was no relevant matter in the minutes to be deleted. If it had been attempted, it would have brought to light that absence of any reference to the ETU Loan in the minutes. If Bernard Riordan did not refer to the ETU Loan by way of ‘deletion’, but nonetheless mentioned it, it is highly likely that either at least one person at the meeting would have wondered why it was not being raised by way of deletion, or would have thought to look at the minutes of the Executive meeting of 20 December 2010 to see what it

169 James Macfadyen, witness statement, 28/4/15, para 10; Colin Harris, witness statement, 29/4/15, CTH-1; Geoffrey Prime, witness statement, 29/4/15, para 7; Mary Stylli, witness statement, 29/4/15, para 8; Michael McManus, witness statement, 29/4/15, para 12; Neville Betts, witness statement, 30/4/15, para 15-17; Stephen Magann, witness statement, 30/4/15, para 8; Trevor Russell, witness statement, 30/4/15, para 7; Wesley Oakes, witness statement, 30/4/15, para 6. Some witnesses could not say whether the discussion was at an officers’ meeting or at a meeting of the State Council on this day: Michael Doust, witness statement, 30/4/15 para 6, Daniel Weizman, witness statement, 30/4/15, para 8. Michael Koppie recalled the loan being mentioned at an officers’ meeting: Michael Koppie, witness statement, 30/4/15, paras 9-10.

170 See para 119.
had decided. It is highly unlikely that this occurred either – for (on the version of events being considered) if it had occurred someone would have picked up the absence of any reference in the minutes of 20 December 2010 to the ETU Loan. So how and why, on the accounts of these witnesses, was the matter raised at all? There is no convincing answer.

123. Of course, many of those who attended the 21 February 2011 meeting have no recollection of the ETU Loan being mentioned.\textsuperscript{171} In most cases (Brad Currey and possibly Barry Humphries are exceptions)\textsuperscript{172} the lack of recollection does not conclusively establish that the Loan was not mentioned. It is, however, consistent with that. One might expect them (and, indeed, Bernard Riordan) to have recalled the ETU Loan if it had been mentioned in any significant way.

**Possible explanations for the absence of any reference to the ETU Loan in the minutes**

124. The preparation of the minutes, their subsequent confirmation and their subsequent endorsement all strongly suggest that there was no discussion of any significance, let alone any decision, about the ETU Loan at the 20 December 2010 Executive meeting or the 21 February 2011 State Council meeting. That is the most obvious explanation for

\textsuperscript{171} Statements from most of these persons were tendered, but they did not give oral evidence: see Kevin Brett, witness statement, 30/4/15, para 6; Benjamin Lister, witness statement, 30/4/15, para 7.

\textsuperscript{172} Bradley Currey, witness statement, 28/4/15, para 14; Bradley Currey, 28/4/15, T:238.17-20; Barry Humphries, witness statement, 30/4/15, paras 9-10.
the omission of any reference to the ETU Loan in the minutes of those meetings.

125. The ETU drew a distinction between the endorsement of minutes containing a particular entry and the endorsement of minutes failing to record something altogether. The ETU submitted that endorsement of the former type of minutes made it hard to contend that they were mistaken. But it submitted that the latter type of minutes did not make it hard to contend that they were mistaken unless those present had a practice of making notes and cross-checking.\(^{173}\) This distinction is too rigid. Much would depend on what the supposedly mistaken entry was, and on what the supposedly mistaken omission was. The argument becomes quite weak where, as here, the omission relates to a very important matter.

126. Some witnesses, however, contend that there was a significant discussion about the ETU Loan at one or both of these meetings and/or a decision to approve it. Their evidence is considered in more detail below.\(^{174}\) But first, on the assumption that there was a substantial discussion or decision about the ETU Loan at the meeting, it is useful to consider two questions. What other explanations for the omission of any reference to it in Paul Sinclair’s notes or the minutes might there be? If that was an error, what was its source?

127. One possibility is error or inadvertence on the part of Paul Sinclair. That is a possibility he rejected.\(^{175}\) The likelihood of it, indeed, is

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\(^{173}\) Submissions for the ETU, 10/7/15, para 17.

\(^{174}\) See paras 175-220.

remote. _First_, because of the amount of money involved, the ETU Loan was a very important transaction. It is therefore to be expected that Paul Sinclair’s attention as minute-taker would have been engaged by any significant discussion of or decision about it. His attention was sufficiently engaged to record approval of the proposal to donate a smaller sum of money (the $150,000 Donation), notwithstanding that it had not been on the original agenda. _Secondly_, Paul Sinclair gave the impression of being a cautious and careful man, attentive to procedural regularity. _Thirdly_, if one accepts the evidence of some of those present at these meetings (for example, James Macfadyen) there was a discussion and decision about the ETU Loan not only at the meeting of the Executive of 20 December 2010 but also at the State Council meeting of 21 February 2011. It is improbable in the extreme that Paul Sinclair would have made the same mistake twice. _Fourthly_, the numerous people who approved the minutes of 20 December 2010 on multiple occasions did so while the events of that meeting would have been fairly fresh in their minds. The minutes of the 21 February 2011 meeting were approved at the next State Council meeting and signed by James Macfadyen. It borders on the inconceivable that everyone, without exception, failed to notice (in a number of cases, on three occasions) that the minutes omitted to make any mention of what would have been the most significant matter discussed at either meeting.

128. The possibility of error or inadvertence on Paul Sinclair’s part was nonetheless relied on in a submission that Paul Sinclair had earlier made mistakes in taking the minutes. In effect, it was said that the minutes should be treated as wrong, not correct, because Paul Sinclair
had made a mistake of a kind habitual to him. This submission is dealt with below.  

129. Another suggested possibility is that Paul Sinclair omitted any reference to the ETU Loan in the minutes because he was following the Agenda, on which the ETU Loan proposal did not appear because it was a late item of business. This suggestion is superficially plausible. But on examination it finds no evidentiary support. First, the Agenda for the 20 December 2010 Executive meeting contains six items whilst Paul Sinclair’s handwritten notes contain 11. None of the items numbered 2, 7, 8, 9, 10 or 11 in Paul Sinclair’s handwritten notes corresponds with any item on the Agenda. Secondly, Paul Sinclair was asked at the hearing whether, generally, he tended to start writing parts of the minutes from the Agenda and then completed them as Agenda items were actually dealt with. He said that he did that from time to time, but only when he was doing the minutes for both the ‘State and Federal’ meetings (that is, presumably, the ETU NSW and the CEPU NSW). There is no suggestion that that was the case in relation to the 20 December 2010 meeting. 

130. A further suggested possibility is that a decision about the ETU Loan was not minuted because it was not made by a formal ballot. As discussed above, the evidence was that almost no decisions at meetings of either the Executive or Council were made in a formal way. Generally decisions at meetings were made by way of consent and 

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176 See paras 136-162.  
177 Bernard Riordan, witness statement, 4/5/15, para 80.  
But that informality did not prevent those decisions from being recorded in the minutes. If there was a decision about the Loan at the meeting in this way which was informal (but, for the ETU NSW, usual), then one would have expected that decision, like any other, to have been recorded in the minutes.

Attacks on Paul Sinclair: general

131. Counsel for Bernard Riordan made some extremely lengthy and critical submissions about Paul Sinclair. The submissions were put in answer to those of counsel assisting and of Paul Sinclair himself. Because of their wide ranging character there is no particularly convenient place in which to deal with them, but it is necessary to do so. These lengthy submissions were directed not only to the ‘reliability’ of Paul Sinclair’s evidence and minute taking but its ‘credibility’. This stood in sharp contrast to the stern and indignant rebukes by counsel for Bernard Riordan to counsel assisting for their supposed attacks on the credibility of other witnesses. The reasons for not being unduly critical of the witnesses whom counsel for Bernard Riordan favours are equally applicable to the main witness he does not favour, namely Paul Sinclair.

132. Most of these attacks advanced by counsel for Bernard Riordan lack any significance. That is because the primary value of Paul Sinclair’s evidence concerns his account of the methods by which he drew up the

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180 Bernard Riordan, 4/5/15, T:542.5-11; Bernard Riordan, witness statement, 4/5/15, para 49.
181 See, for example, Submissions of Commissioner Riordan, 10/8/15, para 3.
182 Submissions of Commissioner Riordan, 13/7/15, paras 50, 54-55.
183 See para 175.
minutes. From those methods can be inferred the likelihood that the minutes, particularly of the 20 December 2010 Executive meeting, are correct and nothing took place which amounted either to a resolution about the ETU Loan or a decision about it sufficiently formal to merit minuting. His actual recollection of the events at particular meetings is no more significant than anyone else’s.

133. What, then, were the attacks?

**Attacks on Paul Sinclair: the ‘10 January 2011’ conversation**

134. One related to a conversation between Paul Sinclair and Bernard Riordan. Paul Sinclair remembered Bernard Riordan saying that the ETU Loan did not require endorsement by the Executive because it was an investment, to be treated in the same way as term deposits. Bernard Riordan did not deny that this was said. It obviously accords with his personal view of the matter. The only point of difference is that Bernard Riordan placed the conversation in February or March 2012, while Paul Sinclair placed it in January 2011. Counsel for Bernard Riordan submitted that ‘on Counsel Assisting’s case theory’ the conversation must have taken place at the ETU NSW Sydney office on 10 January 2011, at a time when Bernard Riordan was on leave. Counsel for Bernard Riordan then relied on phone record evidence to demonstrate that Bernard Riordan was not in the city that day, but in various places in or near the Sutherland shire. Yet all this goes to a false issue. It does not matter on what day in January 2011, or in what month in 2011 or 2012, the conversation took place. Of course Paul Sinclair could be mistaken about the day or the month. Or he could

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184 Submissions of Commissioner Riordan, 13/7/15, para 31.
have been right about the month, and Bernard Riordan could have come into the office on some other day during his period of leave, as he did on various occasions, like other officials. The phone records show that he was in the city on 6 January 2011. Bernard Riordan attended an Executive meeting on 31 January 2011. Further, Paul Sinclair said that at the time of the conversation he saw Bernard Riordan pull out the ETU Loan Agreement. It is more likely that this happened in January 2011 than February or March 2012. The point, however, is that the issue is quite unimportant for two reasons. First, acceptance of Paul Sinclair does not damage Bernard Riordan’s position; rejection of Paul Sinclair does not help Bernard Riordan’s position. Secondly, the state of the minutes and their repeated approval is far more important than the much later recollections of particular conversations and meetings. Counsel for Bernard Riordan descended to extreme detail in answering Paul Sinclair’s submissions on this conversation. The submissions have been read thoroughly, but there comes a point where the marginal utility of further consideration approaches zero, on an issue which has no centrality. It is not proposed to deal with them further.

**Attacks on Paul Sinclair: the 10 October 2011 State Council minutes**

135. Another criticism made by counsel for Bernard Riordan of Paul Sinclair is that he did not deal in his statement with the 10 October 2011 State Council minutes and financial statements. Counsel for

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186 Riordan MFI-2, 4/5/15.
187 Submissions of Commissioner Riordan, 10/8/15, para 5, answering Submissions of Paul Sinclair, 28/7/15, paras 3-5.
Bernard Riordan had it both ways. He alleged that the omission was caused by the ‘inadequacy of the Commission’s investigation and the failure of the police and the Commission to ask Paul Sinclair about this’. But he also attacked Paul Sinclair for not dealing with the matter.\textsuperscript{188} If the investigation was inadequate, why did that affect Paul Sinclair’s credibility and reliability? The mystery is intensified by counsel for Bernard Riordan’s later submission that Paul Sinclair’s evidence in cross-examination about that meeting should be accepted.\textsuperscript{189}

**Attacks on Paul Sinclair: Paul Sinclair’s ‘axe to grind’**

136. A further attack launched by counsel for Bernard Riordan on Paul Sinclair is that he had a ‘motive not to give reliable evidence’ and ‘an axe to grind’ against Bernard Riordan.\textsuperscript{190} But where does the attack go? Counsel for Bernard Riordan never cross-examined Paul Sinclair to suggest that he acted on his supposed motive and actually fabricated evidence. What part of Paul Sinclair’s evidence is said to be incredible or unreliable by reason of the motive? In fact there is quite a lot of material to suggest that Paul Sinclair did not have an axe to grind. He never questioned the validity of the ETU Loan. Unlike Russell Wilson and a State councillor, he never complained about it.\textsuperscript{191} He was unwilling to speak to a publication called ‘Workforce’ about the matter.

\textsuperscript{188} Submissions of Commissioner Riordan, 13/7/15, para 38.

\textsuperscript{189} Submissions of Commissioner Riordan, 13/7/15, para 117(b).

\textsuperscript{190} Submissions of Commissioner Riordan, 13/7/15, paras 43-46; Submissions of Commissioner Riordan, 10/8/15, paras 7-8. One aspect of this attack was dealt with above: see para 132.

\textsuperscript{191} Paul Sinclair, 27/4/15, T:91.28-47.
or to attack Bernard Riordan. It was he who first raised the existence of the ‘tension’ between himself and Bernard Riordan on which the ‘axe to grind’ allegation was based.193

137. A particular aspect of the ‘axe to grind’ thesis is that it led Paul Sinclair deliberately to omit any reference to the ETU Loan in his handwritten notes. That must be rejected. As will be seen, Paul Sinclair was cross-examined to the effect that he bore Bernard Riordan ill-will. It was suggested that the ill-will arose in 2012, as a result of Bernard Riordan not supporting Paul Sinclair as a candidate for the position of Secretary. Paul Sinclair denied this. He said there was tension in the relationship, not ill-will.194 Even were it the case that Paul Sinclair bore Bernard Riordan ill-will for this reason, that could not explain the absence of any reference to the ETU Loan in Paul Sinclair’s handwritten notes, if there had in fact been a discussion or decision about that ETU Loan at either the 20 December 2010 Executive meeting or the 21 February 2011 Council meeting. Paul Sinclair said his relationship with Bernard Riordan in 2010 was very good and remained that way until 2012.195 Bernard Riordan supported him in this.196 There does not seem to be any evidence to the contrary.

196 Bernard Riordan, 4/5/15, T:558.32-34.
The next group of criticisms merit close attention, partly because of their detail, partly because it is assumed that this detail would not have been employed unless the issue were thought very significant, and partly because, unlike most of the others, some of them do go to a central issue: the reliability of Paul Sinclair as a minute-taker. Several criticisms were propounded in this regard.\textsuperscript{197}

One criticism was put thus:\textsuperscript{198}

There are clear factual inconsistencies contained in Mr Sinclair’s handwritten minutes for the State Council Executive meeting on 13 December 2010, which notes [sic] absences and apologies as being ‘nil’, notwithstanding the fact that Mr Buttigieg was not present at that meeting.\textsuperscript{199} This error was subsequently identified and rectified in the typed up minutes for that meeting.

Counsel assisting responded convincingly by submitting that the handwritten notes were accurate. Paul Sinclair’s evidence was that Mark Buttigieg ‘wasn’t an apology for that night, he would have had leave of absence, and it would be for probably six months or something like that’.\textsuperscript{200} Paul Sinclair also said that Mark Buttigieg’s leave of absence ‘may have been the reason why the PA has added him in.’\textsuperscript{201} Hence Paul Sinclair’s evidence was that the handwritten notes were correct: Mark Buttigieg had not given an apology, but had received

\textsuperscript{197} Submissions of Commissioner Riordan, 13/7/15, para 47.

\textsuperscript{198} Submissions of Commissioner Riordan, 13/7/15, para 47(1).

\textsuperscript{199} Paul Sinclair, 27/4/15, T:41.4-12.

\textsuperscript{200} Paul Sinclair, 27/4/15, T:41.20-22.

\textsuperscript{201} Paul Sinclair, 27/4/15, T:41.18-19.
leave of absence. This evidence was not contradicted. And counsel for Bernard Riordan did not cross-examine Paul Sinclair about it. It does not seem right to criticise him for it now.

141. Similarly, the ETU suggested that the minutes routinely failed to record attendance at meetings accurately. One cause of this seems to have lain not with Paul Sinclair but with those persons attending who failed to sign the running sheets properly. In any event, an error as to attendance is in a rather different category from an error about a large loan.

**Attacks on Paul Sinclair: the 13 December 2010 State Council meeting and Chifley**

142. Another criticism was as follows:

Mr Sinclair has admitted to omitting in his minutes of the State Council meeting on 13 December 2010, any mention of the Chifley purchase, which was discussed and approved during the meeting. These minutes were subsequently amended in May 2011 by way of a note to correct the omission and record the discussion and approval of the Chifley purchase.

143. It is true that the amended minutes of the State Council Meeting of 13 December 2010 indicate that an error in the original minutes had been discovered, and a process had been undertaken to correct them. The error appears to be that item 8 of the Executive minutes of

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203 Submissions of Commissioner Riordan, 13/7/15, para 47(b).
204 Sinclair MFI-2, 27/5/15, p 43.
29 November 2010 was not merely endorsed but was ‘deleted’ and discussed by the State Council.\textsuperscript{206} The only substantive difference between the item deleted and the amended item in the State Council minutes appears to be the inclusion of a price for the purchase.\textsuperscript{207} The error is therefore minor. But, in addition, the incident illustrates that errors, even minor ones, when detected, are corrected. That did not occur in relation to the ETU Loan. The incident supports the view that the ETU Loan was not discussed on 20 December 2010: for if it had been, why was its omission from the minutes not picked up?

\textsuperscript{144.} A point similar to this second criticism was made in relation to the minutes of the Executive meeting of 27 February 2012. Paul Sinclair gave evidence in his statement that at that meeting his request to change legal representatives in relation to the proceedings that had been brought was endorsed.\textsuperscript{208} It was suggested to him that the minutes of this meeting do not record any such endorsement and therefore that they were inaccurate.\textsuperscript{209} It is correct that the minutes of 27 February 2012 do not record any such endorsement.\textsuperscript{210} However, the minutes of 12 March 2012 do record such an endorsement.\textsuperscript{211} Paul Sinclair agreed that it was at this meeting that the endorsement

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{206} Sinclair MFI-2, 27/4/15, p 37.
\item \textsuperscript{207} Sinclair MFI-2, 27/4/15, p 31.
\item \textsuperscript{208} Paul Sinclair, witness statement, 27/4/15, para 99.
\item \textsuperscript{209} Paul Sinclair, 27/4/15, T:57.45-59.4.
\item \textsuperscript{210} Sinclair MFI-4, 27/4/15.
\item \textsuperscript{211} Sinclair MFI-5, 27/4/15, item 12.
\end{itemize}
\end{footnotesize}
occurred.\textsuperscript{212} Thus, the error is in Paul Sinclair’s statement, and not the minutes. It is also a rather understandable error.

**Attacks on Paul Sinclair: inability to recall 23 July 2012 meeting**

145. The next criticism was as follows:\textsuperscript{213}

> Mr Sinclair admitted to being unable to recall events at a meeting on 23 July 2012 with any precision, on the basis that he was taking the minutes.\textsuperscript{214} Such an admission suggests that Mr Sinclair lacked the attention to detail necessary to properly recall and record all matters discussed during a meeting.

146. This is a non sequitur. A minute-taker who concentrates on taking minutes – on separating out what should and should not be recorded, and recording what should be recorded – may well compose very accurate contemporaneous minutes without being able to summon up a recollection of what was said three years later. In any event, Paul Sinclair’s recollections of the meetings were in substance similar to those of other witnesses.

**Attacks on Paul Sinclair: contradictions in recall of 20 December 2010 meeting**

147. The next criticism was as follows:\textsuperscript{215}

> [A] Mr Sinclair’s recall of the [ETU Loan] being raised at the meeting on 20 December 2010 is inconsistent, in that his evidence alternates between

\begin{itemize}
\item \textsuperscript{212} Paul Sinclair, 27/4/15, T:101.38-102.7.
\item \textsuperscript{213} Submissions of Commissioner Riordan, 13/7/15, para 47(c).
\item \textsuperscript{214} Paul Sinclair, 27/4/15, T:36.14-26.
\item \textsuperscript{215} Submissions of Commissioner Riordan, 13/7/15, para 47(d).
\end{itemize}
asserting that no mention was made of the loan,\textsuperscript{216} and that he had no recollection of the loan being discussed at the meeting.\textsuperscript{217}

[B] Further, where Mr Sinclair gives evidence that no mention was made of the [ETU Loan] in [sic], his evidence alternates between an unequivocal denial\textsuperscript{218} and being open to his minutes being corrected by Mr Riordan.\textsuperscript{219}

148. Whatever else it does, this submission demonstrates no flaw in Paul Sinclair’s minute-taking.

149. The part of the passage marked ‘A’ instead seeks to demonstrate an inconsistency in Paul Sinclair’s recollection. On the one hand, he said there was no discussion of the ETU Loan at the meeting. On the other hand, it is claimed he said he could not remember whether or not there was any discussion. The fact is that he repeatedly denied that there was any specific mention of the ETU Loan.\textsuperscript{220} The passage relied on to establish a contradiction followed Paul Sinclair’s evidence that there was a resolution about the $150,000 Donation. The passage is:\textsuperscript{221}

\begin{quote}
Q. There was a discussion at the 20 December 2010 meeting, led by Mr Riordan, on the subject of the upcoming State Election, in the broader sense?

A. In regards to the resolution of the $150,000, yes.

Q. Mr Riordan at that meeting spoke about what the union could do to support the ALP, did he not?

A. Not to my recollection, but yes.
\end{quote}


\textsuperscript{217} Paul Sinclair, 27/4/15, T:29.36.

\textsuperscript{218} Paul Sinclair, 27/4/15, T:56.23-30.


\textsuperscript{221} Paul Sinclair, 27/4/15, T:63.29-36.
150. That does not mean: ‘I cannot remember one way or the other whether Mr Riordan spoke about the ETU Loan.’

151. It is also necessary to consider the following passage:222

Q. Did you have any reason to keep the fact of the loan out of the minutes?
A. I have no recollection of a loan being discussed at that meeting on that evening.

That comes just after the following passage:223

Q. Could you have just forgotten or just missed the fact that there was a discussion about a loan?
A. No.
Q. That you’ve just made a mistake?
A. No.

That context demonstrates that Paul Sinclair’s statement: ‘I have no recollection of a loan being discussed’ was a polite way of saying: ‘There was no loan discussed’.

152. The part of the passage marked ‘B’ rests on a submission that Paul Sinclair gave evidence that he was open to his minutes being corrected by Bernard Riordan. That submission is rejected. All Paul Sinclair

said was that if there was an error, it was open to Bernard Riordan to get the minutes corrected. His actual words were.\textsuperscript{224}

If there was an error in the minutes from 20 December 2010, there was an opportunity then for Mr Riordan to tell me “You have made an error. You have failed to record them. We need to fix it.”

153. Counsel for Bernard Riordan submitted that he had no real opportunity to amend the supposedly deficient minutes. Whether or not Paul Sinclair was right or wrong about that is beside the point. The point is that Paul Sinclair’s evidence was not internally inconsistent.

**Attacks on Paul Sinclair: contradictions in methods employed**

154. A further criticism was put thus:\textsuperscript{225}

Mr Sinclair’s evidence in relation to his method of preparing minutes is contradictory, in that he rejects the suggestion that he would prepare the minutes at different times (evidenced by the use of different pen/pencil types),\textsuperscript{226} whilst admitting to preparing agenda items and minutes prior to the start of meetings.\textsuperscript{227}

155. This is an argument that Paul Sinclair contradicted himself about his general method of preparing minutes.

156. The first piece of evidence relied on was a denial that Paul Sinclair had written the minutes for the Executive meeting of 10 January 2011 at

\textsuperscript{225} Submissions of Commissioner Riordan, 13/7/15, para 47(3).
\textsuperscript{226} Paul Sinclair, 27/4/15, T:44.39-44.
\textsuperscript{227} Paul Sinclair, 27/4/15, T:45.29-37.
different times. That was not evidence of his general method. It was evidence of what he did in relation to one specific document on 10 January 2011. The second piece of evidence relied on, in supposed contradiction of the first, was:

I may – from time to time, if I’m doing both sets of minutes, being the State and the Federal, I may make the – off the agenda meeting time, Executive meeting, the accounts, I would put those in off, directly off and fill in the gaps as I progressed for time reasons. … But that would only be on the occasions where I’m doing both sets of minutes.

There is no contradiction. The word ‘may’ indicated that the general practice had exceptions. And it was a general practice operating when Paul Sinclair prepared both State and Federal minutes. He was not doing that on 10 January 2011.

**Attacks on Paul Sinclair: using a pencil**

157. Then it was said: ‘Mr Sinclair admitted to using pencil to prepare and complete minutes, on the basis that the use of pencil permitted the erasure and/or amendment of minutes’.

158. This is an opaque submission. It does not demonstrate what it is designed to support, namely that Paul Sinclair’s ‘prepared meeting minutes are incomplete or incorrect, and that the method employed by him to prepare these minutes is poor’. Counsel assisting attributed a more precise meaning to the submission: that Paul Sinclair’s ‘use of a

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228 Paul Sinclair, 27/4/15, T:44.39-44.
230 Submissions of Commissioner Riordan, 13/7/15, para 47(f).
pencil to prepare draft minutes is evidence of his unreliability as a minute taker because it permits him to make amendments to his draft. Counsel assisting dealt with the submissions so understood in the following way:

The proposition is ridiculous. If relevant at all, it indicates a focus on Mr Sinclair’s part on being accurate in the preparation of draft minutes, and a willingness to make corrections if accuracy required it. But it is not relevant. If Mr Sinclair used a pen he would not be more or less reliable (presumably he could make corrections, by crossing out errors instead of erasing them).

Counsel assisting is entirely correct on this point.

Attacks on Paul Sinclair: the ETU Loan compared to the Chifley purchase

159. The final criticism is as follows:

Mr Sinclair argues that he would have recalled discussion over the [ETU Loan], on the basis of the size of the loan (being $500,000). However, as noted above, Mr Sinclair admitted to omitting from the minutes of the State Council meeting on 13 December 2010 mention of the discussion and approval of the Chifley purchase. The Chifley purchase was $341,000.

160. This reverts to the Chifley purchase, discussed above. Counsel assisting suggested that the novel element in the submission now put is that the difference in magnitude between $341,000 and $500,000 is not

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232 Submissions of Counsel Assisting, 14/8/15, p 15.
233 Submissions of Counsel Assisting, 14/8/15, p 15.
234 Submissions of Commissioner Riordan, 13/7/15, para 47(g).
such as to rule out an error in relation to the latter amount when there was an error in the former. Counsel assisting submitted:

A principal difficulty with that proposition is that it equates two errors of very different magnitude. … [T]he error on 13 December 2010 concerned the acquisition of shares in Chifley Financial Services. Mr Sinclair’s error was to fail to distinguish between the State Council’s approval of that transaction by ‘endorsement’ of Executive minutes and its approval by ‘deletion’. The distinction could be a fine one: as Mr Sinclair agreed in his oral evidence, it was common for items to be deleted not because of any desire to change the decision but because of a desire for the matter to be fully ventilated. That was what occurred in relation to the Chifley purchase. An error of this kind is fundamentally different [from] omitting altogether the approval by the Executive of a $500,000 loan.

161. Again, that submission is substantially correct.

162. The submissions of counsel for Bernard Riordan just discussed were served on 13 July 2015. Further submissions by counsel for Bernard Riordan on, inter alia, the question of Paul Sinclair’s minute-taking were served on 10 August 2015. In part the new submissions covered old ground, in part they descended to greater detail. They have been read closely. But a due sense of reasonableness and a concern for considerations of space make it desirable not to deal with the subject further.

A synthesis of the evidence about the 20 December 2010 Executive meeting

163. The reasoning in this Chapter has drifted from a primary proposition asserted earlier – that the absence from the minutes of 20 December

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236 Submissions of Counsel Assisting, 14/8/15, p 15.
238 Submissions of Commissioner Riordan, 10/8/15, para 6.
2010 Executive meeting of any reference to the ETU Loan suggests that there was no significant decision or discussion about it at that meeting.\textsuperscript{239} The evidence about the recollections of those present is hard to reconcile.

164. But it is convenient to begin with the most convincing possibility. It is a possibility suggested by, amongst other things, the evidence of Neville Betts. That possibility is that the ETU Loan was mentioned at the end of the 20 December 2010 Executive meeting in passing but not in such a way as required minuting. The effect of the evidence of Neville Betts was that Bernard Riordan mentioned the ETU Loan at the end of the meeting, said that he was just letting everybody know what was going on, and that the ETU Loan did not need to be minuted because it was an investment.\textsuperscript{240} There is a certain indefiniteness in the expression ‘at the end of the meeting’. It can refer to something that happened just before or just as the meeting closed. It can also refer to something that happened just after it closed. Neville Betts considered but eventually rejected the idea that the ETU Loan was discussed after the meeting.\textsuperscript{241} But the precise timing must remain unclear. Neville Betts agreed in cross-examination that from what he saw and heard the meeting concurred with the ETU Loan.\textsuperscript{242} Otherwise, Neville Betts’s evidence on this topic was not challenged.\textsuperscript{243} Bernard Riordan denied that he told the meeting that the ETU Loan did not need to be

\textsuperscript{239} See para 124.
\textsuperscript{240} Neville Betts, witness statement, 30/3/15, para 13; Neville Betts, 30/4/15, T:427.31-428.45.
\textsuperscript{241} Neville Betts, 30/4/15, T:428.38-429.4.
\textsuperscript{242} Neville Betts, 30/4/15, T:438.23.
\textsuperscript{243} Neville Betts, 30/4/15, T:437.20-438.33.
Paul Sinclair also denied that he was asked not to record anything in the minutes about the ETU Loan, although he indicated that on occasions he was instructed not to record things in the minutes. Acceptance of these denials leaves open the balance of Neville Betts’s evidence – that Bernard Riordan mentioned the ETU Loan at the end of the meeting and said he was doing so just to let everyone know what was going on. There are meetings of all kinds in which powerful people concerned to keep those present in touch with events do that.

If something along these lines occurred, then the Executive was not asked to approve the ETU Loan in any meaningful sense, and could not have done so. The proposal to enter into the ETU Loan was not presented to the members of the Executive as something for their consideration or decision. They were just told – perhaps just before the meeting ended, perhaps just after – that there was going to be a loan, and that that was not something that needed to be considered by them. If this is what occurred, it would explain why Paul Sinclair’s notes make no reference to the ETU Loan.

The ETU submitted that the absence of any reference to the ETU Loan is ‘not determinative or even probative’. This submission rests on a contention that the whole of Neville Betts’s evidence should be preferred to that of Bernard Riordan and Paul Sinclair. That is, the ETU submitted that the denials by Bernard Riordan and Paul Sinclair of any direction to abstain from recording the ETU Loan in the minutes

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244 Bernard Riordan, 4/5/15, T:552.1-5, 559.7-22.
246 Submissions for the ETU, 10/7/15, para 19(b).
should be rejected.\textsuperscript{247} It is not reasonable to reject those denials. Bernard Riordan and Paul Sinclair were figures playing more central roles than Neville Betts. In view of Bernard Riordan’s central role, it is likely that he would have remembered whether he gave the direction or not. And in view of Paul Sinclair’s habitual role as minute-taker, it is likely that he would have noticed the direction if it had been given. Neville Betts was less likely to be reliable on this aspect of events than the other two. Accordingly, the state of the minutes remains not only probative, but very strongly probative.

167. The proposition that Bernard Riordan mentioned the ETU Loan in a cursory manner – ‘just letting everybody know what was going on’ – finds support in some of the evidence of other witnesses.

168. Glen Potter’s statement and oral evidence to the Commission were to the effect that Bernard Riordan, although he referred to the ETU Loan at the meeting of the Executive, did not ask the Executive to make any decision about the ETU Loan because it was a matter for State Council.\textsuperscript{248} It may be that Glen Potter was confusing his recollection of the Executive meeting with his recollection of the State Council meeting. The notes of Robert Whyburn, who conducted an investigation in 2012, indicate that he was told by Glen Potter that he could not recall whether the matter was raised at the meeting of the Executive but that he recalled the matter was raised but not voted on at State Council.\textsuperscript{249}

\textsuperscript{247} Submissions for the ETU, 10/7/15, paras 18-19.

\textsuperscript{248} Glen Potter, 30/4/15, T:496.24-35; Glen Potter, witness statement, 30/4/15, para 4.

\textsuperscript{249} Whyburn MFI-1, 6/5/15, p 28.
169. In his oral evidence, Trevor Russell said he thought Bernard Riordan was just floating the ETU Loan as a possibility or proposal at the meeting of the Executive.\textsuperscript{250} He said he was horrified to hear that the ETU Loan had been made prior to the State Council meeting of 21 February 2011.\textsuperscript{251} He abandoned, in oral evidence, the claims in his statement that there was a resolution or a vote about the ETU Loan.\textsuperscript{252} Trevor Russell’s position in oral evidence was consistent with his email to Robert Whyburn of 4 September 2012. In that email he said: ‘To my memory it was not voted on at the Executive not State Council, it was raised to inform the councils what was intending to occurring [sic]’.\textsuperscript{253} It is necessary to note that Robert Whyburn’s notes of a conversation with Trevor Russell about the ETU Loan suggest that Trevor Russell told him that it was approved at both meetings.\textsuperscript{254} However, since these notes appear on an email of Bill Maxwell of 2 September 2012, it is to be inferred that Trevor Russell’s email of 4 September 2012 provides a more considered, and therefore more accurate account of his position, at that time. His email is also consistent with his oral evidence.

170. Allan Reid in oral evidence said that Bernard Riordan said to a meeting of the Executive in relation to the proposed ETU Loan: ‘Think about it and we’ll discuss it at a later date’.\textsuperscript{255} Allan Reid was quite clear in his oral evidence that the matter was not raised by Bernard Riordan as

\begin{itemize}
\item\textsuperscript{250} Trevor Russell, 30/4/15, T:450.39-41, 451.44-47.
\item\textsuperscript{251} Trevor Russell, 30/4/15, T: 451.27-42.
\item\textsuperscript{252} Trevor Russell, 30/4/15, T:447.13-448.34, 450.18-37.
\item\textsuperscript{253} Whyburn MFI-1, 6/5/15, p 31.
\item\textsuperscript{254} Whyburn MFI-1, 6/5/15, p 29.
\item\textsuperscript{255} Allan Reid, 29/4/15, T:286.16-17.
\end{itemize}
something on which any decision or approval was required from the Executive.\textsuperscript{256} Allan Reid did not recall the matter being raised at the 21 February 2011 State Council meeting.\textsuperscript{257} Robert Whyburn’s notes suggested that Allan Reid told Robert Whyburn that the matter was raised and voted on at a State Council meeting but that Allan Reid did not attend because he was in hospital.\textsuperscript{258}

171. Bernard Riordan’s view at the time was that the ETU Loan was akin to putting money on term deposit. That was his description in his email to Steve Butler of 11 August 2012.\textsuperscript{259} Putting money on term deposit was something Bernard Riordan did without seeking the approval of the Executive or Council. His oral evidence was that some term deposits were automatically rolled over but that there were some occasions where he took the list of investment options available to the Executive.\textsuperscript{260} In answer to a summons to attend and produce documents issued by the Commission, the ETU NSW provided minutes of meetings of the Executive and State Council from 1 January 2006.\textsuperscript{261} There is no reference in any of the minutes prior to Bernard Riordan’s resignation as Secretary to term deposits. It is consistent with Bernard Riordan taking this view that he would act in the way described by Neville Betts. Having been approached by Sam Dastyari about the ETU Loan earlier that day, Bernard Riordan thought it right to tell the Executive about it, but since it was an investment akin to a

\begin{itemize}
\item \textsuperscript{256} Allan Reid, 29/4/15, T: 284.35, 285.40-286.39, 287.9.
\item \textsuperscript{257} Allan Reid, 29/4/15, T: 285.25-28.
\item \textsuperscript{258} Whyburn MFI-1, 6/5/15, p 29.
\item \textsuperscript{259} Riordan MFI-4, 4/5/15.
\item \textsuperscript{260} Riordan, 4/5/15, T:555.31-556.10.
\item \textsuperscript{261} Summons to attend and produce documents No 48, 19/6/14.
\end{itemize}
term deposit there was no need for the Executive to make any decision about it or for any reference to be made to it in the minutes.

172. Bernard Riordan, indeed, was not in a position to seek approval for the ETU Loan from the Executive. The 20 December 2010 meeting took place only a matter of hours after Sam Dastyari had proposed the ETU Loan. Bernard Riordan had no loan agreement or indeed document of any kind setting out the proposed terms of the agreement. He himself had done no due diligence on the ETU Loan, beyond noting a rough comparison between the interest rate of around 8% and the rates obtained by the ETU NSW on fixed term deposits. He was not in a position to inform the meeting properly about the proposal. Nor was the meeting in a position to make any decision about it. In these circumstances, it would have been understandable if Bernard Riordan had mentioned in passing to the Executive that he had been approached by Sam Dastyari but had said that there was at that time nothing for them to consider or make a decision about.

173. This is consistent with Paul Sinclair’s evidence that Bernard Riordan told him in January 2011 that it was unnecessary to refer the ETU Loan to the State Council because ‘it is not required. It’s an investment’.262 It will be remembered that there is a controversy about the date of this conversation, but not its content.263

174. The best possible explanation for the absence of any reference to the ETU Loan in the minutes is that, if the subject was mentioned at all, it was raised in so cursory a way as to exclude the need for minuting. It

263 See para 134.
is necessary, however, to examine this possibility in light of the evidence of those present at the 20 December 2010 meeting who asserted that the ETU Loan had been discussed and approved.

**Witnesses who claimed the ETU Loan was discussed and approved by the Executive**

175. The ETU made one important and realistic submission. It applies to many aspects of the evidential analysis which this case study calls for. But this is a convenient place at which to record it. The ETU agreed with counsel assisting that there were inconsistencies between witnesses, gaps in their recollections, and vagueness of recall. It submitted that it was hardly surprising that those who attended the relevant meetings about four and a half years before they gave evidence had difficulties of recollection. They were union officials and other lay people. Their occupations did not place a premium on the accurate recall of oral communications. It is likely that since 20 December 2010 they have attended many more meetings. Identity of evidence would have given rise to suspicion. Hence, the ETU submitted, the explanation for the state of the evidence should not be found in poor credibility as distinct from problems of reliability.\(^{264}\) The substance of that submission is sound. In general the findings in this Chapter are made by reference to the probabilities, and to assessments of reliability. They are not made by recourse to any idea that particular witnesses set out to cook up a false story, whether out of a misplaced sense of loyalty, self-protection or some other reason. It is quite probable that they have drifted into error, where they have,

\(^{264}\) Submissions for the ETU, 10/7/15, paras 14 and 20.
because of relatively innocent reconstruction, whether subconscious or not.

James Macfadyen

176. James Macfadyen approved the minutes of the 20 December 2010 Executive meeting three times. He confirmed them as correct at the meeting of 11 January 2011. He signed them at some later point in time. And he endorsed them at the 21 February 2011 State Council meeting. He approved the minutes of the 21 February 2011 State Council meeting at the next State Council meeting on 14 March 2011 and signed those minutes also. In so approving the minutes of each of these meetings, he was acting as President of the ETU NSW. He accepted that he understood the importance of minutes being accurate. He accepted that he satisfied himself that the minutes of both meetings were correct before he signed them and before he resolved that they be confirmed. Any claim by James Macfadyen that the minutes erroneously omitted the discussion and/or approval of the ETU Loan would call for a cogent explanation of how he came to approve them. That explanation was not forthcoming. In addressing the issue, James Macfadyen in his statement said that he had no understanding as to why the minutes did not contain any record of a

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265 When asked by counsel assisting he said he ‘could have’ signed the minutes of 20 December 2010 at the next meeting; James Macfadyen, 28/4/15, T:207.47-208.1. He gave similar evidence in relation to the minutes of 21 February 2011; James Macfadyen, 28/4/15, T:217.45-218.1. In re-examination he was asked what his normal practice was. He said that the minutes ‘might be’ signed about a month after they had been approved at the next meeting; James Macfadyen, 28/4/15, T:236.1-8.


discussion of the ETU Loan.\textsuperscript{268} In oral evidence he said ‘maybe it’s an oversight’.\textsuperscript{269}

177. What assessment is to be made of James Macfadyen’s claims that he now recalls a discussion and approval of the ETU Loan at these Executive and Council meetings? That assessment must be made in the light of three features of his conduct. First, shortly after both meetings he acted on the basis that there was no discussion or approval of the ETU Loan at either meeting. Secondly, he now rejects, as an explanation for his so acting, the proposition that there was no such discussion or approval. Thirdly, he cannot now offer any other explanation for his conduct. Against that background, the evidence of his present recollection would need to be particularly strong in order to displace the inference that naturally arises in assessing his contemporaneous conduct.

178. However, James Macfadyen’s evidence of his present recollections of the meetings was not strong at all. He claimed to have a clear memory that the Loan was approved at the 20 December 2010 Executive meeting and at the 21 February 2011 State Council meeting. However, his memory of other aspects of the meeting was very poor. He had no memory of a discussion about the $150,000 Donation.\textsuperscript{270} He had no memory of the point in time during the meeting at which the ETU Loan was discussed.\textsuperscript{271} At one point in his evidence James Macfadyen claimed to recall that mortality benefits and honorary members were

\textsuperscript{268} James Macfadyen, witness statement, 28/4/15, paras 8, 10.
\textsuperscript{269} James Macfadyen, 28/4/15, T:221.31.
\textsuperscript{270} James Macfadyen, 28/4/15, T:204.2-7.
\textsuperscript{271} James Macfadyen, 28/4/15, T:203.47.
discussed at the meeting.\textsuperscript{272} That served to emphasise how unreliable his recollections of the meeting are. Once it became apparent to him that what he recalled was not in the minutes, he said, not very convincingly, that he was only talking about general procedure.\textsuperscript{273}

179. James Macfadyen’s memory about what occurred at the 21 February 2011 State Council meeting was on any view incorrect. He said he did not think that, at the time of Bernard Riordan’s report to that meeting, negotiations in respect of the ETU Loan had been concluded.\textsuperscript{274} Further, for the reasons set out above, it is unlikely that the ETU Loan was approved by the State Council on 21 February 2011 having regard to Bernard Riordan’s evidence and to the manner in which State Council meetings were conducted.

180. There are other reasons to doubt the quality of James Macfadyen’s recollection. He sent an email to Robert Whyburn on 27 August 2012. The email read:\textsuperscript{275}

\begin{quote}
As President of the ETU NSW Branch I would like to have it placed on record that an Executive Meeting of the ETU NSW held on or about the 14 December 2010, that the then Secretary Bernie Riordan discussed a Loan/Investment request he received from the NSW ALP for $500,000. The terms of the loan/investment was that a schedule of repayments would be produced ASAP and that the interest rate would be 8% for the term of the investment/loan.

I have spoken to all members of the Executive who attended this meeting and they all agreed that this matter was discussed and we all agreed that
\end{quote}

\textsuperscript{272} James Macfadyen, 28/4/15, T:204.15-46, 209.12-42.
\textsuperscript{273} James Macfadyen, 28/4/15, T:211.28- 213.5.
\textsuperscript{274} James Macfadyen, 28/4/15, T:217.21-23.
\textsuperscript{275} Whyburn MFI-1, 6/5/15, p 23.
the loan/investment should be made as it was on a commercial basis, better than what we could invest our money at the time.

They also recall that the Secretary reported this matter to the State Council meeting where it was discussed and there were a number of questions asked about the conditions of the loan/investment there was no one objected to the matter on that night, as the money needed to be paid to the ALP prior to the 31 December 2010.

It would appear that none of these matters were ever recorded in the minutes of the meetings that were endorsed at the State Council meeting in February 2011.

There are handwritten minutes taken at the Executive and State Council meetings by the Assistant Secretaries if they are present at the meeting or one of the executive members writes up the minutes.

If I recall Bernie went on Annual Leave and was not there to see what was recorded in the typed Minutes that went to the Executive meeting in early January 2011 however Alan Reid who is an Executive member has notes of this meeting where there was a schedule from the ALP which was discussed.

It would appear that if there was any wrongdoing it was that the minutes did not reflect what was discussed at the meetings. (emphasis added)

181. There are a number of matters to note about this email.

182. *First*, it is not an impressive record of the details of the transaction. There was no relevant meeting of any kind on 14 December 2010. The email is wrong about the interest rate (8%, not 8.5%). It speaks obliquely, and incorrectly, about the production of a schedule of repayments being one of the terms of the Loan. The fourth paragraph suggests that the ETU Loan was discussed and approved at a State Council meeting prior to its being made. On any view, this must be wrong.
183. Secondly, James Macfadyen claims in the email that he had spoken to all of the other members of the Executive who attended the meeting in December. And he claims that they agreed that the loan was discussed and approved, both by the Executive and by the State Council. That claim is inconsistent with the oral evidence of other members. Michael Brien emphatically denied that he spoke to James Macfadyen prior to sending Robert Whyburn his written recollection of what had occurred on 4 September 2012, after James Macfadyen’s email. Mary Stylli, also, was adamant that she did not speak to James Macfadyen.

184. Thirdly, even if James Macfadyen did speak to members of the Executive, it is unlikely that they all told him that the ETU Loan was discussed and approved at an Executive meeting in December. That is not what a number of them told Robert Whyburn shortly afterwards: see the discussion of Glen Potter’s position and Trevor Russell’s position, above. Further, to the extent that James Macfadyen spoke to members of the Executive, it is unlikely that they all told him that the ETU Loan was discussed and approved at a State Council meeting prior to Christmas. Of the members of the Executive only Mary Stylli and Allan Reid claimed in evidence that the ETU Loan had been approved at a State Council meeting prior to 31 December 2010. James Macfadyen himself did not make such a claim.

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276 Whyburn MFI-1, 6/5/15, p 32.
278 Mary Stylli, 29/4/15, T:330.45-331.11.
279 See paras 168-169.
280 Allan Reid said he thought the loan had been approved at the 13 December 2010 State Council meeting. He did not attend that meeting.
185. Viewed charitably, the claims in James Macfadyen’s email to Robert Whyburn suggest that he has a very poor recall of events. His asserted recollection as to what occurred at these meetings is an unsatisfactory basis on which to make any findings. His contemporaneous conduct in approving the minutes affords a more secure foundation.

Bill Maxwell

186. The only evidence of Bill Maxwell’s position is his email to Robert Whyburn of 2 September. Bill Maxwell stated in that email that there was a vote in favour of the ETU Loan at the Executive meeting. He also stated that the ETU Loan was ‘reported’ to State Council. He said that he did not recall ‘whether it was a minuted item or just reported’. The account concludes: ‘As far as I can remember my name was on the cheque’. Now the ETU Loan monies were not paid by cheque. And Bill Maxwell had nothing to do with their payment. Hence it is safe to infer that his recollections as recorded in this email are faulty. They must concern some other transaction. Unfortunately, the death of Bill Maxwell has rendered it impossible to seek any clarification.

Michael Brien

187. Michael Brien in his statement to the Commission gave evidence that the ETU Loan was discussed at the meeting of 20 December 2010, and that no-one objected. In his written statement to Robert Whyburn,

\[\text{281 Whyburn MFI-1, 6/5/15, p 29.}\]

\[\text{282 Michael Brien, witness statement, 28/4/15, paras 5-6.}\]
he stated that the ETU Loan had been ‘raised’ at this meeting.\textsuperscript{283} Notwithstanding that he claimed to have a clear recollection that the ETU Loan was ‘discussed’,\textsuperscript{284} Michael Brien in oral evidence was unable to give any detailed account of what was actually said at the meeting in the discussions.\textsuperscript{285} He could not recall if there was any discussion about interest rates.\textsuperscript{286} Nor could he recall at what point in the meeting the discussions took place.\textsuperscript{287} He had no independent recollection of either the 13 December 2010 Executive meeting\textsuperscript{288} or of any discussion about the Loan at the 21 February 2011 State Council meeting.\textsuperscript{289}

188. Michael Brien said that he was telephoned by Bernard Riordan prior to the 20 December 2010 meeting. However his recollection was that that occurred ‘[p]robably some days before the meeting’.\textsuperscript{290} He was hesitant in acceding to the proposition, put to him by Bernard Riordan’s counsel, that the discussion may have been actually on the day of the meeting.\textsuperscript{291} If there was a discussion, it could only have been on that day, since that was when Bernard Riordan was first contacted by Sam Dastyari.

\textsuperscript{283} Michael Brien, witness statement, 28/4/15, para 9; MJB-1.
\textsuperscript{284} Michael Brien, 28/4/15, T:265.16.
\textsuperscript{285} Michael Brien, 28/4/15, T:266.5-33.
\textsuperscript{286} Michael Brien, 28/4/15, T:268.29-44.
\textsuperscript{287} Michael Brien, 28/4/15, T:265.39-47.
\textsuperscript{288} Michael Brien, witness statement, 28/4/15, para 4.
\textsuperscript{289} Michael Brien, witness statement, 28/4/15, para 7.
\textsuperscript{290} Michael Brien, 28/4/15, T:263.34.
\textsuperscript{291} Michael Brien, 28/4/15, T:276.45-47.
189. In the above circumstances, Michael Brien’s recollection of what took place at the meeting of 20 December 2010 is of little assistance. In contrast, his approval of the minutes is contemporaneous conduct which provides a sound basis for finding that there was no discussion or approval of the ETU Loan at the 20 December 2010 meeting. Michael Brien approved the resolution at the 11 January 2010 meeting confirming the accuracy of the 20 December 2010 minutes. Prior to doing so he read through the 20 December 2010 minutes. He satisfied himself that they were true and correct. At that time what occurred at the 20 December 2010 meeting was fresh in his mind.292

190. Michael Brien was asked whether he accepted that there was no reference to the ETU Loan in the minutes of the meeting of 20 December because there was no discussion about it at the meeting. His answer was: ‘Well I dare say I have to, but I assure you it was discussed. Maybe it was discussed post the meeting or after the meeting, perhaps, but it was discussed’.293 Michael Brien’s demeanour in giving this answer suggested that he was doing more than raising a mere possibility that the ETU Loan was discussed after the meeting. If so, his evidence in relation to the 20 December 2010 meeting is consistent, in broad terms, with the evidence of Neville Betts, Glen Potter and Trevor Russell, referred to above.294 That is, if the ETU Loan was raised by Bernard Riordan after the meeting, it could only have been on an informal ‘information only’ basis, and not in such a way as to require any reference in the minutes or any decision from the meeting.

292 Michael Brien, 28/4/15, T:269.31-270.5.
294 See paras 164-169.
Mary Stylli

191. Mary Stylli said she had a recollection of there being some mention of a proposed loan at the State Council meeting of 13 December 2010, although no decision was made at that meeting. That could not have happened. When asked in oral evidence about the above recollection she gave a different version of events. She appeared to suggest that the ETU Loan was approved by the State Council before Christmas 2010 on the same day as it was approved by the Executive. That, too, could not have happened. She was asked whether the State Council meeting she was referring to could have been one that took place in February 2011, and she answered: ‘No, I can’t recall that either…No’. That answer may be compared with part of her statement, which read:

'I further recall in February 2011 there was a meeting of the State Council. At the State Council Mr Riordan reported on the loan to the ALP NSW and there was a vote taken to approve the making of the loan.'

192. Mary Stylli was taken to the minutes of the 21 February 2011 meeting and asked if that was the meeting she was referring to in that part of her statement. She said: ‘The only thing that I, like - I can’t remember or I’m not sure of is from Christmas until that meeting, I can’t remember whether the loan was already passed or – yes.'

296 Mary Stylli, 29/4/15, T326.5-327.16
297 Mary Stylli, 29/4/15, T:327.30-35.
298 Mary Stylli, witness statement, 29/4/15, para 8.
Further, in that part of her statement, Mary Stylli was prepared to say that ‘there was a vote taken’ at the State Council meeting in February 2011. That is inconsistent with Bernard Riordan’s position and, for the reasons dealt with above, is highly unlikely to be correct. That counts significantly against her reliability.

It is difficult, therefore, to give any significant weight to Mary Stylli’s recollections. In oral evidence she professed to have a recollection of an event which could not have taken place. She gave a different version of that recollection from the version she gave in her statement. Robert Whyburn’s notes suggest he was told by Mary Stylli that the ETU Loan was ‘definitely approved’ by the Executive and Council. Those notes are unspecific as to time. That may be because, according to Mary Stylli, Robert Whyburn ‘just asked me whether the money that was given to the Labor Party, whether it was a loan or it was a gift’. It may be that Mary Stylli confused a discussion she had at some later point in time about the ETU Loan with one that she has come to believe happened at Executive and Council meetings.

Colin Harris

Colin Harris participated in the resolution on 10 January 2011 to confirm the 20 December 2010 minutes. He agreed that before he did so he read the 20 December 2010 minutes. He did not think that they had left out any decision that the Executive had made on 20 December

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300 See paras 121-123.
301 Whyburn MFI-2, 6/5/15, p 2.
2010. He moved the motion on 21 February 2011 that the State Council endorse the minutes of 20 December 2010. He said he probably read the 20 December 2010 minutes a week before moving that motion. He agreed that at the time he moved it he was satisfied that those minutes accurately recorded the substance of what had been decided at the meeting and that nothing had been left out. He also moved the motion at the State Council meeting of 14 March 2011 confirming the 21 February 2011 State Council minutes. He agreed that at that time he was satisfied that the 21 February 2011 minutes were correct. The overwhelming inference is that he believed, in 2011, that there had been no decision made about the ETU Loan at either the 20 December 2010 meeting or the 21 February 2011 meeting.

196. Unlike any of the other members of the Executive who claimed the ETU Loan had been approved, Colin Harris attempted, at least at the time of reporting to Robert Whyburn, to explain why there was no reference to it in the minutes of either meeting. He said, in his email to Robert Whyburn on 6 September 2012:

I cannot recall whether this was documented in the minutes as I feel there was some uncertainty as to whether this matter was an investment which did not require minuting or if it was a loan which did require minuting.

197. Colin Harris did not adhere to this explanation in oral evidence. He acknowledged the transaction should have been recorded in the

304 Colin Harris, 29/4/15, T:385.27-43.
305 Colin Harris, witness statement, 29/4/15, para 10; CTH-1.
Ultimately he agreed that he had no good explanation for why it was not. The explanation Colin Harris proffered to Robert Whyburn is obviously untenable. Any decision made at a meeting of either the Executive or the Council was something which needed to be recorded in the minutes – regardless of whether it was a decision about an investment, a loan or something else.

198. The only sensible explanation for not recording something that was mentioned at a meeting in the minutes would be if the matter was mentioned in such a way as not to call for any decision from the meeting. This is an available view of Colin Harris’s evidence in relation to the ETU Loan. He said that the Executive did not make decisions about investments. So far as Colin Harris was able to give an explanation of what he meant by ‘investment’, it was ‘parking money for a finite period at a particular interest rate with a financial institution or with someone like the ALP’. Thus, Colin Harris may have thought that the ETU Loan did not need to be minuted because the Executive was not being asked to make a decision about it. It was something that Bernard Riordan merely raised in a cursory fashion for the purposes of information only, in the same way that he mentioned term deposits from time to time.

199. Colin Harris was amongst those witnesses who were prepared to say (and to tell Robert Whyburn) that the ETU Loan was approved at the 21 February 2011 meeting (although in his email to Robert Whyburn

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309 Colin Harris, 29/4/15, T:381.29.31.
he said he believed the meeting was held on 14 February 2011. He went so far as to say: ‘the matter was reported in detail’ to the meeting and ‘[a]fter detailed discussions, this meeting also agreed to the proposal without dissent’. That is fundamentally inconsistent with Bernard Riordan’s position. It tells significantly against Colin Harris’s reliability as a witness.

**Phillip Oswald**

200. Phillip Oswald was a visitor at the meeting of the Executive of 20 December 2010 and 11 January 2011. Notwithstanding that, he said that he would, at the January meeting, have read the minutes of the 20 December 2010 meeting. He accepted that when he read them he was satisfied that they were correct and that they did not leave out anything important that the Executive had decided. Phillip Oswald did, however, claim in his statement to recall discussion and approval of the loan at the 20 December 2010 Executive meeting.

201. Phillip Oswald in his statement said that ‘the proposal about the loan was discussed over a number of weeks’. In this respect he appears to be unreliable. In oral evidence he said that it was ‘more than likely’ that he was referring to the weeks after 10 January 2011. However it could not be the case that any ‘proposal’ was discussed after this time,

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310 Colin Harris, witness statement, 29/4/15, CTH-1.
311 Colin Harris, witness statement, 29/4/15, CTH-1.
312 Phillip Oswald, 30/4/15, T:476.43-477.8.
313 Phillip Oswald, witness statement, 30/4/15, para 7.
314 Phillip Oswald, witness statement, 30/4/15, para 7.
315 Phillip Oswald, 30/4/15, T:479.30-37.
because the ETU Loan had already been made. Nor could it have been the case that the proposal was discussed for a number of weeks prior to 20 December 2010, since it was on that day that Sam Dastyari made the proposal to Bernard Riordan. The likelihood is that Phillip Oswald’s recollections in his statement concern discussions that happened at a later time, when the ALP NSW was proposing to renegotiate the repayment schedule. That would also explain his willingness to confirm the minutes at the January meeting.

202. Phillip Oswald in his statement recalled a discussion, but not a vote, about the ETU Loan at a State Council meeting either before or after Christmas 2010.316 There must be some doubt as to whether Phillip Oswald was at the 21 February 2011 Council meeting. In oral evidence he initially accepted, after looking at the attendance register for the 21 February 2011 State Council meeting, that he was not at that meeting. He was then shown the attendance register for the meeting of the Executive on that day, which recorded his attendance. Phillip Oswald said that he was present at the meeting, despite not signing the attendance register and approving the minutes recording his absence.

203. Phillip Oswald was asked by counsel for Bernard Riordan:317

> Even going to State Council meetings before this catalyst occurred, was it your experience that the Secretary would report matters, such as loans, it wouldn’t get recorded in the minutes, but because there was concurrence of those there it was accepted and approved?

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316 Phillip Oswald, witness statement, 30/4/15, para 8.
317 Phillip Oswald, 30/4/15, T:484.25-29.
Phillip Oswald was prepared to agree to that proposition. His evidence does not seem reliable. It does not sit well with his previous agreement that it was important that decisions of the Executive were recorded in the minutes. Nor does the proposition sit well with his subsequent evidence that he could not recall any other loans coming before him as a State Council member. If he had no such recollection, what was it that he thought he was agreeing to when he assented to the proposition put to him by counsel for Bernard Riordan?

Phillip Oswald also was prepared to agree to a series of leading questions put to him by his counsel in re-examination. For those who desire acceptance of a witness’s evidence, this is never a safe pathway.

Peter Henne

Peter Henne attended Executive meetings as a visitor. There is some doubt as to whether he was a member of the Council or also attended those meetings as a visitor. It is not necessary to resolve that doubt.

Robert Whyburn’s notes indicate that Peter Henne told him that the ETU Loan was ‘discussed definitely’ at Executive and Council but that he could not recall the date. Peter Henne said in his statement in oral evidence that he recalls the discussion taking place at a meeting before Christmas. The notes also indicate that Peter Henne told Robert

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318 Phillip Oswald, 30/4/15, T:490.19-25.
Whyburn that he could not recall if the ETU Loan was voted on and approved. Peter Henne agreed that he told Robert Whyburn that.\(^{321}\) He did not say anything in his statement about the ETU Loan being referred to at State Council meetings.

208. Peter Henne’s evidence does not take the matter very far. It is clear from what he told Robert Whyburn that he understood the distinction between a mere discussion and approval. Peter Henne does not suggest that the ETU Loan was approved by the Executive. He does not suggest that the ETU Loan was discussed or approved by the State Council.

**Mark Buttigieg**

209. Mark Buttigieg’s evidence has no materiality. He attended no meetings of the Executive until June 2011. He attended no meetings of the State Council until December 2011. Nonetheless, he claimed, in 2012, in an email to Robert Whyburn, to have a recollection of the ETU Loan being approved by the Executive and by State Council.\(^{322}\) Similarly, in a statement dated 22 April 2015 he claimed to have a recollection of discussions of the ETU Loan at meetings of the Executive at some unspecified time and at the 21 February 2011 State Council meeting.\(^{323}\) The statement was unsigned. But Mark Buttigieg said it was the result of an interview concerning his recollections. He was asked a series of questions about his recollections, he recited those

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\(^{321}\) Peter Henne, 29/4/15, T:352.18-32.

\(^{322}\) Mark Buttigieg, witness statement, 30/4/15, paras 12-13; MRB-1.

\(^{323}\) Buttigieg MFI-1, 30/4/15, pp 1-2, paras 6-9.
recollections and his recollections were transcribed. The transcription was sent to him and he made amendments where he thought necessary and sent it back.324

210. The most sympathetic view of Mark Buttigieg’s evidence is that he has (and has always had) a very poor recollection of the ETU Loan. Hence his evidence can be put to one side.

**Bernard Riordan**

211. Bernard Riordan’s account of what was said at the meeting included a number of matters not referred to in the evidence of any other witness. He said that there was a discussion about the ETU Loan being repaid from public funding. He said in his statement that he reported that the ETU Loan would be secured against monies payable pursuant to recently introduced public funding arrangements.325 In oral evidence he could not recall whether he used the word ‘security’.326 However, no other witness suggested that security was discussed. Some gave evidence that security was not discussed: James Macfadyen, Michael Brien327 and Mary Stylli.328 Only James Macfadyen suggested that public funding was discussed.329

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325 Bernard Riordan, witness statement, 4/5/15, para 59.
212. The evidence of the Executive members is odd, in light of the fact that Bernard Riordan said in oral evidence: ‘I knew that I wouldn’t be able to get approval off the Executive unless I was able to identify what the level of security was’.330 None of the members of the Executive appeared to have any interest in security.

213. It is unlikely that Bernard Riordan, or anyone else, in fact discussed security in the legal sense. The views of those who gave evidence, so far as they were expressed, were that the ETU Loan was secure simply because it was a loan to the ALP NSW. Bernard Riordan, for example, said: ‘We are not talking about, you know, lending money to somebody off the street here. We are talking about lending money to the Australian Labor Party NSW Branch to which the union was affiliated. In my view and in my experience … the Labor Party would not be reneging or forfeiting on any loan with an affiliate’.331

214. There is a further point of difference between the evidence of Bernard Riordan and other witnesses. Bernard Riordan’s evidence was not to the effect that the Executive approved the ETU Loan. Rather it was that he asked for and was given authority to ‘negotiate the final terms of the loan and that I be further authorised to complete the transaction before the Union’s Christmas shutdown on 23 December 2010’.332 No other witness who said the ETU Loan was raised at the 20 December meeting described what occurred in these terms. In particular, none said that further negotiation was contemplated or authorised.

332 Bernard Riordan, witness statement, 4/5/15, para 60.
215. If a decision of this nature was, in fact, made at the 20 December 2010 Executive meeting, then one might have expected Bernard Riordan to have reported back at the next Executive meeting he attended about what he did pursuant to the authority conferred on him, for example by tabling the ETU Loan Agreement. However Bernard Riordan did not in fact do this. Nor could he recall reporting anything to the State Council meeting of 23 February 2011.\footnote{Bernard Riordan, 4/5/15, T:512.40-46.}

216. In an email dated 11 August 2012 from Bernard Riordan to Steve Butler, Bernard Riordan stated:\footnote{Riordan MFI-4, 4/5/15.}

> The ALP loan is a matter of record. It is not a donation, it is not expenditure. I recall that the request from the ALP was made very urgently to overcome an issue with the new political donation laws. It is a loan which appeared in the accounts and continues to do so. It is an investment along with the variety of investments that the union has, such as, a variety of term deposits. Whenever I rolled over a term deposit I never sought the approval of the State Council. (emphasis added)

217. This email was written much closer in time to the relevant events than when Bernard Riordan gave evidence in May 2015. He does not assert in it that he obtained the approval or authority of either the State Council Executive or the State Council itself for the making of the Loan. If he had in fact obtained the approval of the Executive or the State Council one might have expected that fact to have been given prominence in an email of this kind. Indeed, the final sentence of the passage quoted above makes contextual sense only if he did not seek the approval of the State Council for the ETU Loan. This is consistent with what he said at one point in his oral evidence: ‘My recollection
was that because it’s an investment, it doesn’t need to go to State Council’. It is also consistent with what Paul Sinclair said that Bernard Riordan told him when they discussed the ETU Loan in January 2011. As already noted, the date of this conversation is controversial, but not its terms.

218. Bernard Riordan in oral evidence endeavoured to explain the difficulty by propounding a distinction. The first limb was State Council approval by way of endorsement of the minutes of the Executive. He said that was all that was required in relation to the ETU Loan. The second limb was State Council approval of decisions. This required a notice of motion. However, this distinction is not drawn in his email to Steve Butler. It is odd that, if he was explaining to Steve Butler that he did not seek State Council approval because all that was necessary was State Council endorsement of the Executive minutes, he did not say so in terms. The more likely position is that he was explaining why the ETU Loan never went to State Council in any form – by Executive minutes, notice of motion or otherwise.

219. Bernard Riordan appears to have treated the ETU Loan in a way similar to that in which he treated fixed term deposits. There is no reference to term deposits in the minutes of the Executive or State Council from the period 1 January 2006 until Bernard Riordan’s resignation as Secretary. This suggests that roll-overs of term deposits

335 Bernard Riordan, 4/5/15, T:559.7-9.
337 See para 134.
338 Bernard Riordan, 4/5/15, T:551.43-46.
were not approved by the State Council because they were never the subject of a decision by the Executive and not otherwise brought before the State Council by notice of motion or otherwise. That also is what Bernard Riordan’s email to Steve Butler suggests occurred in relation to the ETU Loan.

220. Having regard to the differences between Bernard Riordan’s account and the differences in the accounts of other witnesses, and to the lapse of time, his email to Steve Butler affords a more secure foundation for assessing his recollections of the meeting of 20 December 2010 than does the evidence in his statement and orally.

‘Consent and exception’/‘concurrence’

221. Counsel for Bernard Riordan submitted that just as much latitude is given to the directors of private companies in relation to the formalities attending their corporate activities, it ought to be given to members of the State Council and the State Executive Council. He submitted that those meetings proceeded on the basis of ‘consent and exception’, not formality. He relied on the following observation of Sir James Bacon V-C: ‘If you are satisfied that the persons whose concurrence is necessary to give validity to the act did so concur, with full knowledge of all that they were doing, in my opinion the terms of the law are fully satisfied.’

340 Poliwka v Heven Holdings Pty Ltd (No 2) (1992) 8 ACSR 747 at 761.
341 Submissions of Commissioner Riordan, 13/7/15, paras 105-107.
342 Re Bonelli’s Telegraph Co (Collie’s Claim) (1871) LR 12 Eq 246 at 258.
Even if this is the right test to apply to a loan described as ‘commercial’, which is of substantial size, which is unsecured, and which is from an unincorporated association to an unincorporated association, there is a problem. The problem is that it is impossible to be satisfied that those present on 20 December 2010 did concur. They were not asked to concur in whatever it was that Bernard Riordan said. He was passing on information in a manner not calling for concurrence and not calling for minuting. And even if he had requested concurrence, it cannot be said that the Executive members had ‘full knowledge of all they were doing’. What is required is full knowledge of all material facts. Bernard Riordan was not in a position to supply full knowledge. He had only been approached by Sam Dastyari hours earlier. The details of the proposal were far from complete. In other words, low though the test for ‘consent’ might be, it has not been satisfied. The submission that there was sufficient evidence of concurrence by the members of the Executive in what Bernard Riordan said does not sit well with other submissions. Counsel for Bernard Riordan submitted that on 20 December 2010, the Executive ‘gave or concurred in a direction or authorisation to the ETU NSW Secretary’ to finalise the ETU Loan. He also submitted that Bernard Riordan ‘received a direction or was given approval’. These are curious usages. Even on the approach advocated by counsel for Bernard Riordan, it cannot be said that the Executive ‘gave’ Bernard Riordan ‘a direction’. He was at liberty not to proceed with the ETU Loan if he so decided. And it cannot be said that it ‘concurred in a direction or

343 See, in the slightly different field of consent by beneficiaries to breaches of trust, Spellson v George (1992) 26 NSWLR 666.
344 Submissions of Commissioner Riordan, 13/7/15, paras 3-4.
345 Submissions of Commissioner Riordan, 13/7/15, para 109.
authorisation’. If there was a direction or authorisation, it was the Executive which gave it. It did not concur in its own direction or authorisation. If it is claimed that the Executive gave an authorisation, it is surprising that there is so little positive evidence of it.

Conclusions on compliance with the Rules

223. The most likely conclusion is that Bernard Riordan did not seek the approval of the Executive for the ETU Loan at the meeting of 20 December 2010. Due respect must be paid to the sincerity of Bernard Riordan’s evidence in stating a recollection that he broached the topic of the ETU Loan, and to Neville Betts’s memory of this. On that basis it is probable that Bernard Riordan told some of the members of the Executive about Sam Dastyari’s request for the ETU Loan. But the evidence, most particularly that of Neville Betts, supports the proposition that he did so in an informal way and not with a view to obtaining any decision or authorisation about that request. If he intended to obtain a decision or authorisation, his manner of discussing the matter did not succeed in conveying that intention.

224. It would appear that the making of the ETU Loan was in breach of the ETU NSW Rules. As stated above, rule 32(d) required State Council approval for the payment of any amounts above $1,000. There was no approval for the ETU Loan. However, even if some form of Executive approval was obtained, the ETU Loan was made prior to seeking or obtaining the approval of State Council, contrary to rule 20(d)(i). Thus, on any view, it was made in contravention of the Rules.
225. As a result, Bernard Riordan, in entering into the ETU Loan Agreement, and in causing the ETU Loan monies to be advanced to the ALP NSW, may have contravened the Rules of the ETU NSW.

**Conflict of interest**

226. It must be stressed that Bernard Riordan made no personal financial gain from the ETU Loan. In theory Bernard Riordan did, however, have a conflict of interest and duty. He had an interest, as an ALP NSW member and recent President, in the ETU Loan being made as and when required by the ALP NSW and on as favourable terms as possible. He had a duty, as Secretary of the ETU NSW, not to make any loan at all unless it was made bona fide and for proper purposes to advance the interests of the ETU NSW, and even then not until the requirements of the Rules had been satisfied. Can it be said that by executing the ETU Loan Agreement and causing the ETU Loan funds to be advanced, Bernard Riordan may also have breached his duty not to act in a position of conflict? Should Bernard Riordan have acted in the same way as he did in connection with the acquisition of a stake in Chifley Financial Services in which he was a director: declaring his conflict and excusing himself from the decision-making process? Probably not. The relevant interests of the ETU NSW overlapped very substantially with those of the ALP NSW.

**Ratification or endorsement**

227. One recurrent theme in the submissions of counsel for Bernard Riordan concerns the alleged ratification or endorsement of the ETU Loan at
various points in time after it had been made. The events relied on are the State Council meetings of 21 February 2011, 14 March 2011, 10 October 2011 and 13 February 2012, and the Executive meeting of 16 January 2012.

228. What is the meaning of ‘ratification’ in these submissions? In part that depends on what it is said was ratified. Was it the ETU Loan Agreement, or Bernard Riordan’s conduct in entering it?

229. If the submission is that the ETU Loan Agreement was ratified, it is irrelevant. If the Rules had been complied with, the ETU Loan Agreement did not need ratification. Counsel assisting did not submit that the ETU Loan Agreement was unenforceable if not ratified. That would depend on whether Bernard Riordan had ostensible authority to enter it. And ratification of the ETU Loan Agreement would not have absolved Bernard Riordan in relation to his conduct – any breach of the rules or any breach of the duties he owed to the ETU NSW.

230. If the submission is that the ETU NSW ratified any breach by Bernard Riordan of the Rules or of his duties as an officer, a question arises. Can a meeting of the Council, or the Council Executive, ratify a breach of the rules or of duty? It is not possible for a meeting of directors to ratify breaches of a duty owed by a director to the company: only a fully informed general meeting of the members can do that.\(^\text{347}\) Does that analogy apply to the ETU NSW? That question need not be answered. That is because even if ratification by the State Council or

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346 Submissions of Commissioner Riordan, 13/7/15, paras 5-7, 38-42, 73-75, 112, 114-121, 127.
347 Woolworths Ltd v Kelly (1991) 22 NSWLR 189 at 207, 231.
its Executive is possible, the next question is: was full disclosure of the circumstances made to the relevant meetings? The answer to that question must be in the negative.

231. What is meant by ‘endorsement’ in the submissions? The submissions referred to endorsement ‘in accordance with’ or ‘pursuant to’ rules 20(a)(i)(2), (c)(i) and (ii), and (d)(i). But it is not clear whether this endorsement was valid by reason of the combined operation of all these rules, or some individual operation of particular rules. A further difficulty is this. If there was a valid Executive decision on 20 December 2010, later endorsement was not necessary for validity. If there was no valid Executive decision, what was it which was purportedly endorsed? Was it the unauthorised actions of Bernard Riordan in entering the ETU Loan Agreement and advancing the $500,000?

232. Counsel for Bernard Riordan submitted that the State Council provided endorsements or ratifications at the four meetings for reasons which ‘include’ the following. The first two reasons turned on the ‘proper construction of the rules … having regard to the apparent purposes of the rules as disclosed by’ their words read in the context of the Rules as a whole.

233. The first reason was that nothing in rules 20(d)(i) and 32(a) ‘expressly provided that a direction or approval can only be given prior to the actions of using the Union’s funds’. One problem with the submission is that rule 32(a) does not deal with the powers of the State Council. It

348 Submissions of Commissioner Riordan, 13/7/15, paras 73-74.
deals with the powers of the Secretary, subject to the directions of the Executive. Another problem with the submission is that for reasons given above,\(^{349}\) rule 20(d)(i) does not authorise the making of a loan before the decision to do so has been endorsed by the Council.

234. The second reason was put thus:\(^{350}\)

Nothing in rules 20(d)(i) and 32(a) expressly provided that a direction or approval to the Secretary can only be recorded in the minutes of the State Executive Council and that State Council “endorsement” must then be obtained by endorsing or ratifying such minutes.

That is true. But it has already been found that there was in fact no relevant direction or approval on 20 December 2010.\(^ {351}\) Even if there had been, despite its not being recorded in the minutes, for a later Council meeting to endorse the direction or approval, or to endorse Bernard Riordan’s actions despite the lack of direction or approval, it would have been necessary to comply with rule 18(c)(iii).\(^ {352}\) That is, it would have been necessary for the matter to be raised at State Council by motion on notice. This did not occur. The fact that it did not occur suggests that there was never any intention to seek the endorsement of

\(^{349}\) See paras 86-87.

\(^{350}\) Submissions of Commissioner Riordan, 13/7/15, para 74(b).

\(^{351}\) See para 124.

\(^{352}\) It provides:

It shall be necessary to summon State Council Meetings as prescribed for the following purposes:

\[\ldots\]

(iii) To vote any sum of money for any purpose other than Management expenses exceeding $5,000.00. The amount to be voted must be stated on the notice summoning the meeting.
State Council. This is not surprising, since Bernard Riordan did not think anything further needed to be done.\footnote{See paras 121-123.}

235. The \textit{third} reason relied on principle 2 stated by Gray J in \textit{Scott v Jess}.\footnote{(1984) 3 FCR 263 at 286-7.} That principle is not relevant. The principle deals with the importance, in considering the power of an organisation to expend its funds, of interpreting its objects and powers broadly. That is not the present problem. There is no doubt that the ETU NSW had power to make the ETU Loan. The only question is whether the rules regulating exercises of that power were followed. That is not the question being dealt with by Gray J.

236. The \textit{fourth} reason involved a statement by Finkelstein J in \textit{Micallef v Donnelly}.\footnote{[2002] FCA 221 at [6].} He stated a principle that action taken under the rules of a voluntary association must not be absurd or unreasonable. That principle is inapposite. Subject to considering Bernard Riordan’s duty of care and diligence, it cannot be concluded that lending money to the ALP NSW was absurd or unreasonable. Again, the only question is whether the rules permitting it were complied with and whether any duties resting on Bernard Riordan were complied with, and, if not, whether the ratification or endorsement took place.

237. Was the execution of the ETU Loan Agreement without a decision of the Executive later endorsed? There are positive reasons for a negative answer. The mere fact that the ETU Loan was mentioned at later meetings of State Council does not amount to endorsement or approval
under the Rules. That is because rules 18(c)(iii) and 32(d) were not complied with. ‘Endorsement’ of a decision by the State Council to enter a transaction must require it to have an opportunity to consider the full details of the transaction in a meaningful way. No opportunity of that kind was afforded to it.

238. An examination of the events at each of the meetings relied on reveals the need to reject the ‘ratification or endorsement’ submission.

239. The first meeting was the Council meeting of 21 February 2011. On the evidence discussed above, there was no ratification or endorsement on that day.

240. The second meeting was the Council meeting of 14 March 2011. Counsel for Bernard Riordan submitted that in answer to a question from Michael McManus, Bernard Riordan said that the ETU NSW had approved a loan to the ALP NSW on commercial terms, to be regarded as an investment, not a donation. Counsel for Bernard Riordan set out other evidence which did not rise this high. But accepting Bernard Riordan’s evidence at its highest, it cannot be said to have described an endorsement or ratification.

241. The third relevant Council meeting was held on 10 October 2011. There is evidence that at that meeting the ETU NSW’s financial statements for the period ending 31 December 2010 were endorsed. There is also evidence that at the meeting, while presenting the financial statements, Bernard Riordan mentioned the ETU Loan. Some

356 See paras 121-123.
357 Submissions of Commissioner Riordan, 13/7/15, para 115.
other evidence fell below that level. But even if one accepts Bernard Riordan’s evidence— and no finding is made rejecting it— there is no evidence that the full circumstances and terms of the ETU Loan were disclosed in sufficient detail to support a finding of informed consent or a finding that there was sufficient specific consideration to be described as ‘endorsement or ratification’.

242. The final relevant Council meeting was held on 13 February 2012. There is evidence that on that day Bernard Riordan reported on the amended schedule for the repayment of the ETU Loan. The report was noted. No State Councillor claimed ignorance of the ETU Loan or raised any disputes about it. Even leaving aside the formalities required by the Rules, there was insufficient evidence of informed consent or specific consideration.

243. The other meeting relied on by counsel for Bernard Riordan was the 16 January 2012 State Council Executive meeting. He relied on it as evidence that those present, and indeed all the Executive, were aware of the ETU Loan. That does not establish endorsement or ratification. And, contrary to the submissions of counsel for Bernard Riordan, it certainly does not establish that State Council, as distinct from the Executive, ratified or endorsed the ETU Loan.

358 Submissions of Commissioner Riordan, 13/7/15, paras 120-121.
359 Submissions of Commissioner Riordan, 13/7/15, para 119(e).
360 Submissions of Commissioner Riordan, 13/7/15, para 118.
Duty of care and diligence

244. Bernard Riordan carried out little due diligence prior to executing the ETU Loan Agreement and advancing the $500,000 to the ALP NSW. At the time the ETU Loan Agreement was made, Bernard Riordan believed that it would be repaid from funding under the Electoral Act but did not know what the quantum of that funding would be.\textsuperscript{361} He did not seek any security, including security over property, a charge over the proceeds of the public funding or a personal guarantee.\textsuperscript{362} He did not know what the ALP NSW’s debts were likely to be following the election, or indeed how much the ALP NSW had budgeted for its costs of the electoral campaign.\textsuperscript{363} He did not know how much the ALP NSW had agreed to borrow from the other unions to which Sam Dastyari had referred in discussions on 20 December 2010.\textsuperscript{364} He had not considered what sort of entity the ALP NSW was or against whom proceedings should be brought if the ETU Loan was not repaid.\textsuperscript{365}

245. If the ETU Loan was to be characterised as a commercial loan, an officer in Bernard Riordan’s position, under a duty to use due care and diligence existing either in the general law or in the standards with which a trade union official should comply, would have done at least the following things.

\textsuperscript{361} Bernard Riordan, 4/5/15, T:529.13-16, 529.41-530.8.
\textsuperscript{362} Bernard Riordan, 4/5/15, T:533.12-40.
\textsuperscript{363} Bernard Riordan, 4/5/15, T:529.18-20, 530.41-43.
\textsuperscript{364} Bernard Riordan, 4/5/15, T:530.10-39.
\textsuperscript{365} Bernard Riordan, 4/5/15, T:561.16-26, 562.21-38.
246.  *First*, that officer would have either obtained security for the ETU Loan or declined to make it. The ETU Loan was for a significant amount. The ETU NSW was not in the business of speculative lending. A reasonable observer would have concluded that it was a real possibility that the ALP NSW would only have requested a loan from the ETU NSW if it was not in a sufficiently healthy financial position to borrow funds from a bank. Lending money to a borrower to whom banks will not lend is speculative lending. If, as Bernard Riordan asserted, the ‘security’ for the transaction was the electoral funding to be received after the 2011 election, then the officer ought to have ascertained whether a charge could be taken over those proceeds. Alternatively, he ought to have requested a personal guarantee.

247.  *Secondly*, the officer would have taken steps to ascertain an appropriate rate of interest to charge, would have attempted in negotiations to obtain that rate, and would have declined to make the ETU Loan if that rate could not be agreed. Bernard Riordan and Sam Dastyari did not have any meaningful negotiations about the rate of interest. Sam Dastyari appears to have proposed a rate of 8.5%. Bernard Riordan accepted it. The only step taken by Bernard Riordan to ascertain whether this rate was appropriate was a mental comparison between the rate of interest the ETU NSW was obtaining on its fixed term deposits and the rate proposed by Sam Dastyari. That comparison, however, was wholly inapposite. The relevant comparison was between the rate a commercial lender would have charged on a loan of this nature and the rate proposed by Sam Dastyari. Bernard Riordan appears never to have considered that comparison. It is likely that few commercial lenders would be prepared to make an unsecured loan to an unincorporated association in financial straits. But any commercial
lender who was willing to do this would be likely to charge a much higher rate of interest.

248. That is apparent from Mark Lennon’s evidence. Unions NSW at this time had a $500,000 loan facility with Members Equity Bank. The facility was secured over real property. The interest rate on the facility was 7.79%.\textsuperscript{366} The bank would probably not have been prepared to lend the funds at all without security. But even if it was, it may safely be inferred that in the absence of security the interest rate would have been significantly higher than 8.5%. Consistently with this, Mark Lennon accepted that any commercial lender prepared to advance $1,500,000 would charge a great deal more than 8.5%.\textsuperscript{367} It is true that he was not an expert financier. It is true that he was unable to be precise about how much higher the rate would have been if there had been no security. It is true as well that no close analysis of the overall terms of the Unions NSW facility has been undertaken.\textsuperscript{368} It is also true that Bernard Riordan had experience on the board of a fairly large public office superannuation fund, and had been Chairman of its investment committee for a decade. On the strength of that, Bernard Riordan thought that 8.5% was an appropriate commercial rate. But with all respect to Bernard Riordan’s experience, common knowledge suggests that it is likely that the prevailing rate of interest for an unsecured loan of $500,000 to an unincorporated association in a precarious financial position would have been significantly higher than 8.5%.

\textsuperscript{366} Mark Lennon, 6/5/15, T:782.13-44.

\textsuperscript{367} Mark Lennon, 6/5/15, T:782.1-11.

\textsuperscript{368} Submissions for the ETU and Named Individuals, 10/7/15, paras 25-26.
Thirdly, an officer in Bernard Riordan’s position would have requested legal advice about the terms of the ETU Loan, as Unions NSW did. Legal advice was required because a significant amount of members’ money was at stake and the proposed loan was to an unusual entity: an unincorporated association. It is likely that legal advice would have drawn attention to the difficulties involved in Sam Dastyari purporting to execute the document on behalf of the ALP NSW. That is certainly so in relation to the legal advice which Unions NSW prudently obtained, but imprudently failed to follow.

Fourthly, an officer in Bernard Riordan’s position would have made an assessment of the ALP NSW’s capacity to repay the ETU Loan. Bernard Riordan said in oral evidence that he had not looked at the ALP NSW’s accounts, although he also said that he ‘had a fair idea what their financial position was’.

Bernard Riordan had no doubt that the ALP NSW would be able to repay the ETU Loan. That belief appears to have flowed from a belief that the election funding would cover the amounts to be lent by unions. But Bernard Riordan did not know what the ALP NSW’s debts were likely to be following the election or indeed how much the ALP NSW had budgeted for its costs of the electoral campaign.

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369 See paras 53-70.
370 Bernard Riordan, 4/5/15, T:582.1.
372 Bernard Riordan, 4/5/15, T:642.7-643.1.
373 Bernard Riordan, 4/5/15, T:529.18-20, 530.41-43.
252. In fact, the ALP NSW’s election expenses turned out to be far in excess of the funding it received from the Electoral Commission. The 2011 accounts record election expenditure of almost $12,900,000 ($10,885,000 on the State Election of 2011 and $2,006,000 on the Federal Election of 2010). The party received $1,281,000 in donations. It received from public electoral funding $6,975,000 under s 58 of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) and $1,718,000 of administrative funding under Part 6A of that Act. The amount of election funding was thus insufficient to repay election expenses, even when combined with donations.

253. If the ETU Loan were commercial, it might have been that by failing to undertake any of the four things identified above, Bernard Riordan contravened s 285 of the Fair Work (Registered Organisations) Act 2009 (Cth) and may have breached his general law duty to act with due care and diligence.

The asserted urgency of the ETU Loan

254. It is worth pausing to consider the following question. Why was Bernard Riordan prepared to enter into the ETU Loan Agreement and advance the Loan monies without obtaining State Council approval and without engaging in the process of due diligence which a commercial lender would ordinarily require? Part of the explanation is the urgency with which the ALP NSW required the money. That urgency was

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374 It is apparent from the 2012 accounts that $6,975 of funding under s 58 was revenue that had not been received as at 30 June 2011. Note 6 to the 2012 accounts indicates that an amount of about $21,000 less than $6,975,000 was received at some point in the 2012 financial year.
intensified by the impending closure of the ETU NSW’s offices on 23 December 2010 for the Christmas break. However, the appropriate response to Sam Dastyari’s request for the ETU Loan, if the necessary approvals and due diligence could not be completed in time, was to refuse the request.

255. The asserted need for the ETU Loan to be made prior to 31 December 2010 was described by Bernard Riordan in his email to Steve Butler of 11 August 2012 as one ‘to overcome an issue with the new political donation laws’. In oral evidence Bernard Riordan said his understanding was based on what Sam Dastyari and Christopher Minns told him on 20 December 2010. His understanding was that the ALP NSW ‘had to report a quantum of money to the [electoral] authority as of 31 December’. This explanation does not sit well with the words ‘overcome an issue’.

256. There is more than a real possibility that the ALP NSW believed that there might be a difficulty with the three union loans, if made after 31 December 2010, because of changes to the Election Funding and Disclosures Act 1981 (NSW) due to come into force on 1 January 2011. Both Sam Dastyari and Christopher Minns were invited to put on statements addressing this issue, among others. Christopher Minns put on no statement. Sam Dastyari’s statement did not address this topic.

375 Riordan MFI-4, 4/5/15.
376 Bernard Riordan, 4/5/15, T:547.4-5.
377 The request to Christopher Minns appears as Annexure JT-1 to the witness statement of Jayne Treherne, 5/6/15. The terms of the request to Sam Dastyari were relevantly the same, and in particular he, like Christopher Minns, was invited to address topic 3.
257. The *Election Funding and Disclosures Act* 1981 (NSW) at all relevant times contained a regime that required disclosure of donations and other payments made to political parties during each financial year. The Act required, at all material times, disclosure of ‘reportable political donations’. The concept of a ‘political donation’ was defined in s 85 to include a range of transactions. A ‘reportable’ political donation was a ‘political donation’ over $1,000: see s 86. Sections 92(6) and 96G required loans to political parties which, had they been gifts, would have been ‘reportable political donations’ to be disclosed as reportable political donations. The Act required disclosures to be made of ‘reportable political donations’ by ‘major political donors’. A ‘major political donor’ was defined in s 84 to mean ‘an entity or other person (not being a party, elected member, group or candidate) who makes a reportable political donation of or exceeding $1,000’. By s 88(2) major political donors were required to disclose reportable political donations of $1,000 or more. Sections 91 and 92 set out when and how such disclosures were to be made.

258. The Act was amended in a number of important ways by the *Election Funding and Disclosures Amendment Act* 2010 (NSW). It received royal assent on 16 November 2010 and commenced on 1 January 2011. Perhaps the most significant amendment was the introduction of caps on political donations. Division 2A contained a regime which prohibited political parties from accepting donations of more than $5,000. For the purposes of ascertaining whether the cap had been exceeded, multiple donations of less than that amount from the same person were aggregated: see s 95A(2).
Another of the amendments was the insertion of subsection (3B) into the definition of ‘political donation’ in s 85. Section 85(1)(a) provided that a ‘political donation’ included a ‘gift made to or for the benefit of a party’. Subsection (3B) provided:

Uncharged interest on a loan to an entity or other person is taken to be a gift to the person for the purposes of this section. Uncharged interest is the additional amount that would have been payable by the person if:

(a) the loan had been made on terms requiring the payment of interest at the generally prevailing interest rate for a loan of that kind, and

(b) any interest payable had not been waived, and

(c) any interest payments were not capitalised

The effect of the introduction of s 85(3B) was thus twofold. First, both the political party and the donor\textsuperscript{378} were required to disclose as a reportable political donation the benefit received by the party by virtue of the making of an uncommercial loan. The quantum of the benefit required to be disclosed was the difference between what would have been payable had ‘the generally prevailing interest rate’ been payable and what in fact was paid. Secondly, the effect of s 85(3B), when combined with the cap on donations, was that political parties were simply not permitted to pay a lender less than ‘the generally prevailing interest rate’ if the difference between that rate and the rate actually charged resulted in the cap on donations being exceeded.

It is therefore likely that it was a concern about the operation of this new provision which lay behind the ALP NSW’s desire to obtain loans from the three unions prior to 31 December 2010. That concern may

\textsuperscript{378} If the amount in question was more than $1,000.
have been what Mark Lennon was referring to in his oral evidence when he said that the Unions NSW Loan had to be made prior to that date. That concern would have had some foundation. The evidence suggests that the ETU Loan may not have been a loan requiring the payment of interest at the generally prevailing interest rate for a loan of that kind.

262. It may also be that a concern about s 85(3B), or a general understanding of it, at least subconsciously influenced various witnesses to call the ETU Loan ‘commercial’. The less commercial it was, the more it might have been seen as a donation.

263. It is unnecessary to make findings about whether, if the ETU Loan had been made after 31 December 2010, it would have involved ‘uncharged interest’ which would have amounted to a political donation. The point for present purposes is that, whatever the reason for urgency, it was solely in the interests of the ALP NSW for the ETU Loan to be made on such an urgent basis.

Non-commercial character of the ETU loan

264. Many members of the Executive are still prepared to defend the ETU Loan. So is the ETU. An example of this is a press release issued by the Union, and approved by Steve Butler, on 27 April 2015, the first day of


380 There is also a question, which need not be pursued, as to whether the amendments apply to loans made before 31 December 2010 if the payments of interest occur (or would have occurred) after 1 January 2011: Election Funding and Disclosures Act 1981 (NSW), s 95B(7) and the terms of s 85(3B) itself.
the hearings directed to this case study. The press release described the ETU Loan on numerous occasions as ‘commercial’ and an ‘investment’. The release refers twice to a total of more than $100,000 interest having been paid on the ETU Loan - seemingly with a view to indicating that it was a good ‘investment’. This sort of sentiment was echoed in the oral evidence of a number of the other members of the Executive who gave evidence: James Macfadyen, for example, said he thought ‘the loan was a good idea as it was commercial in nature and the 8% interest rate was very good’.

265. The ETU also submitted that counsel assisting’s criticisms of the ETU Loan ignored the fact that the relationship between the ALP NSW and the ETU is not akin to the relationship between a commercial lender and a customer. It submitted that the financial support of the ALP NSW by unions was common. It submitted that the ALP NSW was the political arm of a cause and the union movement industrial arm. It submitted that it was wrong to assess the prospects of repayment by the ALP NSW in the way a bank might assess those of an applicant for a loan. It submitted that the ALP NSW would not simply refuse to pay and invite the ETU to sue. Hence it was not wrong for the interest rate to involve a concessional element.

266. It may be accepted that it is generally true that ETU NSW is part of the industrial arm of a broader movement. The industrial arm can seek to

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383 Submissions for the ETU and Named Individuals, 10/7/15, paras 27-31.
aid the political arm. Of course there has been the odd brawl. Thus it is notorious that in 1997 Bernard Riordan led both the community campaign and the internal political campaign against the Carr Labor government’s proposal to privatise parts of the electricity industry. It is notorious that these campaigns resulted in the Premier and Treasurer being defeated on the floor of the ALP NSW Conference. It is notorious that in 2001 Bernard Riordan proposed that Unions NSW should establish a picket around the Parliament of New South Wales in response to the changes to the workers’ compensation system being proposed by the Labor government. In 2008, Bernard Riordan played a significant role in opposing the Labor government’s plan to privatise electricity assets. Perhaps it was for that kind of reason that in 2010 Kristina Keneally, Premier of New South Wales, procured the departure of Bernard Riordan from the Presidency of the ALP NSW.384

But in relation to the ETU’s argument, it may be said that it was certainly within power for the ETU to make a gift to the ALP NSW. Hence the $150,000 Donation was within power. But no-one has ever said that the ETU Loan was a gift. No-one has ever attempted to defend it as a gift. The attempts to defend it operate under the labels ‘commercial transaction’ and ‘good investment’. By the standards applicable to what is usually done under those labels, it was actually extremely reckless. Whether it should be judged by other, non-commercial, standards is considered below.385 But the ETU Loan cannot be convincingly defended if it is treated as ‘commercial’ or as an ‘investment’.

385 See paras 267-272.
In truth there was nothing ‘commercial’ about the ETU Loan. Some unions could be described as ‘trading corporations’. But neither nor the ALP NSW nor the ETU were commercial entities. No thought was given to the identity of the borrower. No thought was given to the need to obtain real or personal security. The terms of the ETU Loan were not the subject of any negotiation. The interest rates charged were beneath what a commercial lender would have charged on an unsecured loan of this nature. The claim that the rate of 8.5% was a good one because it was greater than what the ETU earned on its term deposits is not convincing. Finally, it was not ‘commercial’ because though the borrower committed major breaches of its terms, they were allowed to pass without fuss. In the end the ETU NSW was repaid. In the end the ETU NSW obtained more interest. But the ETU Loan would not have been an attractive part of any aspiring financier’s curriculum vitae. It will not be recorded in the precedent books at the Harvard Business School.

Counsel assisting submitted that the non-commercial nature of the ETU Loan, the Unions NSW Loan and the TWU Loan was critical to the financial survival of the ALP NSW. The auditors of both the 2011 and 2012 accounts expressed the view that there was a material uncertainty about the ability of the ALP NSW to continue as a going concern. The accounts for the financial year ending 30 June 2011 recorded an income deficit of $3,502,000 and a net deficiency of assets of $2,600,000. Note 1(p) states that management of the ALP NSW considered that the risk of the Party not being able to continue as a
going concern was low because they expected that the ETU NSW, TWU and Unions NSW would not demand repayment of the loans if that would result in the Party not being able to continue as a going concern. The accounts postdate the entry into the ETU Loan, but the broad factual position they record does not. On the other hand, the ETU submitted that to analyse ‘the prospects of the survival of the ALP NSW by reference to its short term cash position has an air of unreality’ and that ‘on any serious view, the prospect that the ALP NSW would fail is approximately zero’. It is not necessary to decide this controversy.

Conclusion

269. Does Bernard Riordan’s failure to undertake any of the four precautionary measures identified above mean that he may have breached his duty to act with due diligence and care arising either under the general law or from the standards with which a trade union official should comply? If the ETU Loan is viewed as a commercial loan, as he and other defenders of it attempted to, it was arguably grossly improvident. It is not, however, necessary to analyse the evidence on that issue further. That is because in truth, to the former President of the ALP NSW and the Secretary of one of the most powerful unions in the State, which was affiliated to the ALP NSW, it was not a commercial loan. Indeed, in objective reality it was not a

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390 Submission of the ETU, 10/7/15, para 32, footnote 23.
391 See paras 245-253.
commercial loan. It was a form of assistance to one arm of a large movement given by another. Left was answering the call of left across the great divide. It would not matter if the ALP NSW made late payments. As Bernard Riordan saw it, the ALP NSW would probably pay in the end. Public funding would be available in due course. He thought it could exceed what the ALP NSW was borrowing from the unions.392 He thought the ETU Loan could be repaid without any need to sue the ALP NSW.393 The ALP NSW had repaid debts in the past by borrowing or raising funds.394 As a matter of fact Bernard Riordan was probably correct to have faith in the ALP NSW’s capacity to repay the ETU Loan. For while a trading corporation which becomes insolvent and ceases to be supported by banks and other lenders cannot readily raise funds from any other source, the ALP NSW had a practical power which a trading corporation does not have – the power to raise funds from its members and supporters. That is a trait it shares with many other social institutions not primarily orientated towards making profits.

270. The issue of whether the ETU NSW would demand payment and of the financial weakness or otherwise of the ALP NSW is germane to the non-commercial nature of the ETU Loan. The unlikelihood of repayment being demanded illustrates the non-commercial nature of the ETU Loan. The fact that the ETU Loan might be a breach of duty if it were a commercial loan does not mean it was a breach of duty in view of the identity, background and relationship to the ETU NSW of the borrower.

393 Bernard Riordan, 4/5/15, T:562.31-38, 567.37-568.6, 581.43-582.20.
271. The duty of Bernard Riordan was bona fide to advance the interests of the ETU NSW. But the interests of the ETU NSW in relation to the cry for help from the ALP NSW were not limited to what might be called ‘material interests’. They included the more intangible interests of the ALP NSW. Many of the objects in rule 3 included objects which both the ALP NSW and the ETU NSW would see the ALP NSW as advancing. Hence not only was the ETU Loan within power, but its non-commercial aspects did not place Bernard Riordan in breach of his duty.

272. It must be noted, though, that even non-commercial loans cannot safely be extended without the exercise of some diligence and care by trade union officials. In different circumstances from those attending the ETU Loan, there might be a breach of the duty of diligence and care. But in the circumstances which did attend the ETU Loan, Bernard Riordan did not breach his duty.

273. What of Bernard Riordan’s error in the construction of complex and difficult rules? That was an understandable error. It probably could not be described as an error of judgment, let alone a breach of duty.

The fate of Paul Sinclair

274. The evidence given by Paul Sinclair in connection with his notes of the meeting of the Executive of 20 December 2010 and the meeting of the State Council of 21 February 2011 was discussed above. That evidence was given on 27 April 2015. It is convenient here to deal with a further issue that arose when he was giving evidence on a

395 See paras 109-111.
different topic on 5 June 2015. His evidence concerned the ETU Officers’ Fund. The ETU Officers’ Fund, broadly, was a fund to which contributions were made by officers of the ETU. It was used for the purposes of funding the campaigns of contributors if they ran for office in union elections.

275. He ceased to be a member of the Officers’ Fund three days earlier (that is, on Tuesday 2 June 2015). He had been a member of the Fund for 25 years.

276. No reasons were given to him for the decision terminating his membership. Nor was any compensation. When asked whether he had discussions with anyone informally about that, he gave the following evidence:\textsuperscript{396}

A. I’m very lonely these days
Q. What do you mean "these days"?
A. No-one talks to me.
Q. Since when?
A. Well, basically, some of them I would say since I was last here; others since Tuesday.
Q. Here in the Commission?
A. In the Commission, yes.
Q. So has your reception around the office or your dealings with people around the office changed since you gave evidence before the Commission?
A. Significantly.

\textsuperscript{396} Paul Sinclair, 5/6/15, T:855.30-856.24.
Q. In what respect?
A. They don't - *I no longer get allocated any work. I don't get communicated. No-one talks to me - or rarely talks to me.*

Q. Has that been a *dramatic change* - before you gave evidence and after you gave evidence?
A. *Most definitely.*

Q. When you say you're not being allocated work, what do you mean by that?
A. Well, the responsibilities I had before I was invited, or, well, before I was called to this hearing was that I had my responsibilities as the Assistant Secretary in regards to the day-to-day operations, running of the office, the likes of that. I don't get involved or I'm not involved in any of those decision-making processes now. *I effectively sit in my office.*

Q. Has that been the case since you gave evidence to this Commission on 27 April 2015?
A. *Yes.*

Q. Was the change *sudden*?
A. *Yes.*

(emphasis added)

277. He went on to say that, as a result of a decision of Steve Butler about three weeks prior to the day on which he was giving evidence, 5 June 2013 (that is, after he initially gave evidence on 27 April 2015 regarding the ETU Loan), he was no longer required to attend Executive meetings or take minutes.³⁹⁷

³⁹⁷ Paul Sinclair, 5/6/15, T:856.42-46; 857.43-858.11.
278. He said that it was probably a fair summation of matters to say that he was being 'frozen out'.

279. Paul Sinclair’s demeanour in giving evidence in 2014 and on 27 April 2015 was solemn and serious. On 5 June 2015 he seemed melancholy and depressed.

280. The cross-examination by counsel for the ETU NSW on this aspect of Paul Sinclair’s evidence developed a fairly high temperature. Its main parts, and its aftermath, were as follows:

Q. Can I now turn to a subject about which you gave evidence in the course of answering some questions of Mr Stoljar this morning and, in particular, some of [the] things you said about what happened, I think you said, on Tuesday of this week – there was a Caucus meeting; is that right?

A. There was.

Q. Is this the position, that at that Caucus meeting, do I understand it correctly, there was a call for nominations for various positions and you stood for the position of Assistant Secretary?

A. That’s correct.

Q. That then went to a vote and you lost that vote?

A. You could call it a loss, yes.

Q. There were some votes in your favour and a greater number of votes against your nomination?

A. That’s correct. You must have been at the Caucus meeting.

Q. I’m just trying to recall --

A. I know Caucus doesn’t leak, so you must have been there.

Q. I’m just trying to understand the evidence you were giving earlier when Mr Stoljar was there. That is the case, is it not, that at the previous equivalent meeting that occurred prior to the last elections, at that time you stood against Mr Butler, both of you seeking the Caucus nomination for the position of Secretary?

A. When?

Q. You and the rest of the current officeholders were elected in 2011?

A. Correct.

...

Q. Can I just clarify, at the point that Mr Riordan stood down as Secretary, there was then a Caucus meeting, the purpose of which was to pre-select a candidate who would stand from the Caucus for the position of Secretary to replace Mr Riordan?

A. That’s the practice, yes.

Q. And there was such a meeting that occurred at which time you and Mr Butler both stood inside the Caucus meeting seeking the nomination of the Caucus for the position of Secretary?

A. That’s correct.

Q. At that meeting Mr Butler had the numbers, so to speak, and he was selected ahead of you and consequently became the ticket nomination for the position of Secretary?

A. That’s correct.

Q. Since that time you have, do you accept, continued to politically oppose him internally within the Union?

A. Totally incorrect.

Q. Wouldn’t you say this is fair to say, that you have opposed him for the last four years internally within the Union?

A. The last four years? He has only been there since 2012. Are you saying that I opposed him before he became Secretary?

Q. Since the time he has become Secretary, you have --

A. Done nothing but support him.
Q. --- opposed him internally within the Union, have you not?

A. Have done nothing but support him, correct.

Q. Would you accept this proposition, that there needs to be between the Secretary and the Assistant Secretary a high degree of trust?

A. I agree, and I have that level of trust, yes.

Q. And you accept, do you not, that there is always a risk, for any member of the Caucus, before every election, that they might lose the confidence of a majority of the Caucus and so lose their nomination?

A. Incorrect.

Q. Isn’t this the position: if you had had the numbers on Tuesday, you would have been seeking to oust Mr Butler from the position of Secretary?

A. Totally incorrect. Whatever your source of information is, it’s not very reliable. If you recall, in two-thousand-and --

Q. Mr Sinclair --

A. Wait a minute, I’m just answering your question, which is –

Q. No, you’re not answering my question, Mr Sinclair. You are not. You’re now making a speech?

A. You’re --

Q. Mr Sinclair, you’re not answering my question.

A. Mr Taylor, you’re making assertions that the relationship between myself and Mr Butler is not a cordial relationship. As far as I’m concerned it is. I have worked with him, I have assisted him everywhere I can, even down to his periods of ill health in 2014 when I stepped up to the mark and filled in for him. He asked me if he could take a package; he asked me to be regressed. I told him he had to get himself well before we talked about any of that and when he was well he would return to his position.

If I had an interest in taking over the Secretary of the Union, that was a perfect opportunity, but it never occurred.

Now, for you to stand there and put to me that this relationship is tainted, I reject it totally.
Q. If you don’t politically oppose Mr Butler and wish him well, is there any particular reason why you thought it was necessary to then put on the public record, not responsive to a question, information about his health and conversations that he had with you at that time?

A. That was personal and private between myself and Mr Butler.

…

Q. … The question is: do you accept the proposition that when you gave that lengthy answer a moment ago, in which you revealed material which you, yourself, say was private and confidential between you and Mr Butler, that you were doing so out of a feeling of animus, unhappiness that reflects your attitude generally towards Mr Butler?

A. Totally not.

281. Senior counsel for Steve Butler then said:

Commissioner they are the questions I have at this stage. There are some matters that Mr Sinclair said, in particular – if I talk about a general subject matter, the matters that I’ve cross-examined Mr Sinclair about last – about which we weren’t aware would be a matter of evidence and for which [my instructing solicitor] is not in a position to give me any instructions.

It may be, in those circumstances, that we need to make an application to take further steps by way of evidence, including asking Mr Sinclair some further questions in light of those instructions, but at this stage, that’s all the questions I have.

282. Just before the sittings that day concluded, senior counsel for the ETU NSW requested and was given a direction that his clients file any further evidence (inter alia, evidence concerning Paul Sinclair’s evidence set out above) on or before 12 June 2015. The question of further evidence thereafter and cross-examination on the further
evidence was left open. But no further evidence was filed. Paul Sinclair’s evidence stands uncontradicted. Indeed to a large extent there was no cross-examination on it even on 5 June 2015.

283. Paul Sinclair’s evidence, uncontradicted as it is, should be accepted. Paul Sinclair has, after 25 years as an officer and 28 years with the union, been 'frozen out' because he gave evidence at this Commission which was perceived to be adverse to the ETU NSW. He is the victim of an angry silence. That, obviously, is a highly unsatisfactory state of affairs. Unlike Russell Wilson, he himself never made any complaint about the ETU Loan. He, like every other ETU official who gave evidence, appeared in response to a summons issued by the Commission, not voluntarily. It was never suggested by any of the counsel examining him that he was not attempting in giving his evidence to be truthful. Paul Sinclair’s evidence in some respects was not greatly different from evidence given by other officials, for example Neville Betts\(^{401}\) and Allan Reid.\(^{402}\) Nonetheless, counsel for the ETU NSW (who also represented Neville Betts and Allan Reid) cross-examined Paul Sinclair to the effect that he had made a mistake in not recording a discussion about the ETU Loan in the minutes.

284. In the above circumstances, that Paul Sinclair should have been treated in the shabby, despicable way he described is lamentable. The ETU proffered some self-congratulatory submissions about how since December 2010 its financial management had been overhauled with

\(^{400}\) Paul Sinclair, 5/6/15, T:926.10-927.12.

\(^{401}\) See para 164.

\(^{402}\) See para 170.
the aid of KPMG and union governance training had been given. Perhaps so. The benefits of these processes do not seem to have secured basic human courtesies between ETU NSW officials. The life of a trade union official who steps out of line can be hard.

285. Counsel for Paul Sinclair went further. He referred to s 6M of the Royal Commissions Act 1902 (Cth). It provides:

> Any person who uses, causes or inflicts, any violence, punishment, damage, loss, or disadvantage to any person for or on account of:
> (a) the person having appeared as a witness before any Royal Commission; or
> (b) any evidence given by him or her before any Royal Commission; or
> (c) the person having produced a document or thing pursuant to a summons, requirement or notice under section 2;

is guilty of an indictable offence.

286. He also referred to s 6N of the same Act. It provides:

> (1) Any employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee having:
> (a) appeared as a witness before a Royal Commission; or
> (b) given evidence before a Royal Commission; or
> (c) produced a document or thing pursuant to a summons, requirement or notice under section 2;

is guilty of an indictable offence.

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403 Submissions for the ETU, 10/7/15, para 8.
404 The treatment of whistleblowers is dealt with in Chapter 2 of Vol 5 of this Report.
Penalty: $1,000, or imprisonment for 1 year.

(2) Subsection (1) does not apply if the employee was dismissed or prejudiced in his or her employment for some reason other than the reasons mentioned in subsection (1).

287. Counsel for Paul Sinclair submitted that there was a prima facie case against various senior persons at the ETU NSW that they had contravened those sections. He submitted that the papers should be referred to the Commonwealth Director of Public Prosecutions for consideration of whether those persons should be charged.

288. It is likely to be very true that ss 6M and 6N, and the equivalent general law rules in relation to contempt of court in litigation, are probably breached with a frequency which is scandalous. Anything which could assist their more effective enforcement should be encouraged.

289. Counsel for the ETU, and more particularly for various officials, including Steve Butler, opposed Paul Sinclair’s submission on various grounds. Some of those grounds are weaker than others. Rather than evaluate them all, it is sufficient to concentrate on one. But for one exception, Paul Sinclair did not name the persons responsible for his treatment. The exception is Steve Butler. However, it is quite unclear whether Steve Butler indicated that Paul Sinclair should no longer attend Executive meetings or take minutes on grounds falling within s 6M or s 6N, or on some other grounds. If police officers can by their own investigations clarify what those grounds were, and who the other persons responsible for the maltreatment of Paul Sinclair may have been, prosecution is a question which should be considered. But the
state of Paul Sinclair’s evidence as it stands, even though it was not
callenged or contradicted, makes it premature to accede to his
counsel’s application.

**New Law investigation: Terms of Reference**

290. In 2012, Robert Whyburn conducted what may be called the New Law
investigation into how the ETU Loan came to be made. Senior counsel
for Robert Whyburn submitted, both orally during the hearing and in
writing after it, ‘that questions or evaluative judgments as to what
[Robert Whyburn] should or should not have done … – as distinct
from the facts as to what he actually did – are outside the
Commission’s Terms of Reference’.\(^\text{405}\) He submitted that those
questions could be raised and judgments made about an ‘officer of an
employee association’. But Robert Whyburn was not in that category.

291. The case study concerning the ETU Loan concerns a chain of events
beginning in December 2010 and concluding with the maltreatment of
Paul Sinclair after his testimony before 5 June 2015. How did the ETU
Loan come to be made? Did it comply with the rules? Even if it did,
were appropriate criteria of decision-making employed? What was the
ETU NSW’s response to internal complaints about it? How did it
come about that one person who was totally innocent of wrongdoing,
Paul Sinclair, was victimised and sent to Coventry for his role in giving
truthful answers to questions under legal compulsion? It must be
remembered that the ETU submissions in particular placed great stress
on its virtuous response to the fallout from the ETU Loan affair. In

\(^{405}\) Robert Whyburn, 6/5/15, T:797.23-799.42; Submissions of Robert Whyburn, 10/7/15,
para 2.
part that self-praise is merited. In part it is not. The ETU’s employment of a solicitor from a corporate firm half owned by it as part of its response to the fallout is within the Terms of Reference. So is its employment of KPMG to conduct a (not entirely favourable) review of what the solicitor did. The ETU’s submissions did not abstain from raising questions about Paul Sinclair, nor from making evaluative judgments about his competence as a minute-taker.\textsuperscript{406} The submissions advanced by counsel for Bernard Riordan went even further in these respects.\textsuperscript{407} It is true that Robert Whyburn operated nearer the margin of the ETU Loan affair and its aftermath than quite a few others. But the Terms of Reference do include inquiries into the governance of employee associations. Part of the governance of the ETU involved enlisting Robert Whyburn’s services. An examination of what he was asked to do and what he did is reasonably incidental to the ETU Loan affair. In general it may be said that to set out the facts on a topic in a certain order can convey an evaluative judgment about them. That illustrates how very difficult it is to draw a practical distinction between stating the facts about what Robert Whyburn did and stating what evaluative judgments should be made about what he did. That is so particularly because the ETU has endeavoured to use his inquiry as a method of cloaking itself in virtue. Hence the New Law investigation is within the Terms of Reference.

\textsuperscript{406} Submissions for the ETU, 10/7/15, paras 16-20.

\textsuperscript{407} Submissions of Commissioner Riordan, 13/7/15, para 47.
New Law investigation: the background

292. Bernard Riordan was appointed to the Fair Work Commission on 24 February 2012.\textsuperscript{408} Steve Butler then became secretary of the ETU NSW. Steve Butler, up until that time, had not been a member of the Executive. He was present at the State Council meeting of 23 February 2011. His evidence was that he could not with any confidence recall any discussion of the ETU Loan at the meeting.\textsuperscript{409} That must also have been the case in 2012, when he commenced investigating the ETU Loan. That is because he does not appear to have told Robert Whyburn, during the course of this investigation, that he recalled the ETU Loan being discussed or approved on 23 February 2011.

293. Russell Wilson was an ETU NSW organiser. Russell Wilson appears to have become aware of the ETU Loan in February 2012.\textsuperscript{410} In August 2012, he complained to Steve Butler that the ETU Loan had been made without proper approval. Russell Wilson’s complaint prompted Steve Butler, at some point in August 2012, to seek legal advice about the ETU Loan. He went to Robert Whyburn of New Law. New Law was a corporate law firm established in about June 2011 as a joint venture between the ETU NSW and the NSW Nurses and Midwives Association. It was funded by those entities in equal shares. Bernard Riordan and Paul Sinclair were the founding directors of New Law. Bernard Riordan ceased being a director on 12 March

\textsuperscript{408} See para 383.

\textsuperscript{409} Steve Butler, witness statement, 30/4/15, para 17.

\textsuperscript{410} Russell Wilson, witness statement, 27/4/15, para 5.
2012. Steve Butler was a director at the time of the New Law investigation.411

294. The document containing Steve Butler’s instructions to Robert Whyburn is undated.412 The document does not begin by instructing Robert Whyburn to investigate whether Bernard Riordan ever sought approval for the ETU Loan. Rather it begins by stating: ‘At some time in late 2010 BR raised the issue of a 500k loan/investment to the ALP with the ETU executive’. That was one of the matters to be investigated. It was not a matter to be treated as an axiomatic assumption prefatory to the matters to be investigated. The document does not in terms pose a question for Robert Whyburn to answer. But implicitly it asks for Robert Whyburn’s advice on Russell Wilson’s complaint. That complaint is described as being whether Bernard Riordan breached the rules in relation to making the ETU Loan by not seeking an endorsement from State Council. The document goes on to state that, although there is no record of the transaction in the minutes, ‘members of the executive are very clear and adamant that the discussion did place at the executive at the very least and possibly at the State Council meeting’. The comment made about the statement quoted earlier in this paragraph applies to this statement too.

295. Robert Whyburn gave initial advice to Steve Butler by email on 27 August 2012.413 That email sets out, under the heading ‘FACTS’, that Robert Whyburn was ‘instructed that members of the Executive who were at the meeting in December 2010 clearly recall the matter

412 Whyburn MFI-1, 6/5/15, p 1.
being discussed and approved at Executive and possibly at the subsequent Council meeting’. The email then expresses the view that ‘the matter of a loan is one for the Executive’ because it was not ‘expenditure’ and therefore not subject to rule 32(d).

296. On or about 3 September Robert Whyburn spoke to or received emails from a number of members of the Executive about the ETU Loan. On the same day Robert Whyburn reported to Steve Butler. He stated that he adhered to his original advice.\(^{414}\) That email recorded that Paul Sinclair’s recollection was ‘clearly’ that the matter was not raised at either the Executive or Council. Robert Whyburn did not explain why he discounted Paul Sinclair’s recollection. But it would appear that he took the view that, because the majority of persons he spoke to were present at the meetings said the matter was discussed, Paul Sinclair’s account must have been incorrect. If so, he operated under a fallacy. It is a fallacy shared by various represented persons in their written submissions. The fallacy is to concentrate on the quantity of evidence, not its quality. Elections and resolutions turn on majorities. But accurate factual decisions do not involve a process of counting heads. For them the best technique is not counting, but weighing.

297. Robert Whyburn provided a further advice, on 8 October 2012, on New Law letterhead.\(^{415}\) That letter repeated the substance of his emails of 3 September and 27 August 2012.

298. In April 2013 Steve Butler asked KPMG to review Robert Whyburn’s report of 8 October 2012, discuss with Robert Whyburn that report and

\(^{414}\) Whyburn MFI-1, 6/5/15, p 30.

\(^{415}\) Sinclair MFI-2, 27/4/15, pp 236-240.
his investigation, and provide the ETU NSW with a written view on the investigation.416 KPMG reported back to Steve Butler by letter dated 18 July 2013.417 That KPMG report did not deal with the substance of the matters investigated by Robert Whyburn. Nor did it express any views on the conclusions reached by Robert Whyburn. What it did do was to conclude, first, that there was an appearance of a lack of independence on the part of New Law and Robert Whyburn. Secondly, the KPMG report concluded that, on balance, while there were additional investigative procedures Robert Whyburn could have conducted, he appeared to have made relevant enquiries in relation to the complaint.418 In short, it examined the way Robert Whyburn had proceeded on his journey. It did not purport to examine the merits of the destination he had reached.

299. Steve Butler’s investigations appear to have ceased at that point. On 24 July 2013, it will be recalled, the ALP NSW made the last of the repayments of principal and interest on the ETU Loan. It seemed to have receded into the oblivion of history.

New Law investigation: some difficulties

300. Among the difficulties which attended the New Law investigation are the following.

301. First, as KPMG observed, the inquiry can hardly be described as having the appearance of independence. New Law was half owned by the ETU NSW. Robert Whyburn had a very close friendship with Bernard Riordan. It appears that New Law did not bill the ETU NSW for the time Robert Whyburn spent on the inquiry. In an email to KPMG, Robert Whyburn sought to justify this on the following basis: ‘But they do pay for the work in the sense that I am an employee and there is no return to them as an owner for the work that I got paid via my salary to provide’. That emphasises New Law’s lack of independence.

302. Robert Whyburn gave evidence that employed solicitors are often given the task of conducting an ‘impartial’ investigation of complaints about the affairs of the organisations which employ them. He submitted that there is nothing ‘improper’ about that. He submitted that since New Law was only partly owned by the ETU NSW, he was more independent than any employed solicitor would have been. And he pointed to his own evidence that his friendship with Bernard Riordan did not cause him to doubt his ability to conduct an impartial inquiry.

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419 Robert Whyburn, 6/5/15, T:796.24-42.
420 Sinclair MFI-2, 27/5/15, p 250.
421 Sinclair MFI-2, 27/5/15, p 250.
These submissions missed the point made by counsel assisting. Counsel assisting were not contending that the investigation lacked independence. They were contending that it lacked the appearance of independence. There may be nothing actually ‘improper’ in investigations conducted by in-house solicitors or solicitors in firms part owned by a client, or solicitors who are friendly with a client. But there is nothing apparently independent about them either.

303. The above lack of apparent independence was reinforced by the instructions given by Steve Butler to Robert Whyburn. They proceeded on two assumptions. One was that in late 2010 Bernard Riordan raised the issue of the ETU Loan with the Executive. The other was that the Executive approved the ETU Loan: ‘members of the executive are very clear and adamant that the discussion did take place at the executive at the very least and possibly at the State Council meeting’. How and when Steve Butler came to give those instructions is not apparent. Robert Whyburn submitted that it is perfectly common for solicitors to be asked to advise clients on the basis of assumed facts. Steve Butler’s instructions may have ‘confined, at least initially, the extent of the inquiries Mr Whyburn had to make in order to provide the advice requested’, but this cast no doubt on his independence. This submission too misses the point. Steve Butler had asked Robert Whyburn to assume the truth of propositions into the truth of which he ought to have been inquiring.

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424 Whyburn MFI-1, 6/5/15, p 1.
425 Submissions of Robert Whyburn, 10/7/15, para 5.
without being fettered by any assumptions. That is no way to set up an apparently independent inquiry. Solicitors are often asked to assume facts before advising on a controversial point – but not when the facts assumed are themselves not only controversial but at the centre of the controversy on which the advice is requested.

304. Secondly, Robert Whyburn in oral evidence said that he came to the view that State Council approval for the ETU Loan was obtained on 20 December 2010. On no view could that be correct. The minutes of the State Council meeting of that day indicate that the meeting did not proceed because of a lack of quorum. No witness said that State Council approval was obtained on 20 December 2010. Nor did Robert Whyburn ever make reference to such approval in his advices to Steve Butler. Counsel assisting submitted that it is not apparent how Robert Whyburn could have come to this view. Senior counsel for Robert Whyburn submitted that his journey to that view was both readily apparent and defensible. He set out that journey as follows.

305. On 27 August 2012, the then President of the ETU NSW, James Macfadyen, sent Robert Whyburn an email saying that the Executive and the State Council had approved (or, in the case of the State Council, not objected to), the ETU Loan at their meetings on or about 14 December 2010. As set out in his email to Steve Butler of 3 September 2012, by that date Robert Whyburn had spoken to all 11 members of the Executive whose names had been given to him. All but two of the 11 clearly recalled that the ETU Loan had been

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426 Robert Whyburn, 6/5/15, T:806.43.
approved in late 2010, with the vast majority nominating the December meeting. All but two of the 11 had a clear recollection of the ETU Loan being raised at the Executive meeting. The two who did not have that recollection recalled it being raised at the State Council meeting. All but three recalled a vote to approve the ETU Loan being taken at the Executive meeting. All but one of the 11 recalled the ETU Loan being raised at the State Council meeting, and all but three recalled a vote to approve it being passed at that meeting. Robert Whyburn assumed that James Macfadyen’s reference to a meeting of the Executive and State Council on or about 14 December 2010 was a reference to the meetings of 20 December 2010.

306. It is only possible to characterise what Robert Whyburn termed as ‘a reasonable basis’ for the view that State Council approved the ETU Loan on 20 December 2010 if one employs very loose criteria of reason. The inquiry did not apparently give sufficient weight to the minutes of the meetings. Those minutes revealed that there cannot have been State Council approval at a meeting on 20 December, because that meeting did not proceed for want of a quorum. And the minutes of the meeting which did take place, the Executive meeting, minutes which were much-approved in later meetings, reveal that no approval was recorded. In short, Robert Whyburn’s submission is a fair riposte to counsel assisting. How he came to his view is clear. But its very clarity exposes its irrationality.

307. Thirdly, Robert Whyburn’s construction of the rules, which rests on the idea that a large loan is not ‘expenditure’ and that rule 32(d) only applies to ‘expenditure’, has been considered and rejected above.
308. Fourthly, at no point in time did Robert Whyburn deal squarely with the insistence by Paul Sinclair that the ETU Loan was never discussed at the meetings in question. Nor did he deal with the support for that insistence in the minutes. A thorough, impartial investigation ought to have required very cogent material supporting a contrary view. Instead, Robert Whyburn appears to have been content to proceed on the basis that, if a majority of members of the Executive said that the ETU Loan was approved, then it must have been approved. Counsel assisting submitted that that approach is irrational.

309. Senior counsel for Robert Whyburn responded to this criticism by counsel assisting thus:428

Mr Whyburn’s approach was logical. Others might have weighed the material that was before him differently, but there was nothing illogical or irrational in Mr Whyburn believing what he had been told by the majority of persons claiming to have been present at the relevant meetings. To have disbelieved what those members of the Executive told him, Mr Whyburn would have had to form the view that they were all either lying or mistaken. Given the number of members in question, it was reasonable for him not to form that view. (emphasis added)

310. The dichotomy posed in the second last sentence is too stark. As senior counsel for the ETU rightly pointed out in relation to the four and a half year gap from December 2010 to April-May 2015,429 the probability of error arising through mistake is much greater than the probability of error arising from lies. Senior counsel for the ETU’s point holds good even for the shorter interval from December 2010 to September 2012. As was done earlier, it is better to accept the benign

428 Submissions of Robert Whyburn, 10/7/15, para 17.
429 See para 175.
point of view advocated by senior counsel for the ETU. The probability of error arising through mistake is also objectively very high, in view of the inconsistencies, gaps and vagueness of the witnesses’ recollections. The best guide to truth lay in circumstances not resting on human memory – the contemporaneous and much-approved minutes.

311. There is a sixth and related point. Robert Whyburn did not attempt to grapple with some of the obvious inconsistencies and inaccuracies in the accounts given by the majority of those he spoke to on the Executive. Those inconsistencies have been discussed above. Robert Whyburn does not appear to have noticed that Mark Buttigieg, who claimed that the loan was approved by the Executive and Council, was not present at any of the relevant meetings. He does not appear to have been concerned by James Macfadyen’s claim in his email that he had spoken to all of the members of the Executive and had been told that the Loan was approved on or about 14 December 2010.

312. Senior counsel for Robert Whyburn submitted that it was not incumbent on him to investigate the inconsistencies and inaccuracies. For this two reasons were assigned. One was that:

[T]he substantial majority of the accounts Mr Whyburn was given were broadly consistent in their substance, namely that the ETU Loan was approved at a meeting of the Executive followed by a meeting of the State Council. To the extent that there were discrepancies between the accounts, they were as to matters of detail rather than as to the fundamental question of whether the loan had been approved by the relevant organs of the ETU NSW at all.

430 Submissions of Robert Whyburn, 10/7/15, para 19.
But the accounts were not appropriately weighed against the contemporaneous and much-approved minutes of ‘the relevant organs of the ETU NSW’. The other factor assigned as making it reasonable for Robert Whyburn not to investigate further was that the investigation was triggered by Russell Wilson’s complaint that Bernard Riordan had not complied with the rules; that Bernard Riordan was no longer a member of the ETU NSW, and that therefore no action could be taken against him whatever the outcome.\textsuperscript{431} This proves too much. It is an argument for not having an inquiry at all. In any event it is not a good argument. If Bernard Riordan had not complied with the rules, no-one else had either.

313. On the one hand, senior counsel for Robert Whyburn contended that evaluative judgments were to be avoided, as being outside the Terms of Reference. On the other hand, he concluded that if conclusions were to be reached, it should be concluded that he ‘fairly and competently investigated and advised the ETU NSW on Mr Wilson’s complaint.’\textsuperscript{432} The first contention was rejected above, but it is accepted that as far as possible unnecessary evaluative judgments should be avoided. The second submission must be accepted in part and rejected in part. Robert Whyburn acted fairly. He acted in good faith. There is nothing to suggest that he consciously acted without independence. Nor, given the time constraints and conditions under which he was operating, can it be said that he acted incompetently. But the ETU NSW did not permit him to have the appearance of independence. He was an executive in a company half owned by the

\textsuperscript{431} Submissions of Robert Whyburn, 10/7/15, para 20.
\textsuperscript{432} Submissions of Robert Whyburn, 10/7/15, para 21.
ETU NSW. He was given as starting assumptions propositions which he should have been investigating. He was given very little time to conduct a proper investigation. He relied on a 27 August 2012 email from the President of the ETU NSW, James Macfadyen, which was completely wrong both in detail and in substance. He gave too little weight to the contemporary records of the ETU NSW’s constitutional organs. While the true construction of the rules is a matter on which minds can reasonably differ, he did operate on a wrong interpretation. The ETU NSW caused him to conduct an unsatisfactory inquiry, despite his own earnest efforts as the inquirer.

314. What about Steve Butler? The better course would have been for him to have briefed an independent law firm to conduct an inquiry, not to have briefed it on the assumption that the Executive approved the ETU Loan, and to have given it more time. But his conduct cannot be said to have breached the duties he owed to the ETU NSW. His behaviour resulted from nothing more sinister than a misunderstanding of how an inquiry should have been carried out.

D – UNIONS NSW LOAN

The other two loans

315. At about the same time the ETU NSW was entering into the ETU Loan, the ALP NSW was entering into two further loans. One, in the amount of $1,000,000, was advanced pursuant to a loan agreement dated 21 December 2010 between the Transport Workers’ Union –
New South Wales (TWU NSW) and the ALP NSW (TWU Loan).\textsuperscript{433} The other, in the amount of $1,500,000, was advanced pursuant to a loan agreement between Unions NSW and the ALP NSW (Unions NSW Loan).\textsuperscript{434} These funds were advanced on 23 December 2010.

**Unions NSW Loan: Terms of Reference**

316. The first submission of Unions NSW was that any inquiry into the Unions NSW Loan was outside the Terms of Reference.\textsuperscript{435} It gave no reasons for the submission. So brief a submission can be dealt with briefly.

317. Unions NSW is a State peak council for employees established under the *Industrial Relations Act 1996* (NSW).\textsuperscript{436} It is an unincorporated association. It is an entity established by unions. Hence it is a ‘related entity’ within the meaning of the Terms of Reference. The conduct of Unions NSW in making the Unions NSW Loan is capable of raising governance concerns within at least paras (a), (f), (g) and (k) of the Terms of Reference.

\textsuperscript{433} Sinclair MFI-2, 27/4/15, pp 381-388.


\textsuperscript{435} Submissions of Unions NSW, 10/7/15, last paragraph.

\textsuperscript{436} *Industrial Relations Act 1996* (NSW), s 215.
Unions NSW Loan: the facts

318. On 2 December 2010 Sam Dastyari sent a request for a loan to Mark Lennon. Mark Lennon was then the Secretary of Unions NSW. In 2014 he became president of the ALP NSW. The request was for a loan of $1,500,000 at an interest rate of 8.5%. Repayments were to be completed by 30 June 2013.

319. On 7 December 2010 Jeff Priestly, the Financial Controller of the Unions NSW, sent a draft loan agreement to Julia Sorbara, a lawyer at Unsworth Legal. In the email to Julia Sorbara, Jeff Priestly asked her to peruse the agreement and ‘let us know your thoughts’. Julia Sorbara provided an advice to Jeff Priestly on 10 December 2010.

320. Julia Sorbara’s advice was comprehensive and careful. She identified a number of difficulties with the agreement. The first difficulty was that the agreement was a loan from one unincorporated entity to another. Julia Sorbara recommended that the parties to the agreement be the Trustees of Unions NSW and that the ALP NSW should advise as to the correct party on its behalf. Julia Sorbara also pointed out that the agreement did not provide for what would happen if the ALP NSW did not make repayments in accordance with the repayment schedule. She recommended an additional clause to deal with that.

439 Lennon MFI-1, 6/5/15, pp 1-3.
In the final paragraph of her advice Julia Sorbara referred to amendments to the *Election Funding and Disclosures Act 1981* (NSW). Julia Sorbara pointed out that one of those amendments would expand the definition of political donation to include uncharged interest on a loan. She said that while there was provision in the proposed loan for the payment of interest it was possible that if it was less than the general and prevailing interest rate for a loan of that kind then the rate of uncharged interest might be deemed to be a political donation. In that case, Unions NSW might have to make a declaration about that in its disclosure statement. Julia Sorbara offered to discuss this in greater detail if it was concerning to Unions NSW.

It is not clear what Jeff Priestly did with Julia Sorbara’s advice. Mark Lennon, meanwhile, had taken the view that the interest rate offered by Sam Dastyari in his letter was, of all things, too favourable. He negotiated with Sam Dastyari to reduce that rate down to 7.8%. Mark Lennon thought the interest rate proposed by Sam Dastyari was too high because it was above the rate that Unions NSW was charged by its bank for a loan facility of $500,000. That facility, however, was secured by real property. Yet Mark Lennon agreed that a commercial lender willing to advance $1,500,000 without security would charge a great deal more than 8.5% interest. With respect, if the Unions NSW Loan was ‘commercial’ in character, Mark Lennon’s view was a bizarre one for a person who owed fiduciary duties and duties of care and diligence to the lenders. The interests of the lenders

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440 Mark Lennon, 6/5/15, T:772.30-773.12.
441 Mark Lennon, 6/5/15, T:772.40-43.
442 Mark Lennon, 6/5/15, T:782.39-44.
would have been helped by a higher rate and only injured by a lower rate. His approach is only defensible if one abandons any idea of defending the transaction as being a commercial one.

323. On 15 December 2010 a special meeting of the Unions NSW Finance Committee was held. Jeff Priestly is noted in the minutes as being on annual leave. The minutes record that Mark Lennon advised the Committee that the ALP NSW requested a $1,500,000 loan to assist with the State Election in March 2011 and that a repayment schedule over 18 months with an interest rate commencing at 7.8% was proposed. A motion to make a loan to the ALP NSW in those terms was moved and approved.\footnote{Sinclair MFI-2, 27/4/15, p 287.}

324. On 21 December 2010, Sam Dastyari, purportedly on behalf of the ALP NSW, executed a loan agreement (the Unions NSW Loan Agreement).\footnote{Sinclair MFI-2, 27/4/15, p 294.} The Unions NSW Loan Agreement was executed by three persons on behalf of Unions NSW. Messrs Cahill and Hayden did so on 21 December 2010. Michael Want did so on 23 December 2010. The execution by these three persons was in accordance with the advice of Julia Sorbara, save that they did not describe themselves as acting in their capacity as trustees of Unions NSW.

325. There were significant delays in the repayment of the Unions NSW Loan. The schedule of repayments in the Unions NSW Loan Agreement required repayment by 30 June 2012.\footnote{Sinclair MFI-2, 27/4/15, p 290.} The first repayment to Unions NSW took place on 27 November 2013. Further
repayments appear to have been made on 28 May 2014, 21 January 2015 and 25 March 2015.447

**Unions NSW Loan: problems**

326. Unions NSW followed proper internal procedures in approving the Unions NSW Loan. However, counsel assisting submitted that the approval had several unsatisfactory features.

327. *First*, the Unions NSW Loan had most of the difficulties identified in connection with the ETU NSW Loan. As with the ETU NSW Loan, there was no attempt to obtain security from the ALP NSW or to obtain a more favourable interest rate. Instead, Mark Lennon negotiated the interest rate down. Unions NSW submitted in effect that it had no duty to get security or a more favourable interest rate because it was not a commercial lender and did not engage in the lending of money in the course of its regular activities.448 However, those circumstances suggest that Unions NSW might have displayed greater caution in granting the Unions NSW Loan. Unions NSW also submitted that its finance committee had assessed the interest rate as appropriate. That begs the question whether it was correct to have done so.

328. *Secondly*, although legal advice was sensibly requested about the Unions NSW Loan, and though the advice was correct, some aspects of that advice were not followed. Mark Lennon could not recall why he did not follow Julia Sorbara’s advice about the problem created by an

447 Mark Lennon, witness statement, 6/5/15, para 17.
448 Submissions of Unions NSW, 10/7/15, second paragraph.
attempt to make a contract between two unincorporated associations.\textsuperscript{449} Julia Sorbara’s advice regarding making appropriate provision for what should happen if the ALP NSW did not make repayments in accordance with the repayment schedule was also rejected.\textsuperscript{450}

329. In response, Unions NSW submitted that it never had any doubt that the Unions NSW Loan was legally binding and would be repaid. It submitted that that is why it decided not to follow Julia Sorbara’s advice. Unions NSW pointed out that its auditors, KPMG, never doubted that the Unions NSW Loan was legally binding and would be repaid.\textsuperscript{451} But that is far from satisfactory. The ALP NSW was in a very difficult financial position. It defaulted on the repayment of the Unions NSW Loan, as it did in relation to the ETU Loan. Its financial position called for better inquiries. Officeholders seeking to act in the best interests of Unions NSW would have conducted better inquiries.

330. Unions NSW also submitted that it was inherent in the submissions of counsel assisting that unincorporated associations cannot enter into legally binding contracts. In purported refutation of that alleged incapacity, Unions NSW submitted:\textsuperscript{452}

\begin{quote}
[I]t is likely that … all of the major political parties in Australia are unincorporated associations yet they employ staff, are registered for payroll tax and income tax, enter into commercial agreements on a daily basis, and their NSW branches are recognised under the \textit{[Election Funding, Expenditure and Disclosures Act 1981 (NSW)]} as being entitled to incur large amounts of expenditure (notwithstanding their apparent lack of legal status) and to receive millions of dollars in public funding.
\end{quote}

\textsuperscript{449} Mark Lennon, 6/5/15, T:776.17-777.13.  
\textsuperscript{450} Mark Lennon, 6/5/15, T:777.44-778.8.  
\textsuperscript{451} Submissions of Unions NSW, 10/7/15, paras 3, 5.  
\textsuperscript{452} Submissions of Unions NSW, 10/7/15, paras 7-8.
331. No part of this fustian invalidates any aspect of Julia Sorbara’s advice. If employees, governments, and the commercial suppliers of goods and services choose to deal with unincorporated associations, they are at liberty to do so. That does not alter the wisdom of Julia Sorbara’s advice about how to structure a loan from one unincorporated association to another (financially shaky) unincorporated association.

332. Thirdly, there is no evidence that consideration was given to another problem raised by Julia Sorbara – whether the loan would fall within the definition of a political donation by reason of amendments to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). Unions NSW submitted that it held the view that the interest rate was commercially appropriate and therefore could not have amounted to a political donation. There is actually very little detailed evidence about what the contemporaneous thinking of the persons responsible for making the decision on behalf of Unions NSW to advance the Unions NSW Loan. And the submission contains an internal contradiction. For some purposes, the Unions NSW submission is: ‘We are not a commercial organisation and we do not have to charge commercial rates.’ But for the purposes of the *Election Funding, Expenditure and Disclosures Act 1981*, the Unions NSW submission is that the Unions NSW Loan was not a donation because the interest rate was ‘commercially appropriate’.

333. The criticisms made by counsel assisting are generally valid if the Unions NSW Loan is viewed as ‘commercial’. But in substance the Unions NSW Loan, like the ETU Loan, was not to be judged by the standards of commercial dealings. It was an eleemosynary act between
particular limbs of a social movement. Counsel assisting did not in terms contend that any person connected with the Unions NSW Loan had been in breach of any legal or professional standard. It would therefore not be right to make any finding to that effect.

E – TWU LOAN

334. The TWU Loan is not examined here in detail. That is because the relevant TWU witness, Wayne Forno, was ill and could not give oral evidence, and because counsel assisting made no submissions about the TWU Loan. However, it is worth noting Wayne Forno’s account in his evidence statement of how the TWU Loan came to be made. It is not intended by comparing the TWU Loan with the other two to suggest any criticism of the other two. But, making due allowance for the fact that the ALP NSW gave TWU NSW much more time than it gave ETU NSW and Unions NSW to consider its request, the events surrounding the TWU Loan do indicate what could have been done without necessarily supporting the view that it ought to have been done.

335. In late November 2010, Sam Dastyari asked Wayne Forno for a loan from the TWU NSW of $1,500,000. Wayne Forno told Sam Dastyari that he would speak with the Finance and Administrative Committee. Wayne Forno then spoke to various senior officials, who agreed with him that the TWU NSW should explore the proposal more fully. Wayne Forno then had an informal meeting with Sam Dastyari inviting him to send a documentary account of the proposal. On or about 2 December, Wayne Forno received a letter setting out the details. A few days later he received a copy of a draft agreement. These
documents were tabled before the TWU NSW Administrative Committee. That Committee decided that it could not lend $1,500,000 but was prepared to consider a loan of $1,000,000. It saw the loan as attractive because of the interest rate of 8.5%. The Committee considered that security should be sought. In due course ALP NSW was informed that it would consider a loan for $1,000,000, secured against the waiving of affiliation fees in the event of non-payment. The matter was then debated at the Administrative Committee on 10 December and received the Committee’s approval. On the same day a meeting of the TWU NSW Committee of Management was held by phone. Seventeen persons attended and there were three apologies. That Committee resolved to call an extraordinary meeting on 17 December to consider the loan. The TWU NSW then negotiated the terms of the loan agreement so as to reduce the amount to $1,000,000 and insert a term providing that in the event of a failure to make a repayment it should be set off against affiliation fees. The ALP NSW provided a revised version of the loan agreement. It was referred to the TWU NSW’s auditors who formed the view that the agreement was appropriate. On 17 December the CEO of TWU NSW explained to the committee of management the terms of the TWU Loan. Questions were put and answered. Sam Dastyari addressed the meeting and took questions. A general debate then took place on the merits of the TWU Loan. It was resolved that the loan be made. On 21 December, a loan agreement was executed. Since a new committee of management was to meet for the first time on 4 February 2011, Wayne Forno provided a report to the committee about the TWU Loan and opened the matter for debate to enable new committee members to state their views. The
loan was endorsed without dissent. Minds may differ on the wisdom of the TWU Loan. But the procedures pursuant to which the decision to advance it was made reveal considerable care and thought.

F – THE FIRST AND SECOND FEDERAL COURT PROCEEDINGS TO RECOVER BOARD FEES

Relevant background

336. In about July 1997, the Divisional Council of the Electrical Division passed the following resolution:

That where officials who are nominally employed full time by the unions serve on boards, corporations, government authorities, etc and sitting fees or stipends are paid for holding such position, any fees or stipends received by officials must be reimbursed to the union after taking into consideration any additional personal costs to the official. Any additional personal costs that are refunded to the official shall be subject to approval of Branch State Council or Executive.

337. Pursuant to rule 7.2 of the Divisional Council rules that decision was ‘final and binding on all members’.

338. On 15 September 1997 a State Council Executive Meeting of the Electrical Division, NSW Divisional Branch included the following under the heading ‘Director Fees’:

The Secretary recommended that “we note and endorse the policy division of the Divisional Council regarding Board fees and confirm the existing arrangements for all NSW Branch Officials who have been endorsed by the Branch to hold positions on boards is to continue on the understanding that any reasonable payments received by officials are able to be retained

453 Wayne Forno, witness statement, 6/5/15, paras 4-22.
to compensate for the extra time and/or costs spent by them on such tasks”.
The Secretary also reported that no official of the Branch is presently endorsed. It was resolved that the report be received and that the policy be endorsed.

339. On the same day, 15 September 1997, the State Council Executive of the ETU NSW held a meeting. The minutes of the meeting record the following under the heading Directors’ Fees:

The Secretary reported that “we note the policy decision of the Electrical Divisional Council of the CEPU relating to Board fees and confirm that the existing arrangements for all offices of this Union, who have been endorsed to hold positions on Boards is to continue on the understanding that any reasonable payment received by officials are retained to compensate for the extra time and/or costs spent by them on such tasks”. It was resolved the report be received and endorsed.

340. For a number of years following these resolutions a practice developed pursuant to which officials of the ETU NSW (who were also at the same time officials of CEPU (NSW)) kept payments received by reason of occupying places on various boards. They did not remit them to the CEPU (or any division or branch thereof) or to the ETU NSW.

Dean Mighell commences the First Federal Court Proceedings

341. Dean Mighell was the Branch Secretary of the Victorian Divisional Branch of the Electrical Energy and Services Division of the CEPU from 1997 until 5 March 2013. He was capable, vigorous, energetic and independent-minded. Dean Mighell was concerned to obtain more autonomy for his Branch. He had two main reasons for this.
342. *First*, during the time he was Secretary, the New South Wales and Queensland Branches collectively had the majority of votes on the Divisional Council. On nearly every occasion those two branches formed an alliance.\(^\text{454}\) This led to decisions being imposed on the Victorian Branch which were contrary to policies adopted by the State Council of that Branch. Dean Mighell gave the example of a decision to donate $270,000 of Divisional funds to the ALP.\(^\text{455}\)

343. *Secondly*, Victoria, unlike other Australian States, had no legislation permitting the registration of unions in that State. In other States, it was possible for Branches effectively to move their entire operation into a State registered union, and thus avoid control by the Divisional Council. In Dean Mighell’s view, the New South Wales Branch had in fact done this.\(^\text{456}\) Dean Mighell was concerned that the New South Wales Branch, through its control of the National Executive, could simultaneously do two things. One was exert significant control of the National Executive over the Victorian Divisional Branch. The other was retain autonomy in respect of its own affairs by operating through a State based union.\(^\text{457}\)

344. Dean Mighell became aware of the practice by which New South Wales union officials retain board fees. He took objection to it. He heard rumours of the practice at around the time he became Branch Secretary in 1997.\(^\text{458}\) He appears to have been the instigator of the

\(^{454}\) Dean Mighell, witness statement, 5/5/15, para 7.

\(^{455}\) Dean Mighell, witness statement, 5/5/15, para 10.

\(^{456}\) Dean Mighell, witness statement, 5/5/15, para 12.

\(^{457}\) Dean Mighell, witness statement, 5/5/15, para 13.

\(^{458}\) Dean Mighell, witness statement, 5/5/15, paras 15-16.
resolution passed in 1997.\textsuperscript{459} But at some point he seems to have forgotten about it.\textsuperscript{460} His memory was jogged after he moved a resolution to amend the rules of the union to prevent the practice in 2010 at a Divisional Conference.\textsuperscript{461} At that time, he said, he was reminded of the resolutions on the topic that had been passed in 1997.\textsuperscript{462} He raised the issue of the payment of directors’ fees at two meetings of Divisional Executive in the first half of 2011.\textsuperscript{463} On 12 May 2011 Dean Mighell sent emails to members of Divisional Executive asking why acceptance of Board fees by any official would not be in breach of the 1997 Divisional Conference policy.\textsuperscript{464} On 20 May 2011 he sent them another email proposing the engagement by the union of an agreed independent auditor to examine the financial arrangements of all officials serving on boards to ascertain whether the 1997 Divisional Conference policy was being complied with.\textsuperscript{465}

Senior counsel for the ETU (Vic) submitted that this background strongly supported Dean Mighell’s evidence that he brought the First Federal Court Proceedings to end the practice of officials being paid directors’ fees. He submitted that since Dean Mighell had been unable to end it by acting within the Electrical Division, he began the First

\textsuperscript{459} See paras 336-338.
\textsuperscript{460} Dean Mighell, witness statement, 5/5/15, para 18.
\textsuperscript{461} Dean Mighell, witness statement, 5/5/15, para 17.
\textsuperscript{462} Dean Mighell, witness statement, 5/5/15, para 18.
\textsuperscript{463} Dean Mighell, witness statement, 5/5/15, para 19.
\textsuperscript{464} Dean Mighell, witness statement, 5/5/15, para 19, DM-1.
\textsuperscript{465} Dean Mighell, witness statement, 5/5/15, para 20, DM-2.
Federal Court Proceedings to end it. Those circumstances, however, have to be weighed with others.

In 2011 he embarked on an investigation into the practice. By at least May 2011 Dean Mighell had engaged Ruth Kershaw, from EB Economics, in this connection. By at least 5 July 2011, Ruth Kershaw had identified a number of members of the NSW divisional branch as having, since the passing of the 1997 resolution, received board fees without remitting them to the CEPU. Those members, and the amounts received, were:

(a) Bernard Riordan: $1,807,884
(b) Neville Betts: $595,374
(c) Paul Sinclair: $991,839
(d) Mick Doust (organiser): $418,471
(e) Steve Butler (at that time, an organiser): $366,973
(f) Rebecca Mifsud (a legal officer who left the ETU in 2010): $54,787
(g) Warwick Tomlins (former assistant secretary): $706,043.

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466 Submissions of the Victorian Divisional Branch of the Electrical Division of the CEPU, Dean Mighell and Gary Carruthers, 9/7/15, para 20. Hereafter these submissions will be called ‘Submissions of Dean Mighell’.

467 Dean Mighell, 5/5/15, T:666.16-17.

468 Mighell MFI-2, 5/5/15, tab 4.
Ruth Kershaw’s report also identified two organisers, Russell Wilson and John Thornton, as having received board fees in amounts yet to be determined. Russell Wilson had, since October 2010, been an acting director of NESS. That was one of the companies from which Paul Sinclair had received fees, according to Ruth Kershaw. John Thornton was identified as having been a director of Chifley Financial Services Pty Ltd. That was one of the companies from which Bernard Riordan had received fees, according to Ruth Kershaw.

It will be necessary to return to Ruth Kershaw’s report. That is because senior counsel for Dean Mighell launched a major attack on it.

On 11 July 2011 Dean Mighell commenced the First Federal Court Proceedings by the filing of an application and statement of claim. He commenced proceedings in his own name, in his capacity as a member of the CEPU.

On 14 July 2011, Dean Mighell addressed the Special State Council meeting. He ‘reported that legal proceedings have been initiated under his name to seek the monies received by the NSW Officials be returned to the Union’. A resolution of the Divisional Branch Council authorising this expenditure was in the following terms:

That the conduct of the NSW Officials is wrong and should be rectified. That it is in the interests of the members of the ETU to support D. Mighell's legal proceeding. Further, that the Victorian Branch will support D. Mighell's legal proceeding and authorises expenditure on costs related to the proceedings including those already incurred.

Mighell MFI-2, 5/5/15, tabs 5-6.
Mighell MFI-2, 5/5/15, tab 3, p 76.
Mighell MFI-2, 5/5/15, tab 3, p 76.
351. It is quite plain from the parts of the minutes quoted above that the expenditure of Branch monies was authorised on the basis that those monies were to be spent to pursue the three NSW officials for wrongdoing and to recover directors’ fees retained by them.

352. Ruth Kershaw had identified a number of members of the ETU NSW who had received fees contrary to the 1997 resolution. But the First Federal Court Proceedings were brought only against three respondents, namely Bernard Riordan, Neville Betts and Paul Sinclair. Dean Mighell in oral evidence said that he thought that these were the only respondents because they were the only officials receiving board fees at that time. However that explanation is unconvincing. First, it is irrelevant. Officials who no longer received board fees could be sued for past board fees. Secondly, it is inconsistent with public statements made by Dean Mighell in the ETU NSW News shortly after commencement of the proceedings. Those statements refer to the other persons identified by Ruth Kershaw as being presently in receipt of directors’ fees. Thirdly, it is also obvious from Ruth Kershaw’s email that the only official or ex-official who was no longer receiving board fees was Warwick Tomlins (who had by this time ceased not only to receive fees but also to be an official). Rebecca Mifsud did continue to receive fees but was no longer an official. When this was pointed out to him, Dean Mighell retreated to the position that he was

472 Dean Mighell, 5/5/15, T:691.17-47.
473 Mighell MFI-2, 5/5/15, tab 7, p 123.
‘not sure what the view was at the time or how we based that opinion on at the time’. 474

The application filed by Dean Mighell in the First Federal Court Proceedings requested orders under s 164 of the *Fair Work (Registered Organisations) Act 2009* (Cth) that the respondents perform and observe the rules of the Electrical, Energy and Services Division of the CEPU. 475 In addition, the application requested orders under s 164A that the respondents repay the amounts received by them in their capacity as board members. The s 164A orders sought repayment of the monies to the CEPU (and not to any particular Division or Branch).

Dean Mighell in his statement gave the following explanation for commencing the First Federal Court Proceedings: 476

24. I commenced the proceeding because I wanted to stop the practice of Divisional officials pocketing directors' fees. I believed that conduct to be in breach of the rules of the Division because it was contrary to the policy determined by Divisional Conference in 1997. I decided that it was necessary to commence the proceeding because my attempts within the Division in 2010 and earlier in 2011 to bring the practice to an end had been unsuccessful. In those circumstances, I was of the view that the commencement of the proceeding was in the best interests of the Victorian members who I represented, as well as being in the best interests of the Division and the CEPU as a whole.

25. In the proceeding, I also sought an order that each of the Respondents repay to the union the amounts paid to them by way of director's fees. Although I genuinely wanted to obtain such an order if the case succeeded at trial, my main focus was on stopping the practice. It was also my understanding that an order for repayment of monies by a union official for breach of union rules was unprecedented.

474 Dean Mighell, 5/5/15, T:724.30-32.
475 Mighell MFI-2, 5/5/15, tab 5, pp 72-73.
476 Dean Mighell, witness statement, 5/5/15, paras 24-25.
355. Notwithstanding the last sentence quoted, Dean Mighell said in oral evidence that when he commenced the proceedings he thought he had a strong case.\textsuperscript{477} Consistently with what he said in the last paragraph quoted, Dean Mighell denied in oral evidence that his primary purpose was to obtain orders compelling the repayment of the money.\textsuperscript{478}

356. Dean Mighell’s claim that the repayment of past fees was a subsidiary or secondary purpose of the proceedings, and that the primary purpose was ‘stopping the practice’ is difficult to accept, for at least three reasons.

357. \textit{First}, the most obvious way for Dean Mighell to ‘stop the practice’ would be to obtain an order for the repayment of past fees against the three named respondents pursuant to s 164A. That would have deterred officials from any further retention of board fees in a most powerful way. That, also, was the only substantive relief Dean Mighell sought in the proceedings, apart from the order pursuant to s 164 that the respondents perform and observe the CEPU rules. Senior counsel for the ETU (Vic) submitted that s 164A had only been introduced in 2007, had received little judicial consideration and required proof that the respondents had ‘acted unreasonably’. He submitted that s 164 relief was ‘the most obvious way to stop the practice’.\textsuperscript{479} Even if this is correct, it does not help Dean Mighell. For the question stands: why discontinue proceedings seeking valuable

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\textsuperscript{477} Dean Mighell, 5/5/15, T:679.6.
\textsuperscript{478} Dean Mighell, 5/5/15, T:691.17-27.
\textsuperscript{479} Submissions of Dean Mighell, 9/7/15, paras 11-14.
s 164 relief? Even if an order under s 164 was easier to obtain than an order for repayment of directors’ fees under s 164A, it does not follow that Dean Mighell’s primary purpose was to obtain an order under s 164.

358. Secondly, the only reason it would be in the interests of the Victorian members to ‘stop the practice’ would be to ensure that, in the future, directors’ fees were paid to the Federal Union. The benefits to Victorian members of stopping that practice would be indirect, because the monies would be used (at least in theory) for the benefit of all Branches of all Divisions. But nonetheless the benefits may be accepted as real. Those benefits were purely financial. They brought more money for the Federal Union. The benefits to Victorian members of obtaining an order for the repayment of past board fees were of exactly the same nature. They were indirect and wholly financial in the sense that they would bring in more money for the Federal Union. They were also greater in quantum than the immediate benefits of stopping ‘the practice’. Millions of dollars would be returned to the union immediately (some 10 years of board fees plus interest) as distinct from, say, a few thousand dollars a month for the future. Why, then, would Dean Mighell give priority to stopping the practice over obtaining a repayment?

359. Thirdly, if, in truth, obtaining repayment of past directors’ fees was only a secondary concern, why commence the First Federal Court Proceedings against three respondents and not just one? If Dean Mighell had wanted, as it were, to make an example of someone for the purpose of encouraging those who were contemplating retaining future directors’ fees to a different course, he could have done that just as
effectively with one respondent as with three. Joining three respondents added to the cost of the proceedings because it required additional discovery and submissions on the question of quantum. It created the risk of separate representation. Senior counsel for the ETU (Vic) submitted that he joined the three respondents because he believed that they were the only officials then receiving directors’ fees. Yet he must have known from Ruth Kershaw’s researches, which were available just before the proceedings started, that there were several others.

360. Against that background, it may be asked: how would an order under s 164 ‘stop the practice’? It would bind only the three respondents. It is true that a Federal Court decision against three officials would encourage the other officials to obey the rules. But so would a Federal Court decision against one of them. The most effective way of ‘stopping the practice’ would have been to join all officials currently receiving payments. Faced with a choice between joining one or joining all, he compromised, and joined only three. Was it only a coincidence that those three were his political opponents?

361. The idea now advocated on behalf of Dean Mighell that an order under s 164 was easier to obtain than an order under s 164A does not sit well with his evidence. He did not give evidence that it was harder to obtain an order under s 164A than it was to obtain one under s 164. He understood that an order for repayment was ‘unprecedented’. But he

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480 Submissions of Dean Mighell, 9/7/15, para 17, citing Dean Mighell, 5/5/15, T:691.24.
481 See paras 347-352.
482 Dean Mighell, witness statement, 5/5/15, para 25.
also thought he had a ‘strong case’.\textsuperscript{483} In his written submissions in the Federal Court proceedings, signed by the counsel who represented him before the Commission, he claimed that an order for repayment of funds could be made under s 164.\textsuperscript{484} If so, an order under s 164A would not have been necessary at all.

362. These considerations suggest that Dean Mighell’s asserted explanation for commencing the proceedings was not the actual explanation. They suggest that his asserted explanation was given so as to enable him to explain the fact that he discontinued the proceedings. His conduct in discontinuing the proceedings is considered further below.\textsuperscript{485} It is necessary first to consider a more likely reason that Dean Mighell commenced the proceedings. It centres on CEPU elections held during the 2011 year.

The context in which the proceedings were commenced

363. The proceedings were commenced at around the same time as or shortly before a number of elections were held:\textsuperscript{486}

(a) Nominations for Divisional quadrennial elections for Divisional Secretary and Assistant Divisional Secretary opened on 4 July 2011 and elections were held.

\textsuperscript{483} Dean Mighell, 5/5/15, T:679.6.

\textsuperscript{484} Mighell MFI-2, 5/5/15, tab 9, paras 60-64.

\textsuperscript{485} See paras 384-416.

\textsuperscript{486} In addition to the references in the sub-paragraphs below, see correspondence to the Australian Electoral Commission and declarations of results made by the Commission tendered on 19 June 2015.
The New South Wales Branch also had quadrennial elections in July 2011, for all official positions, the results of which were declared on 29 July 2011. These elections appear to have been uncontested.

The Victorian Branch, too, had quadrennial elections in July 2011. NSW officials were funding candidates to oppose Dean Mighell, and Dean Mighell was aware of this.

In November 2011 elections were held for a number of offices on the National Executive of the Electrical Division. Dean Mighell, Bernard Riordan and Peter Simpson nominated for the two Divisional Vice-President positions. Dean Mighell was unsuccessful.

In November 2011, elections were held for positions on the National Executive of the CEPU. Dean Mighell and Bernard Riordan were two of the four nominees for the three National Executive positions. Bernard Riordan was successful. Dean Mighell was not.

In December 2010, Dean Mighell, together with Troy Gray and Howard Worthing from the Victorian Branch, had held a meeting with Bernard Riordan, Paul Sinclair and Neville Betts. The payment of directors’ fees was one of the issues discussed. At that meeting, Dean Mighell sought the support of Bernard Riordan, Paul Sinclair and

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487 Mighell MFI-2, 5/5/15, tab 18.
489 Dean Mighell, witness statement, 5/5/15, para 48.
Neville Betts in one or more of the above elections. Dean Mighell indicated to the meeting that he was contemplating running against Peter Tighe in the upcoming elections for the position of Secretary of the Electrical Division.\(^{490}\) Dean Mighell accepted that at this point he was indeed contemplating running for the position of Divisional Secretary, although ultimately it was not he, but Howard Worthing, who nominated for it.\(^{491}\) Dean Mighell instead ran for one of the Divisional Vice-President positions. Dean Mighell did not deny attending a meeting of the nature described above where he asked for, but did not receive, the support of these New South Wales officials in connection with the elections.\(^{492}\) Paul Sinclair’s evidence was that at the end of the December 2010 meeting, Dean Mighell said words to the effect that if the support was not given it would be open warfare and that he would embark on his campaign against the ETU NSW with Bernard Riordan, Neville Betts and Paul Sinclair as his targets.\(^{493}\) Senior counsel for the ETU (Vic) did not submit that this evidence should not be accepted.\(^{494}\) It is accepted. Dean Mighell could not recall this, but denied ever linking his candidacy for the Divisional Secretary position with his concerns about directors’ fees.\(^{495}\) Since Paul Sinclair agreed with this denial and no-one else disagreed, counsel for Dean Mighell submitted that ‘the only finding open’ is that the


\(^{491}\) Dean Mighell, 5/5/15, T:670.7-9; 670.45-671.2.

\(^{492}\) Dean Mighell, 5/5/15, T:671.34-36; Dean Mighell, witness statement, 5/5/15, paras 46-47.


\(^{494}\) Submissions of Dean Mighell, 9/7/15, paras 22-23.

\(^{495}\) Dean Mighell, 5/5/15, T:672.23-46; Dean Mighell, witness statement, 5/5/15, paras 47-48.
denial is correct. Whether or not it is ‘the only finding open’, it is a finding which is made.

365. Dean Mighell accepted that part of his platform in these elections, and a significant issue, concerned the keeping by NSW officials of directors’ fees. That was also apparent from articles published in the ETU NSW News circulated by him at the time. But then counsel assisting moved to submissions which senior counsel for Dean Mighell strongly attacked. Counsel assisting submitted that the retention of directors’ fees by the three respondents was the centrepiece in Dean Mighell’s campaign. They relied, for example, on the ETU NSW News Spring 2011 edition, which reproduced quoted words attributed to Dean Mighell by the Daily Telegraph: ‘This legal action is really to do with a lack of transparency. That money is union money, it belongs to our membership.’

366. Counsel assisting further submitted that commencing the proceedings at the time and against the respondents that he did assisted Dean Mighell in his election campaign in at least two ways. First, he could make public statements disparaging the conduct of his political rivals and make claims that he was taking steps to stop it. Those claims centred around the proposition that he was endeavouring to ensure that millions of dollars would be returned to the Union. Secondly, Dean Mighell could, by demanding that some millions of dollars be paid by

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496 Submissions of Dean Mighell, 9/7/15, para 23.
497 Dean Mighell, 5/5/15, T:676.39.
500 Mighell MFI-2, 5/5/15, tab 7.
the respondents to the First Federal Court Proceedings, apply pressure to his political rivals.

367. Dean Mighell’s election campaign also affords the only reasonable explanation for why he only joined three of the nine persons identified by Ruth Kershaw as having received directors’ fees. Bernard Riordan, Paul Sinclair and Neville Betts were his most significant political opponents. Paul Sinclair’s view was that he, as assistant secretary, was regarded as Bernard Riordan’s likely successor and that Neville Betts was the likely successor to the assistant secretary role.\(^{501}\) Had Dean Mighell genuinely commenced and prosecuted the proceedings for the purpose of furthering the interests of the Victorian members, there is no good reason why he would not have joined all nine respondents. If he succeeded against the three respondents, he would succeed against the other six and, on Ruth Kershaw’s figures, the union would have obtained a further $1,546,274 plus interest (plus whatever was recovered from Russell Wilson and John Thornton). The most likely reason why Dean Mighell never pursued those additional millions is that, despite his public statements, he was never at any point interested in any ensuring the return of any money to the Union.

368. Senior counsel for Dean Mighell, in contrast, submitted that the directors’ fees issue was only part of a much broader picture.\(^{502}\) It probably does not matter whether that issue was the centrepiece of Dean Mighell’s campaign or only a significant part of it.\(^{503}\) A linked

\(^{501}\) Paul Sinclair, witness statement, 27/4/15, para 78.

\(^{502}\) Submissions of Dean Mighell, 9/7/15, paras 24-26, citing Dean Mighell, 5/5/15, T:676.37-43; 677.10.

\(^{503}\) Dean Mighell, witness statement, 5/5/15, paras 47-48.
Senior counsel for Dean Mighell denied that the three respondents to the First Federal Court Proceedings were Dean Mighell’s ‘most significant political opponents’. He argued that the only basis provided for this claim was to be found in the opinions expressed by Paul Sinclair about who he thought was ‘next in line’ for various offices in ETU NSW. He submitted that Paul Sinclair’s opinion was irrelevant. He submitted that on counsel assisting’s submissions, what mattered was whom Dean Mighell saw as his most significant political

504 Submissions of Dean Mighell, 9/7/15, paras 26, 29.
505 Mighell MFI-2, 5/5/15, tab 7, p 35.
opponents. He submitted that Dean Mighell was never questioned about this by counsel assisting and gave no evidence to support the claim now made.\footnote{Submissions of Dean Mighell, 9/7/15, para 28.} However, a strong inference that Bernard Riordan, Paul Sinclair and Neville Betts were Dean Mighell’s most significant political opponents may readily be drawn from what Dean Mighell said to those three gentlemen at the meeting of December 2010 about open warfare and about those three gentlemen being the targets.

370. Senior counsel for Dean Mighell submitted that there were only three respondents in the First Federal Court Proceedings because he believed they were the only officials then receiving directors’ fees.\footnote{Submissions of Dean Mighell, 9/7/15, para 32, citing inter alia Dean Mighell, 5/5/15, T:672.11-21.} Dean Mighell did say he was speaking from memory and stood to be corrected. A correction is in order, because Ruth Kershaw’s report to Dean Mighell revealed that other officials were or might be receiving directors’ fees. Senior counsel for Dean Mighell conceded that Steve Butler was an official receiving directors’ fees.\footnote{Submissions of Dean Mighell, 9/7/15, para 34.}

371. Senior counsel for Dean Mighell then made various criticisms of Ruth Kershaw’s report. They were put thus:\footnote{Submissions of Dean Mighell, 9/7/15, paras 33-34.}

\begin{quote}
[T]he calculations apparently undertaken by Ms Kershaw do not provide a reliable basis for the Commission to make findings about the amounts of directors’ fees paid to persons who were not joined in the proceeding. This is because the evidence upon which these claims are made is incomplete.\footnote{Mighell MFI-2, 5/5/15, tab 4.} Ms Kershaw’s email attaches the document entitled “ETU NSW Board Remuneration References Report”. She states that “it
includes excerpts from the original documents, so it is rather large”. The email also refers to a page 5. Notwithstanding this, only one page of the attachment was tendered as evidence. Further, that page contains a number of asterisks (including against Mr Butler who was not joined in the proceeding), the meaning of which is unexplained. Given that the document is incomplete and in the absence of any evidence from Ms Kershaw explaining its contents, the Commission cannot safely proceed on the basis that one page of the attachment provides an accurate and complete record of the payments made to the persons identified.

However, even on the face of the summary document apparently prepared by Ms Kershaw, it does not have the clear meaning as apparently assumed by Counsel Assisting. Nine individuals are listed. In relation to two of them, 512 no amount of remuneration is identified and instead the letters “TBD” are listed. Of the remaining persons, four were not joined to the proceedings. In relation to those four individuals, two (Mifsud and Tomlins) appear to have previously ceased their directorships and/or employment with ETU NSW. Of the remaining two, (Mick Doust and Steve Butler), Mr Mighell’s evidence in relation to Mr Doust was that his best recollection when he commenced the proceeding was that he was no longer receiving directors’ fees. 513 It would appear that, on the face of the one page document apparently prepared by Ms Kershaw, only one ETU NSW official (Steve Butler) who was not joined in the proceeding was apparently receiving directors’ fees at the relevant time. In relation to Mr Butler an amount of $366,973 is listed. Notably however, an asterisk appears next to that amount, the meaning of which is unclear.

372. Counsel assisting responded thus: 514

This submission begins from a false premise, namely that only one page of an attachment to Ms Kershaw’s email was tendered. In fact what the submission describes as one page of an attachment is the second page of the email itself. The attachment to the email (the report of EB Economics) was the subject of an (unmeritorious) claim for privilege. 515 Counsel Assisting are content to tender the entirety of the attachment and hereby invite the Victorian Branch of the Electrical Services Division (on behalf

512 Russell Wilson and John Thornton.
513 Dean Mighell, 5/5/15, T:691.43.
514 Submissions of Counsel Assisting, 14/8/15, pp 22-23.
515 It is item 22 on Mr Borenstein’s list of documents dated 29 April 2015.
of whom the claim for privilege purportedly\textsuperscript{516} was made) to withdraw its claim for privilege.

373. That is, for senior counsel for Dean Mighell to submit that ‘only one page of the attachment was tendered’ is disingenuous. The evidence is in the condition it is because privilege was claimed for the missing material. Needless to say, counsel assisting’s invitation for the supposed claim for privilege to be withdrawn was not accepted.

374. Counsel assisting then went on to answer the balance of the quoted submissions of counsel for Dean Mighell thus:\textsuperscript{517}

In any event, the content of the second page of the email is clear. The only asserted lack of clarity is the asterisk beside the amount of money said to have been received by Mr Butler. However, an asterisk also appears next to one of the figures said to have been received by Mr Sinclair. The presence of that asterisk did not prevent Mr Mighell commencing proceedings to recover that same amount of money in the Federal Court. There is no basis to infer that the asterisk next to the amount said to have been received by Mr Butler was any obstacle to claiming that amount from Mr Butler.

375. These points must be accepted.

376. Even if Steve Butler were the only other official receiving directors’ fees, there was no good explanation for the fact that the three respondents were sued and not him. The explanation proffered by senior counsel for Dean Mighell was that his later elevation to the position of Secretary of the ETU NSW shows he was a senior official

\textsuperscript{516} The Branch is not an entity on behalf of whom privilege could be asserted: it has no separate legal existence from the CEPU.

\textsuperscript{517} Submissions of Counsel Assisting, 14/8/15, p 23.
and a ‘significant political opponent’ of Dean Mighell. But the rise of Steve Butler could not have been predicted confidently at a time when the long-serving Secretary, Bernard Riordan, was still in post with no sign of any departure being likely.

The conduct of the proceedings

377. As stated above, the State Council of the Victorian Divisional Branch resolved on 14 July 2011 to fund Dean Mighell’s litigation, including costs already incurred. It did so on the basis that it was in the interests of its members to support the proceeding. Solicitors had been engaged by Dean Mighell to run the proceedings on his behalf.

378. On 24 August 2011 each of the respondents filed a defence in the Federal Court proceedings. The central contention seems to have been that the roles of the respondents on the various boards were ‘not directly connected to or did not arise from their roles of officials of the Federal union’. Rather, they were directly connected to or arose out of their positions as officers of the state union, namely the ETU NSW.

379. On 12 September 2011, the State Council of the ETU NSW unanimously resolved to indemnify Bernard Riordan, Neville Betts and Paul Sinclair against ‘any judgment amount and/or any costs or other orders that may be made … in the proceedings’. The resolution was

518 Mighell MFI-2, 5/5/15, tab 3, p 76.
520 Sinclair MFI-1, 27/4/15, tab 24, para 16.
521 Harris MFI-1, 29/4/15.
expressed to be passed ‘in recognition of the fact that the 3 NSW officers named were at all times acting with the full knowledge and approval of the Electrical Trades Union of Australia, NSW Branch’. A prior resolution to similar effect was made by the ETU NSW Executive on 18 July 2011.522

380. The parties to the Federal Court proceedings completed full preparation for a hearing. On 2 November 2011 affidavits of Bernard Martin Riordan and Paul Anthony Sinclair were filed on behalf of the respondents. On 7 February 2012 the applicant provided further and better particulars of the quantum of his claim. The claim against Bernard Riordan was reduced to $948,844. The claim against Neville Betts was increased to $642,535. The claim against Paul Sinclair was reduced to $745,794.523 The applicant briefed senior and junior counsel. All three respondents, too, were represented by senior and junior counsel. Written submissions were filed in early February 2012.

381. The hearing of the proceedings commenced before Cowdroy J on 20 February 2012.524 On that day the parties requested an adjournment. On the morning of 21 February 2012, Cowdroy J adjourned the proceedings to 15 and 16 March 2012.525

382. On the afternoon of 22 February 2012 a notice of discontinuance was signed by representatives of the applicant and by Robert Whyburn on behalf of the respondents. The notice stated that the proceedings were

522 Harris MFI-1, 29/4/15.
523 Mighell MFI-2, 5/5/15, tab 8.
discontinued by consent, with no order as to costs. That notice was filed in the Federal Court the next day.526

383. On 24 February 2012 the Governor-General appointed Bernard Riordan Commissioner of the Fair Work Commission, with effect from 26 March 2012.

Dean Mighell’s reasons for discontinuing the proceedings: risk

384. Dean Mighell in his statement set out the circumstances in which he discontinued the proceedings. He gave six reasons for doing so.527 Dean Mighell’s mind is a subtle and complex one, but six is a suspiciously high number.

385. Dean Mighell said that he discontinued the proceedings because they were not without risk.528 No doubt the proceedings were not without risk, but this could not have been a reason for discontinuing them. Dean Mighell’s view was that he had a strong case. He did not suggest this view ever changed.529 It is true, as his senior counsel pointed out, that he did consider his strong case had a risk attached to it, namely that the Court might consider that the monies in dispute did not belong to the federal union but to a separate State registered entity.530 Counsel assisting responded by saying that even if the risks were accurately stated by Dean Mighell, they could not explain the decision to

526 Mighell MFI-2, 5/5/15, tab 15.
527 Dean Mighell, witness statement, 5/5/15, paras 34-35.
528 Dean Mighell, witness statement, 5/5/15, para 35(c).
529 Dean Mighell, 5/5/15, T:679.4-6.
530 Dean Mighell. 5/5/15, T:692.36-42; 711.32-712.8.
discontinue, because it was not said that they had changed. Dean Mighell did not say that what at first he had thought the case strong but later came to believe it was weak.

386. Senior counsel for Dean Mighell said that there were many reasons why a person who started proceedings believing the case was strong but not without risk should discontinue even though nothing had changed.531

In Mr Mighell’s circumstances, the proceeding he commenced was novel and unprecedented. The reasons he gave for discontinuing the proceedings are illustrative of the range of circumstances and interests which might reasonably inform a plaintiff to decide to discontinue a claim which was otherwise perceived as being strong.

387. This is circular reasoning. In addition, while it is not uncommon for persons with strong cases to commence proceedings later to discontinue them because of a fear of a heavy adverse costs order in the eventuality, even if it is unlikely, of defeat, that was not a problem Dean Mighell faced. As counsel assisting submitted: ‘Mr Mighell had little to no risk of an adverse costs order (and little to no chance of obtaining a favourable costs order), and most of the cost of the litigation to the Victorian Branch had already been incurred.’532

531 Submissions of Dean Mighell, 9/7/15, para 63.
532 Submissions of Counsel Assisting, 14/8/15, p 25.
Dean Mighell’s reasons for discontinuing the proceedings: costs

388. Dean Mighell said that discontinuance meant the Branch could avoid further substantial expenditure on legal costs. Counsel assisting submitted that this was a spurious reason. He said that by the time that Dean Mighell came to discontinue the proceedings, his branch had incurred about $245,000 in legal fees in connection with the proceedings and about $20,000 in fees to EB Economics. Substantial management time must also have been expended (including the time of the Branch’s in-house lawyer, Geoff Borenstein). Prosecution of the proceedings to their conclusion was unlikely to have incurred any substantial further fees. It is apparent from the email of Cowdroy J’s associate of 21 February 2012 that the proceedings were estimated to take two days. Counsel briefed on the hearing charged for at least one day in any event. Dean Mighell’s solicitors charged fees for their involvement in the settlement negotiations and preparation of the notice of discontinuance.

389. Senior counsel for Dean Mighell met these arguments by contending that the estimate of $245,000 was highly exaggerated, because it included charges for work unrelated to the First Federal Court Proceedings. Yet neither Dean Mighell nor the Victorian Branch of

533 Dean Mighell, witness statement, 5/5/15, para 35(d).
535 Dean Mighell MFI-2, 5/5/15, tab 14.
536 There is an invoice from Herman Borenstein QC charging fees for 21 February, but no invoice charging fees for 20 February, see Penfold MFI-3, 5/6/15. As counsel assisting submitted, it is not apparent whether there is an error in the date of the invoice, or whether there is an additional invoice from Herman Borenstein, charging for the 20th.
537 Submissions of Dean Mighell, 9/7/15, paras 65-67.
the Electrical Division of the ETU would state what the correct figure was, despite being the best qualified persons to do so. Whatever the figure was, it was large.

390. Senior counsel for Dean Mighell also submitted that substantial further fees would have been incurred. The proceedings had been listed for two days, but a third had been reserved. An appeal was possible.\(^{538}\) These, of course, were all matters which should have been remembered when the First Federal Court Proceedings started. Having made the decision to start those proceedings and thus to run those risks of heavy costs expenditure, Dean Mighell cannot convincingly claim that a fear of incurring costs caused him to terminate the proceedings.

**Dean Mighell’s reasons for discontinuing the proceedings: Gray proceedings**

391. Dean Mighell said that one of the matters agreed upon by him and Bernard Riordan was the discontinuance of other proceedings brought by Troy Gray.\(^{539}\) Dean Mighell appeared to be referring to a term in one of the settlement Deeds proposed during settlement negotiations (discussed below).\(^{540}\) Counsel assisting pointed out that this Deed was never signed by Troy Gray. Nor, so far as the evidence reveals, was Troy Gray’s signature ever sought. This cannot have been a reason for discontinuing the proceedings.

\(^{538}\) Submissions of Dean Mighell, 9/7/15, para 68.

\(^{539}\) Dean Mighell, witness statement, 5/5/15, para 35(e).

\(^{540}\) See paras 401-416.
Senior counsel for Dean Mighell submitted. 541

Whether or not the deed was ever signed by Mr Gray does not alter the fact that, considered objectively and reasonably, the existence in Mr Mighell’s mind of an agreement providing for the discontinuance of other legal proceedings could reasonably and rationally be a factor in his decision to discontinue the directors’ fees proceeding.

The problem, however, is that until the document recording the agreement was fully negotiated, settled and agreed, the weight of that agreement in Dean Mighell’s decision-making processes must have been too slight to count as a material reason for discontinuance.

Dean Mighell’s reasons for discontinuing the proceedings: capacity to reinstate

Dean Mighell also said that he understood that he would be able to re-institute the proceedings in the event that Bernard Riordan’s promises were not honoured. Counsel assisting submitted that this could not have been a reason for discontinuing the proceedings in the first place. It was at best a reason for Dean Mighell being satisfied with the terms on which the proceedings were discontinued. But the reason, in any event, rings false. In fact the promises Dean Mighell claimed Bernard Riordan made – if they were made – were not honoured. Dean Mighell did not then re-institute the proceedings. Instead, he instructed Gary Carruthers to do so, and even then only against Neville Betts and Paul Sinclair.

541 Submissions of Dean Mighell, 9/7/15, para 70.
With considerable realism, senior counsel for Dean Mighell ‘accepted that this could not have been a reason for discontinuing the proceedings in the first place’. But this concession of senior counsel creates an impact on the client’s credibility which is extremely devastating. When Dean Mighell gave a reason for action he was purporting sincerely to narrate the contents of his own mind. People of Dean Mighell’s ability cannot make innocent mistakes about the contents of their own minds. For him to narrate something about his mind which his senior counsel denies is to leave him in a condition of being mendacious about what was in his mind.

Senior counsel for Dean Mighell then advanced three submissions.

The first was that:

[M]aterially identical proceedings (save that Mr Riordan was not named as a respondent) were later commenced on the prompting of Mr Mighell. This is conduct consistent with Mr Mighell’s reasoning as to why he discontinued the proceeding.

This is circular reasoning. It is also very opaque.

The second submission was:

Further, it is entirely unsurprising and reasonable for Mr Mighell not to have reinstituted the proceeding in his own name: at the relevant time he had decided to resign from his position as Branch Secretary. Given the

542 Submissions of Dean Mighell, 9/7/15, para 71.
543 Submissions of Dean Mighell, 9/7/15, para 72.
544 Submissions of Dean Mighell, 9/7/15, para 73.
545 Dean Mighell, witness statement, 5/5/15, para 40.
controversy which attached to the directors’ fee claims and the fact that Mr Mighell had originally commenced them at a time when he was Branch Secretary, it is unremarkable that he did not re-institute the proceedings in his own name in light of his imminent resignation, but instead requested Mr Carruthers, the Branch President, to do so.

But why did a decision shortly to resign as Secretary make it impossible to reinstitute the proceedings?

399. The third submission was: 546

The fact that the proceeding which was eventually “re-instituted” by Mr Carruthers did not name Mr Riordan is irrelevant to the genuineness of Mr Mighell’s reasoning in discontinuing the proceeding in the first place. In any event, as to why Mr Riordan was not named as respondent in the later proceedings, Mr Mighell gave evidence that at that time he did not understand Mr Riordan to be a member of the union and that he had advice that there would be difficulties in bringing the action against him. 547 Further, Mr Mighell gave convincing evidence that, notwithstanding the very substantial differences between he [sic] and Mr Riordan in the period that they were officers of the union, Mr Mighell did not want to stand in the way of Mr Riordan’s career by “playing the man”. 548 (emphasis in original)

The supposed advice that Bernard Riordan could not be sued after he ceased to be a member of the union for directors’ fees received before that time seems completely wrong in law. It is very unlikely to have been accepted by a sharp-witted man like Dean Mighell. The contention that Dean Mighell did not want to play the man is startling. 549 He had been playing the man for years, and if, after some

546 Submissions of Dean Mighell, 9/7/15, para 74.
547 Dean Mighell, 5/5/15, T:703.36; 705.8.
548 Dean Mighell, 5/5/15, T:704.
549 Dean Mighell, 5/5/15, T:704.6-24.
sudden conversion, he had wanted to cease playing the man, some unanswerable questions arise. Why did Dean Mighell seek advice about his capacity to sue Bernard Riordan once he had left the union? Why did Dean Mighell reserve his rights in the Deed with Bernard Riordan to recommence proceedings against him?  

Finally, if to recommence the formerly discontinued proceedings against Bernard Riordan is to play the man, presumably commencing them in the first place was also to play the man. If that is so, they were an abuse of process. The legitimate purpose of instituting legal proceedings is to vindicate legal rights, not injure the respondent by ‘playing the man’. Dean Mighell’s First Federal Court Proceedings played the man named Bernard Riordan because Bernard Riordan was his political enemy. When Bernard Riordan moved from the secretaryship to the Fair Work Commission, Dean Mighell considered that he ‘had stepped out of that arena’. Once he had stepped out of that arena he had ceased to be a political opponent. Suing him in order to damage him as a political opponent became unnecessary. But while he remained a political opponent, the weapon of litigation could be used against him – not to recover millions of dollars for the union, not to stop the practice relating to directors’ fees, but to defeat Bernard Riordan politically. To use the process of litigation in that way is to abuse legal process.

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550 Dean Mighell, witness statement, 5/5/15, DM-03, clause 10.
Dean Mighell’s reasons for discontinuing the proceedings: oral agreement between Bernard Riordan and Dean Mighell

401. Dean Mighell said he discontinued the First Federal Court Proceedings because he believed he had secured Bernard Riordan’s agreement to undertake his best endeavours to stop the practice of officials retaining board fees. It was an ‘oral undertaking’. 552

402. Bernard Riordan said in his statement that on about 17 February 2012, he telephoned Dean Mighell and told him that he was likely to be appointed Fair Work Commissioner, but that his appointment could not proceed while he was a respondent to the proceedings. Bernard Riordan said that he also told Dean Mighell that there were family reasons why he was seeking his consent to the discontinuance of the proceedings. 553 According to Bernard Riordan, Dean Mighell agreed to discontinue the proceedings, but on the basis that he could recommence if he needed to. 554 Bernard Riordan did not refer to any proposed rule changes or proposal to stop the practice of receipt of directors’ fees as aspects of any agreement with Dean Mighell regarding the discontinuance of the proceedings. 555 He did say that before and after the discontinuance he had discussions with Dean Mighell about the rule changes that Dean Mighell was seeking. 556 He made no reference at all to discussions regarding stopping the practice of accepting directors’ fees.

552 Dean Mighell, 5/5/15, T:708.18.
553 Bernard Riordan, witness statement, 4/5/15, paras 104-105.
555 Bernard Riordan, witness statement, 4/5/15, paras 104-111.
556 Bernard Riordan, witness statement, 4/5/15, paras 102, 112-114, 120-121.
403. Dean Mighell in his statement did not refer anywhere to the conversations about Bernard Riordan’s prospective appointment as Commissioner as a reason for discontinuance. However, in oral evidence Dean Mighell accepted that he had conversations with Bernard Riordan broadly along the lines of those set out in Bernard Riordan’s statement. Dean Mighell denied that Bernard Riordan mentioned family reasons as a reason for seeking his consent to discontinuance, but he accepted it was mentioned.

404. In cross-examination by counsel for Dean Mighell, Bernard Riordan said that he had agreed by 22 or 23 February 2012 to take all reasonable steps to gain the agreement of Peter Simpson to the various proposed rule changes set out in a draft Deed. He said this was a fundamental element of their agreement. Bernard Riordan also appeared to accept that by this time he and Dean Mighell had reached oral agreement that Bernard Riordan would use his best endeavours to make sure that the practice of accepting directors’ fees in NSW would come to an end. He did so in one place unqualifiedly. In the other it may have been that he and the cross-examiner were at cross-purposes and the answer recorded is incomplete. But these two answers are inconsistent with the more detailed accounts he gave in oral evidence to counsel assisting in which he denied any recollection of the oral agreement Dean Mighell alleged. In all the circumstances described

557 Dean Mighell, 5/5/15, T:696.10-698.5.
559 Bernard Riordan, 4/5/15, T:626.8-30.
561 Bernard Riordan, 4/5/15, T:625.27-43.
562 Bernard Riordan, 4/5/15, T:596.3-28; 599.30-600.3.
below, the sounder reading of Bernard Riordan’s evidence should be accepted and Dean Mighell’s version should not be accepted.

405. It is likely that Dean Mighell and Bernard Riordan discussed Bernard Riordan’s appointment as Commissioner as a reason for discontinuing the proceedings. That, in fact, was the reason Bernard Riordan wanted the proceedings to be discontinued. It is also likely that they discussed the rule changes that Dean Mighell was seeking in order to achieve increased autonomy for the Victorian Branch. That is likely because that was the main subject matter of the Deeds that were drafted at this time.

406. It is unlikely, however, that Dean Mighell and Bernard Riordan had any agreement that Bernard Riordan would use his best endeavours to ensure that the practice of retaining board fees ceased. The Deed that Dean Mighell claims was signed makes no reference to any such agreement.\textsuperscript{563} Had that formed any significant part of the terms on which he was prepared to discontinue the proceedings, it is highly likely that it would have been embodied in that Deed. The Deed did contain obligations on Bernard Riordan to ‘use his best endeavours and take all reasonable steps’\textsuperscript{564} to gain Peter Simpson’s support for the proposed rule changes.

407. Dean Mighell gave an explanation for the absence of any reference in the Deed to an obligation on Bernard Riordan to take steps to stop the practice of retaining board fees. But it was implausible. He claimed in his statement that he had proposed the inclusion of such a clause but

\textsuperscript{563} Dean Mighell, witness statement, 5/5/15; DM-03.
\textsuperscript{564} Dean Mighell, 5/5/15, witness statement, DM-03, clause 4.
that Bernard Riordan said it was not appropriate because it concerned
the ETU NSW and the other matters concerned the federal union.\footnote{565}
Bernard Riordan made no reference to anything of this kind in his
statement. In cross-examination he said he could not remember it.\footnote{566}
It is inherently unlikely that, if Dean Mighell made such a proposal,
Bernard Riordan would have opposed it on that basis. And it is
inherently unlikely that if Bernard Riordan had opposed it on that
basis, Dean Mighell would have accepted that opposition. These
things are inherently unlikely because the reason Dean Mighell
suggested that Bernard Riordan gave is an obviously unsatisfactory
reason for not including such an obligation in the Deed. The Deed
imposed personal obligations on Bernard Riordan to do various things.
It was entirely appropriate, if the parties had indeed agreed to it, for
one of these things to be using his best endeavours to ensure a
cessation of the practice of officials keeping directors’ fees.

408. The better explanation is either that there was no proposal during the
settlement negotiations that Bernard Riordan make efforts to stop the
practice of board fee retention, or that Bernard Riordan did not accept
any such proposal. This is supported by a number of matters. \textit{First},
Bernard Riordan makes no reference to any of these matters in his
statement. \textit{Secondly}, Bernard Riordan in detailed parts of his oral
evidence did not accept that there was any such agreement, and
contradictory parts should be set aside.\footnote{567} \textit{Thirdly}, it is unlikely that
any efforts made by Bernard Riordan to ‘stop the practice’ would have
been of any use, and therefore unlikely that they would have been

\footnote{565}{Dean Mighell, witness statement, 5/5/15, para 30.}
\footnote{566}{Bernard Riordan, 4/5/15, T:623.4-16.}
\footnote{567}{Bernard Riordan, 4/5/15, T:599.30-600.3.}
either requested by Dean Mighell or promised by Bernard Riordan. As Bernard Riordan observed: ‘My capacity to influence the ETU in NSW or the CEPU Electoral Division NSW Branch was on a fast-track to zero….As one of my colleagues once said: “There’s nothing more ex than an ex”.’\textsuperscript{568} The change in position of ETU NSW under which directors’ fees were paid to the union only took place after Bernard Riordan gave up the Secretaryship and Steve Butler took over.\textsuperscript{569} Fourthly, although Bernard Riordan did endeavour to obtain consent to the proposed rule changes, there is no evidence that he made any effort to stop the practice after the discontinuance of the proceedings. And there is no evidence that Dean Mighell asked Bernard Riordan to make those efforts.

**Dean Mighell’s reasons for discontinuing the proceedings: agreement on rule changes**

409. Dean Mighell said he discontinued the proceedings because agreement had been reached to effect rule changes to give the Victorian Branch greater autonomy.\textsuperscript{570}

410. Counsel assisting put the following submissions.

411. At least by the time that Dean Mighell and Bernard Riordan came to have the above discussions, Dean Mighell’s solicitors had prepared draft Deeds of settlement in connection with the proceedings. Two of

\textsuperscript{568} Bernard Riordan, 4/5/15, T:599.40-45.

\textsuperscript{569} Steve Butler, witness statement, 30/4/15, para 53.

\textsuperscript{570} Dean Mighell, witness statement, 5/5/15, paras 34, 35(a)-(b).
them are in evidence.\textsuperscript{571} One is between Dean Mighell and Bernard Riordan (‘the First Deed’).\textsuperscript{572} That First Deed contains as an attachment another Deed (‘the Second Deed’).\textsuperscript{573} The Second Deed names as parties all of the parties to the proceedings together with Troy Gray and Peter Tighe. This Second Deed attached a copy of the rules of the Electrical Division of the CEPU and the Rules of the CEPU.\textsuperscript{574} These copies of the Rules had tracked changes which set out proposed amendments to the Rules.

412. Counsel assisting invited attention to the following aspects of the Deeds.

(a) The First Deed provided for the discontinuance of the proceedings. It also provided for the agreement of Bernard Riordan to the proposed rule changes attached to the Second Deed. And it provided for him to use his best endeavours to procure Peter Simpson’s consent to the rule changes. The First Deed preserved Dean Mighell’s entitlement to recommence the proceedings if the Second Deed was not executed within 14 days.

(b) The proposed rule changes attached to the Second Deed, if made, would have given each Branch of the Division a greater degree of autonomy over its own affairs. A key example is the proposed amendments to rule 11.2 of the

\textsuperscript{571} Dean Mighell, witness statement, 5/5/15, DM-03; DM-04.
\textsuperscript{572} Dean Mighell, witness statement, 5/5/15, DM-03.
\textsuperscript{573} Dean Mighell, witness statement, 5/5/15, DM-03.
\textsuperscript{574} Dean Mighell, witness statement, 5/5/15, DM-04.
Divisional rules, which sought to remove the control that the Divisional Council and Divisional Executive had over the financial affairs of each Branch.

(c) With minor exceptions, the proposed rule changes were never made. This is apparent from a comparison of those proposed changes with the rules of the CEPU Electrical Division in their current form. The minor exceptions were changes to rule 18 regarding the execution of industrial agreements and changes to rule 19 regarding the institution of court proceedings. Rule 11.2 was amended to give each Branch autonomy on the question of affiliation to political parties. This change was not specifically proposed in the document containing the proposed changes, but could fairly said to be one which increased autonomy. Significantly, however, Dean Mighell’s proposal to give Branches autonomy in relation to political donations (proposed rule 20.1.6) was not adopted.

(d) Neither Deed dealt at all with the practice of officials receiving board fees. Nor did any of the proposed rule changes.

(e) Neither Deed required any of the board fees retained by the respondents to the proceedings to be repaid. Indeed, the payment of money by them did not appear to have formed any part of settlement discussions at any stage.

413. The Second Deed was never executed. Was the first Deed ever executed? That is unclear. It would seem that Bernard Riordan signed a Deed, probably the First Deed, on 23 February 2012. That is apparent from Aron Neilson’s email of 23 February 2012, which states that Bernard Riordan had given him a signed copy of the First Deed. Aron Neilson asked Dean Mighell to sign a counterpart and post it to him ‘so we have a copy in our office’. The email went on to say: ‘I will hold the deeds here for safe keeping unless you want me to post it to you’. 576 Bernard Riordan recalled signing a document of some kind. When shown the draft Deed that Dean Mighell claimed to have signed, he said the provisions looked familiar but that could not recall whether that was the document he signed. 577 Paul Sinclair said he recalled Bernard Riordan signing a Deed. 578

414. Dean Mighell says that he believed he signed the First Deed and posted it to Aron Neilson in accordance with his request. No signed Deeds, however, have been produced in answer to notices issued by the Commission. One would expect Bernard Riordan, Dean Mighell or their solicitors, or all of them, to have retained copies of a settlement agreement that had been executed by both men, if it ever was. 579

415. Whatever the position, it is clear that Bernard Riordan and Dean Mighell did not sign any document agreeing to settle the proceedings

576 Dean Mighell, witness statement, 5/5/15, DM-03.
578 Paul Sinclair, witness statement, 27/4/15, para 97.
579 Clause 11 of the draft Deed permitted execution by exchange of counterparts. It would appear from Aron Neilson’s email to Dean Mighell of 23 February 2012 (Dean Mighell, witness statement, 5/5/15; DH-03) that execution by exchange of counterparts was what was contemplated at this time.
prior to the signing of the Notice of Discontinuance, and the delivery of that document to Bernard Riordan by Dean Mighell’s solicitors on the evening of 22 February 2012. That is apparent from Robert Whyburn’s email of 23 February 2012, which proposed amendments to the First Deed.\textsuperscript{580}

416. Senior counsel for Dean Mighell submitted that none of this mattered. Dean Mighell agreed to discontinue the First Federal Court proceedings because of an oral agreement with Bernard Riordan for increased Victorian Branch autonomy.\textsuperscript{581} But, as counsel assisting pointed out, an oral agreement by Bernard Riordan to use best endeavours to effect rule changes giving increased Victorian Branch autonomy was close to valueless, because ‘[t]here’s nothing more ex than an ex’. It cannot have had any significance in Dean Mighell’s decision to discontinue. These submissions of counsel assisting are therefore accepted.

The position of Paul Sinclair and Neville Betts

417. What about Paul Sinclair and Neville Betts? Counsel assisting saw their absence from the settlement negotiations as telling. Counsel assisting put the following submissions. Dean Mighell neither requested nor was given assurances from Paul Sinclair and Neville Betts in relation to stopping the practice of receipt of board fees or rule changes. Indeed, it would appear that they were not consulted in any significant way at any stage in the settlement negotiations. Although Dean Mighell claimed in oral evidence that Paul Sinclair was at some

\textsuperscript{580} Mighell MFI-2, 5/5/15, tab 16.

\textsuperscript{581} Submissions for Dean Mighell, 9/7/15, paras 52-55.
of the meetings involved, he could not recall any.\textsuperscript{582} There is no evidence of any attempt to prepare a separate Deed for Neville Betts and Paul Sinclair, akin to the Deed signed by Bernard Riordan.\textsuperscript{583} Largely, they were regarded, both by Dean Mighell and Bernard Riordan, as an irrelevance. As Paul Sinclair said in his statement ‘[e]verybody else seemed to be running the matter, all bar Mr Betts and I’.\textsuperscript{584}

\textbf{418.} That they were so regarded by Dean Mighell underscores his lack of interest in obtaining orders forcing them to repay to the Union monies said to be owed by them. Once, however, Bernard Riordan’s proposed appointment as a Commissioner presented Dean Mighell with the prospect that his main political opponent was departing the scene, he abandoned any pretence in being interested in pursuing Neville Betts and Paul Sinclair.

\textbf{419.} Senior counsel for Dean Mighell submitted that the joint representation of the respondents and Bernard Riordan’s senior office as Secretary meant that it was unsurprising that Dean Mighell negotiated the discontinuance with him. He submitted that Dean Mighell understood that Paul Sinclair and Neville Betts were to be parties to the Deed because Bernard Riordan had given an assurance that he would speak to them.\textsuperscript{585} The evidence is confusing on that matter. Dean Mighell told counsel for Paul Sinclair that the latter ‘was to be a party to the

\textsuperscript{582} Dean Mighell, 5/5/15, T:729.42-730.17.

\textsuperscript{583} The Deed presented by Bernard Riordan to Paul Sinclair to sign (see Paul Sinclair witness statement, 27/4/15, paras 94-97) would appear to be the First Deed – that is, the Deed to which only Bernard Riordan and Dean Mighell were parties.

\textsuperscript{584} Paul Sinclair, witness statement, 27/4/15, para 91.

\textsuperscript{585} Submissions of Dean Mighell, 9/7/15, paras 77-78.
deed, as was Mr Betts, and Mr Riordan gave us an undertaking that he would have those discussions and I believe he did’.\textsuperscript{586} Earlier he had given a different account to counsel assisting. He said: ‘the agreement was reached between Riordan and myself, and it didn’t include anyone else’. And he said Bernard Riordan undertook to discuss the matter with Paul Sinclair and Neville Betts.\textsuperscript{587} But he did not say that Paul Sinclair and Neville Betts would be invited to be parties to the Deed. Indeed it is hard to see what point that would have had, for the Deed imposed obligations only on Bernard Riordan. Paul Sinclair, Neville Betts and Bernard Riordan were not cross-examined about this by Dean Mighell’s senior counsel.

420. The evidence thus does not reduce the force of counsel assisting’s submission. If Dean Mighell’s real interest in the First Federal Court Proceedings was stopping the practice of officials retaining directors’ fees, he would not have discontinued the proceedings against Paul Sinclair and Neville Betts.

**Assessing Dean Mighell’s conduct**

421. Counsel assisting correctly submitted that if Dean Mighell really did commence and prosecute the First Federal Court Proceedings for the purpose of obtaining the relief sought in them, his decision to discontinue those proceedings is impossible to understand. In particular:

\begin{itemize}
  \item \textsuperscript{586} Dean Mighell, 5/5/15, T:730.21-23.
  \item \textsuperscript{587} Dean Mighell, 5/5/15, T:706.47-707.16.
\end{itemize}
(a) He commenced the proceedings believing he had a strong case.\textsuperscript{588} He does not suggest that this belief changed.\textsuperscript{589}

(b) He discontinued the proceedings without reaching any binding settlement agreement with Bernard Riordan, and without even seeking to enter into any such agreement with Paul Sinclair or Neville Betts.

(c) The draft settlement agreement that he had with Bernard Riordan at the time of discontinuance would, once executed, have achieved nothing except Bernard Riordan’s promise to support rule changes. The rule changes themselves had nothing to do with obtaining the repayment of directors’ fees or with stopping that practice.

(d) There is no suggestion that, in settlement discussions, he ever requested, as part of any proposal for settlement, any payment of money by the respondents.

(e) By the time that Dean Mighell came to discontinue the proceedings, his branch had incurred at least a large sum in legal fees in connection with the proceedings – possibly as much as $245,000, though Dean Mighell did not reveal how much, if at all, that was an overestimate – and at least $20,000

\textsuperscript{588} Dean Mighell, 5/5/15, T:679.6.

\textsuperscript{589} Dean Mighell, witness statement, 5/5/15, para 35(c).
in fees to EB Economics.\textsuperscript{590} Substantial management time was expended.

(f) To have prosecuted the proceedings to their conclusion was unlikely to have incurred any, or any substantial, further fees. It is apparent from the email of 21 February 2012 from Cowdroy J’s associate that the proceedings were estimated to take two days.\textsuperscript{591} Counsel briefed on the hearing charged for the first day in any event. With the possible exception of Herman Borenstein, senior counsel charged for both days. Dean Mighell’s solicitors charged fees for both days due to their involvement in the settlement negotiations.

(g) The risk of an adverse costs order if Dean Mighell was unsuccessful in the proceedings was minimal. A costs order could only be made if the proceedings were found to have been vexatious or instituted without reasonable cause.\textsuperscript{592}

422. The above matters suggest that Dean Mighell did not commence and prosecute the First Federal Court Proceedings for the purpose of obtaining the relief sought in them. They suggest that he was at all times indifferent to the question of whether the respondents owed the Union the monies claimed. They fortify the inference that arises as a result of Dean Mighell joining only three of the nine officers identified by Ruth Kershaw as having received board fees. The inference is that Dean Mighell commenced and prosecuted the proceedings for the

\textsuperscript{590} Penfold MFI-3, 5/6/15.
\textsuperscript{591} Mighell MFI-2, 5/5/15, tab 14.
\textsuperscript{592} Fair Work (Registered Organisations) Act 2009 (Cth), s 329(1).
purposes of further his own interests in the union elections in 2011 and
damaging those of his political rivals.

423. The only reasonable inference is that Dean Mighell discontinued the
First Federal Court Proceedings because he perceived that
discontinuance would result in Bernard Riordan’s appointment as a
Fair Work Commissioner, thus removing one of Dean Mighell’s key
political rivals. It is probably also correct that Bernard Riordan’s
prospective appointment gave Dean Mighell the opportunity to seek
rule changes that would give his Branch more autonomy. However,
that had nothing to do with the relief claimed in the proceedings. And
Dean Mighell had no assurance that those changes would ever be
made. And, in fact, for the most part, they have not been made.

424. Dean Mighell’s conduct in commencing, prosecuting and then
discontinuing the proceedings raises two issues. First, whether it
involved breaches of his duties as an officer of the CEPU. Secondly,
whether this conduct was an abuse of the processes of the Federal
Court.

**Breach of officers’ duties**

425. As an officer of the CEPU, Dean Mighell owed a fiduciary duty not to
place himself in a position where his interests might conflict with his
duties to the CEPU. He also owed a fiduciary duty not to use his
position to confer an advantage on himself. In addition, he owed
statutory duties to act for proper purposes and a duty not improperly to
use his position to gain an advantage for himself or cause detriment to the union.593

426. In prosecuting the First Federal Court Proceedings, Dean Mighell spent Branch monies and utilised branch resources in the form of management time. The total monies spent were large, and may have been well over $200,000.594 He owed duties to his members to ensure that these resources were expended for proper purposes. The purposes that were proper in this context were the pursuit of the monies claimed and of s 164 relief in the proceedings. The resolution of State Council authorising expenditure in connection with the proceedings could only have been made on the assumption that those were the purposes for which the proceedings were brought and for which expenditure would be incurred. To have authorised expenditure in connection with Dean Mighell’s election campaigns would have contravened s 190 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).595

427. The analysis above596 of the circumstances in which Dean Mighell commenced and subsequently discontinued the First Federal Court Proceedings indicates that he utilised Branch resources to further his own political purposes by assisting him in election campaigns at Branch, Divisional and National level in 2011. He discontinued the proceedings in order to secure the departure from the union of a key political rival. At no stage was he acting in the interests of the Branch.

593 *Fair Work (Registered Organisations) Act* 2009 (Cth), ss 286(1)(b), 287(1).
595 Mighell MFI-2, 5/5/15, tab 3, p 76.
596 See paras 341-416.
428. None of his conduct in commencing, continuing and discontinuing the First Federal Court Proceedings was a proper exercise of his powers as a union official. He was not acting in the interests of the Branch, the Federal Union or the members of either. He was self-interested. His conduct, as a result, may have amounted to a breach of:

(a) his fiduciary duty not to use his position as an officer to confer an advantage on himself and his statutory duty under s 287 of the *Fair Work (Registered Organisations) Act 2009 (Cth)*; and

(b) his fiduciary duty not to act in a position of conflict; and

(c) his statutory duties to act in good faith and for a proper purpose under s 286 of the *Fair Work (Registered Organisations) Act 2009 (Cth)*.

429. As a result of Dean Mighell’s breaches of duty, substantial Branch resources (money and management time) were expended which could otherwise have been devoted to serving the interests of its members. Pursuant to s 6P of the *Royal Commissions Act 1902 (Cth)* and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against Dean Mighell for pecuniary penalty orders in relation to possible contraventions of ss 286 and/or 287 of the *Fair Work (Registered Organisations) Act 2009 (Cth)*.
Abuse of process

430. Counsel assisting asked: ‘Did Dean Mighell’s conduct in relation to the proceedings amount to an abuse of process?’ For present purposes, the relevant category of abuse of process is proceedings that involve a court’s process being employed for an ulterior or improper purpose, or in an improper way. The question is whether the First Federal Court Proceedings were brought, or were prosecuted, for a predominant purpose other than that for which Federal Court processes were designed.\(^597\) The onus of satisfying a court that there has been an abuse of process is a heavy one.\(^598\)

431. This category of abuse of process is distinct from the category that concerns proceedings commenced without any reasonable basis. Proceedings may be an abuse on the ground of improper purpose even if they have reasonable prospects of success. The question is not whether the proceedings, objectively considered, are reasonably based. Rather, the question is whether the purpose of the party prosecuting the proceedings is ‘collateral’ or ‘ulterior’ or ‘foreign’ to the nature of the process. The relevant purpose to consider is the subjective purpose of the person instituting or maintaining the proceedings.\(^599\) It is not an

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\(^{597}\) Williams v Spautz (1992) 174 CLR 509 at 523-4, 529; Clavel v Savage [2015] NSWCA 61 at [52].

\(^{598}\) Williams v Spautz (1992) 174 CLR 509 at 529.

abuse of process where the purpose is to take advantage of an entitlement or benefit which the law gives the litigant in any event.  

432. It is difficult to see how the termination of proceedings considered in isolation could amount to an abuse of process in the above sense. However, the circumstances in which proceedings are terminated may shed light on the subjective purposes of the person who instituted and maintained them. That is the case here. For the reasons given above, the circumstances in which Dean Mighell commenced and subsequently discontinued the proceedings indicates that he was prosecuting those proceedings for purposes foreign to the processes of the Federal Court. He regarded those processes as a mere tool to be deployed to advance his own political aspirations.

433. Senior counsel for Dean Mighell took issue with these submissions at a factual level in ways already discussed. But he also submitted that even if Dean Mighell’s commencement of the proceedings was motivated by a belief that this would advance his own political interests, it was insufficient to constitute an abuse of process, because his immediate purpose was to secure an end within the ambit of the proceeding – enforcing the rules of the union pursuant to s 164. Counsel assisting denied that that was Dean Mighell’s immediate purpose. In all the circumstances, that denial must be accepted.

Robert Whyburn’s signature on the notice of discontinuance

434. The notice of discontinuance is signed, purportedly on behalf of the respondents, by Robert Whyburn.\textsuperscript{601} By that signature, Robert Whyburn represented to the Federal Court that the three respondents had consented to the discontinuance of the proceedings with no order as to costs. Neither Neville Betts nor Paul Sinclair had in fact consented.\textsuperscript{602} The representation in the notice of discontinuance was therefore false. Its significance was that, under the Federal Court Rules, Dean Mighell was entitled as of right to discontinue the proceedings without the leave of the Court if the respondents consented.\textsuperscript{603} But in the absence of that consent, Dean Mighell would have needed the leave of the Court to discontinue the proceedings.\textsuperscript{604} If it had been necessary for Dean Mighell to seek leave, Neville Betts and Paul Sinclair would have had an opportunity to oppose the discontinuance of the proceedings, or to seek the imposition of terms (such as the payment of costs or a condition against commencing fresh proceedings) in relation to that discontinuance.

435. How did Robert Whyburn come to sign the notice of discontinuance purportedly on behalf of Paul Sinclair and Neville Betts? Robert Whyburn’s evidence was that he had a conversation with Bernard Riordan in which Bernard Riordan told him that it had been agreed that the proceedings would be ‘withdrawn’, and that Bernard Riordan told

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{601} Mighell MFI-2, 5/5/15, tab 15.
\item \textsuperscript{602} Neville Betts, witness statement, 30/4/15, para 33; Neville Betts, 30/4/15, T:433.14-\textsuperscript{434.13}; Paul Sinclair, witness statement, 27/4/15, para 100.
\item \textsuperscript{603} Federal Court Rules 2011, rule 26.12(2)(b).
\item \textsuperscript{604} Federal Court Rules 2011, rule 26.12(2)(c).
\end{itemize}
\end{footnotesize}
Robert Whyburn, ‘We’re all pleased about that’ and ‘Do what you’ve got to do to get rid of it’. 605 Robert Whyburn took those as instructions to sign the notice of discontinuance. He did not attempt to check with Paul Sinclair or Neville Betts as to whether they concurred. 606

436. Robert Whyburn was not cross-examined by counsel for Bernard Riordan on this issue. Subsequent to the hearing, Bernard Riordan was invited to address Robert Whyburn’s evidence. He did so in a further statement. In that statement, he said that he was not aware at the time that the leave of the Court or the consent of the other side might be required to discontinue the proceedings, and that his understanding at the time, based on his Federal industrial tribunal experience, was that Dean Mighell could simply unilaterally withdraw or discontinue the proceedings. 607 This was broadly consistent with his oral evidence. 608 Bernard Riordan did not recall the terms of his discussion with Robert Whyburn. 609

437. There are some other factors pointing against any findings adverse to Robert Whyburn or Bernard Riordan in this regard. There had been a court-ordered mediation involving Bernard Riordan, Paul Sinclair and Neville Betts. Although that had not resolved the matter, Robert Whyburn’s understanding was that all of his clients ‘were still very keen to try and settle the matter’. 610 Further, Robert Whyburn

607 Bernard Riordan, second witness statement, 5/6/15, paras 9-10.
608 Bernard Riordan, 4/5/15, T:597.45-598.3.
609 Bernard Riordan, second witness statement, 5/6/15, para 17.
understood that Bernard Riordan, Paul Sinclair and Neville Betts had been involved directly in settlement discussions regarding the proceedings.611 Robert Whyburn’s understanding was that the ETU NSW’s protocol was that all instructions in relation to litigious matters came through the Secretary, namely Bernard Riordan.612

438. The evidence does not support a finding that Robert Whyburn signed the notice knowing that Paul Sinclair and Neville Betts had not given their consent to the discontinuance. Nor does it support a finding that Bernard Riordan deliberately misled Robert Whyburn into believing that Paul Sinclair and Neville Betts had consented. What happened was nothing more than an unfortunate misunderstanding.

The Second Federal Court Proceedings

439. On 5 February 2013, proceedings were commenced in the Federal Court of Australia. These were the Second Federal Court Proceedings. The respondents were Paul Sinclair and Neville Betts (but not Bernard Riordan). The proceedings requested identical relief to the relief sought by Dean Mighell in the First Federal Court Proceedings.613 The claims in the statement of claim filed in the Second Federal Court Proceedings were in identical terms to those made in the statement of claim filed in the First Federal Court Proceeding.614 The Second Federal Court Proceedings were, however, fresh proceedings. They

were not strictly speaking a recommencement of the First Federal Court Proceedings commenced by Dean Mighell. The Second Federal Court Proceedings were commenced by Gary Carruthers, the Victorian Divisional Branch President. The Branch agreed to fund the Second Federal Court Proceedings, as it had the First. According to Paul Sinclair, the Second Federal Court Proceedings were discontinued the day before their first return date.\textsuperscript{615} The precise date of discontinuance is unclear from the evidence.

440. The central submissions advanced by counsel assisting about the Second Federal Court Proceedings are as follows.

441. There are a number of puzzling aspects about the Second Federal Court Proceedings.

442. \textit{First}, Bernard Riordan was not a respondent. That was puzzling because, like Paul Sinclair and Neville Betts, he still (on the view propounded in both statements of claim) owed $1,800,000 plus interest to the CEPU. The fact that he was no longer a member of the Union was irrelevant. Section 164A(5) of the \textit{Fair Work (Registered Organisations) Act} 2009 (Cth) expressly permitted actions against non-members.

443. \textit{Secondly}, the statement of claim in the First Federal Court Proceedings claimed amounts which were identical to the amounts claimed against Neville Betts and Paul Sinclair in the statement of claim in the First Federal Court Proceedings (that is, ignoring interest, $595,374 and $991,839 respectively). However, further and better particulars had

\textsuperscript{615} Paul Sinclair, witness statement, 27/4/15, para 106.
been provided in the First Federal Court Proceedings changing the amounts claimed (to, respectively, $642,535 and $745,794). Thus it must have been known that the amounts claimed in the statement of claim in the Second Federal Court Proceedings were incorrect. Yet the errors were mechanically perpetuated. In addition, Neville Betts and Paul Sinclair had received further directors’ fees since the time of filing the statement of claim in the First Federal Court Proceedings.

444. The third puzzling aspect of the Second Federal Court Proceedings is that they were commenced by Gary Carruthers and not by Dean Mighell. That is puzzling because the Federal Court Rules created no bar to Dean Mighell recommencing the First Federal Court Proceedings. Given that, in those proceedings, discovery had been given, subpoenas issued and all of the evidence and written submissions filed, commencing the Second Federal Court Proceedings through Gary Carruthers made no sense. According to Gary Carruthers, Dean Mighell was, at the time of commencement, about to resign as Branch Secretary. However Dean Mighell had brought proceedings in his capacity as a member of the CEPU, not in his capacity as Secretary.

445. The fourth puzzling aspect of the Second Federal Court Proceedings is that they were discontinued very soon after they started. That was puzzling because nothing specific and concrete seems to have been achieved by the proceedings.

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616 Mighell MFI-2, 5/5/15, tab 8.
Gary Carruthers was a very unimpressive witness. One might have expected the President of the Victorian Branch and the only named applicant in the Second Federal Court Proceedings to have been able to give at least a vague account of the circumstances in which the proceedings were brought and to have shed some light on the matters referred to above. Gary Carruthers either would not or could not. Gary Carruthers appears to have commenced the proceedings solely because he was asked to by Dean Mighell and with very little understanding of what they involved.

Why were proceedings not brought against Bernard Riordan? The position of Gary Carruthers appeared to be that Dean Mighell only asked him to commence proceedings against Neville Betts and Paul Sinclair, and that ‘Mr Riordan was no longer about, so we just presumed to go – to pursue Betts and Sinclair’.

He sought no legal advice on this issue.

Gary Carruthers appeared equally ignorant as to the circumstances in which the Second Federal Court Proceedings were discontinued. He did not know what a ‘first return date’ was. That is significant because he was only entitled to discontinue the First Federal Court Proceedings without leave because he did so prior to the first return date. One might therefore have expected Gary Carruthers to have had discussions with his lawyers about that. However, Gary Carruthers

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620 Gary Carruthers, 5/5/15, T:749.31-750.7.
denied having any discussions with his lawyers about the time at which the proceedings were discontinued.621

449. Nor was Gary Carruthers able to shed any light on the nature of any agreement reached leading to the discontinuance of the proceedings. Gary Carruthers said on a number of occasions that he was not privy to the negotiations. All he could say is that Troy Gray had reported back to the State Council and Executive on the topic.622 He did not seem to know with whom agreement had been reached.623 At one point he said that the agreement reached was ‘[b]etween Vic Branch and NSW Branch on the directors’ fees’.624 However in his statement he said agreement had been reached on both that issue and on rule changes to provide greater autonomy.625 He was not able to identify with any clarity the nature of the rule changes in question. He could only say that ‘the main issue was the New South Wales, which we’ve already been through, the New South Wales State registered branch, transparency and the interference with the Victorian Branch’.626

450. Gary Carruthers said he did not know how much Paul Sinclair and Neville Betts were said to owe the union at the time of discontinuance of the proceedings.627 He later said that ‘it was some millions of dollars and I thought there was a worthwhile thing to give back to the

621 Gary Carruthers, 5/5/15, T:749.41-750.3.
622 Gary Carruthers, 5/5/15, T: 750.28-751.7.
members of the union’. 628 When it was pointed out that he did not get any of those millions of dollars back, he could only say: ‘Well, as of the day, directors’ fees, millions of dollars now will flow back to the members of the union and I think that is worthwhile’. 629 The difficulties in taking a stance of this nature have been identified in connection with Dean Mighell.

451. It is not, indeed, apparent that any agreement of any kind ever was reached. As mentioned above, the rule changes for which Dean Mighell was agitating have, with minor exceptions, not been made. There has been no change in the rules in relation to the receipt of legal fees. There seems to be no document recording any agreement or arrangement to end the Second Federal Court Proceedings. It is true that, in fact, for the time being, the practice of NSW officials retaining board fees has stopped, in circumstances described by Steve Butler in his statement. 630 Steve Butler did not say in that statement that the stopping of that practice had anything to do with any agreement reached in relation to either the First or the Second Federal Court Proceedings. Nor did he say that his decision was in any way connected with the Second Federal Court Proceedings brought by Gary Carruthers, although he agreed in cross-examination that the First Federal Court Proceedings were ‘a factor’ in his decision-making process in this regard. 631

628 Gary Carruthers, 5/5/15, T:752.5-7.
630 Steve Butler, witness statement, 30/4/15, paras 49-51.
452. Senior counsel for Gary Carruthers stressed many of the submissions made in relation to Dean Mighell. He said both sets of proceedings were not brought by Dean Mighell and Gary Carruthers in their individual capacities, but in furtherance of the expressed collective interests of the Victorian Branch, to whom Dean Mighell reported back. Gary Carruthers started the Second Federal Court Proceedings because the settlement which had caused the discontinuation of the First Federal Court Proceedings had collapsed. Senior counsel relied on arguments advanced earlier to explain why Bernard Riordan and Dean Mighell were not parties. He submitted that it was not necessary to join Bernard Riordan because the goal was to stop the payment of directors’ fees in future, not the recovery of them for the past. Senior counsel contended that the discontinuation of the Second Federal Court Proceedings was not puzzling. It happened because Troy Gray and Steve Butler reached an agreement to end the practice of officials retaining directors’ fees and to introduce rule changes bringing autonomy to the Victorian Divisional Branch. Senior counsel submitted that it was pointless to criticise Gary Carruthers’s ignorance of what a ‘first return date’ was. An electrician holding office in an honorary capacity would naturally be unfamiliar with the language of civil procedure. Senior counsel said Gary Carruthers’s non-participation in the negotiations that led to discontinuance did not matter, since he delegated the task to Troy Gray. Finally, senior counsel said that it did not matter whether any agreement leading to the discontinuance of the Second Federal Court Proceedings had actually been reached. An informal agreement sufficed.632

632 Submissions for Dean Mighell, 9/7/15, paras 98-112.
In resolving these controversies, it is sufficient to concentrate on the substitution of Gary Carruthers for Dean Mighell as applicant, and on Gary Carruthers’s role thereafter. Counsel assisting’s submissions are correct. Dean Mighell was not suing as Secretary, but as a member. His impending departure from office as Secretary did not incapacitate him from being the applicant in the Second Federal Court Proceedings. If he were to cease being Secretary, any member could have been the applicant and he was a member. To institute Federal Court proceedings is in the long run to invoke the massive power of the Commonwealth to enforce the Court’s orders. The institution of legal proceedings can put the respondents to great and generally irrecoverable expense in this type of litigation. It can have very oppressive consequences. Yet Gary Carruthers seems to have instituted the proceedings not only ignorantly, but nonchalantly. He invoked the aid of the State with a light heart. He dropped the matter equally light-heartedly. He knew practically nothing about the Second Federal Court Proceedings or why they were structured as they were. This is not a pedantic question about whether he was ignorant of legal terms. Legal proceedings have substantive consequences. Those who start them must ensure that they are aware of those consequences. Gary Carruthers was plainly nothing but the tool of the desires of others. He knew nothing about why Bernard Riordan had been dropped from the proceedings. He knew virtually nothing about why he himself had taken over from Dean Mighell. Whatever agreement was or was not reached by Troy Gray does not seem to have been causative of the discontinuance. It is obscure what the purpose in starting the proceedings of Gary Carruthers – the applicant – was, as distinct from what the purposes of others – who were not applicants – may have been. Finally, in kindness to Gary Carruthers, it is desirable
to abstain from setting out any close analysis of his testimonial performance. It would be cruel to publish one. But it is enough to say that counsel was correct to criticise his unsatisfactory performance. The substantive significance of it is simply that he did not explain clearly what purpose he, as applicant, personally had that did not involve an abuse of process, and did not explain why he, as applicant, personally chose to discontinue the proceedings when he did. The truth is that he had no personal role in those decisions. He simply did whatever others told him was the right thing to do. He was a tool, not a principal.

454. What conclusions are to be drawn in regard to the Carruthers proceedings?

455. *First*, Gary Carruthers was no more than an instrument to serve the ends of someone else within the Branch – probably Dean Mighell.

456. *Secondly*, the evidence does not support any particular finding as to the true purpose of the proceedings, save that it was not to achieve what the application and statement of claim on their face sought to achieve. That is, the proceedings had nothing to do with any bona fide desire to recover board fees from Neville Betts and Paul Sinclair. As such, they were an abuse of process.

457. *Thirdly*, Gary Carruthers, although not a paid official, was nonetheless, as President, an officer of the Branch. The proceedings he instituted could have exposed the Branch to great expense, for it had resolved to fund them. He owed statutory duties to act with care and due diligence
and statutory duties to act in good faith and for a proper purpose.\textsuperscript{633} His complete lack of understanding of the proceedings indicates that he may have breached his duty to act with care and due diligence. The evidence also supports a finding that, in commencing the proceedings, he may have contravened s 286(1).\textsuperscript{634} It is hard to see how commencing proceedings that are an abuse of process could ever amount to acting for a ‘proper purpose’ within the meaning of that section. At any rate, nothing about Gary Carruthers’s conduct suggests the existence of any proper purpose. Pursuant to s 6P of the \textit{Royal Commissions Act} 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against Gary Carruthers for pecuniary penalty orders in relation to possible contraventions of ss 286 and/or 287 of the \textit{Fair Work (Registered Organisations) Act} 2009 (Cth).

G – THE ETU OFFICERS’ FUND

\textbf{Background}

458. This section concerns the ETU Officers’ Fund (the Fund).

459. The Fund is a relevant entity within the meaning of the Commission’s Terms of Reference.

\textsuperscript{633} \textit{Fair Work (Registered Organisations) Act} 2009 (Cth), ss 285, 286(1).

\textsuperscript{634} \textit{Fair Work (Registered Organisations) Act} 2009 (Cth).
The Fund was established by the officers of the ETU (NSW). The Fund has been in existence since at least the early 1990s. The Fund has written rules. Some key provisions of those rules, as at July 2011, were as follows. The Fund had three elected ‘trustees’ who were required to hold the assets of the Fund on behalf of the Fund. As at July 2011 Paul Sinclair, Geoffrey Prime and John Thornton were the three trustees. Contributions were made into the Fund on a weekly basis by its members. They made payments into a bank account operated on the joint signatures of two of the trustees of the Fund. Membership of the Fund was by invitation made by a duly convened meeting of members. The Rules also provided for the removal of members by, amongst other means, the same process. Expenditure of Fund monies was required to be authorised by a meeting of members. However, emergency expenditure could be authorised by the campaign director and trustees provided that a report of that expenditure was made to the members in general meeting within 14 days.

The evidence before the Commission concerned two particular matters relating to the Fund. First, the withdrawal and expenditure of $60,000 in cash for the purposes of union elections in 2011. Secondly, the payment to the Fund by the ETU (NSW) of an amount of $367,692.92. Only the first matter will be dealt with here. That is because it is not reasonable to reach any positive conclusions about the second matter.

Withdrawal and expenditure of $60,000

462. An amount of $60,000 was withdrawn from the Fund’s bank account by cash cheque on 15 July 2011. The cheque was signed by Paul Sinclair and Geoffrey Prime. The cheque was presented and the funds withdrawn by Warwick Penfold. He put the cash into a tin in a safe in the ETU offices. Those funds were used for purposes connected with CEPU elections in Victoria. Members of the Fund spent their own money in connection with those elections. They then presented receipts for that expenditure to Warwick Penfold. He reimbursed that expenditure from the cash tin.636

463. Warwick Penfold said in his statement that he kept records of the receipts presented to him and occasionally reconciled those receipts with the cash in the tin.637 Paul Sinclair prepared a complete and accurate reconciliation of expenditure of the $60,000.638 It indicates that that money was used for the purposes described by Paul Sinclair in his oral evidence. An amount of $22,000 was returned to the Fund bank account following the elections. Paul Sinclair said in oral evidence that the decision to spend the $60,000 in this way was made as a result of a decision of the campaign director, trustees and the Fund secretary to spend the money, rather than a decision of the caucus.639 As indicated above, such a decision was permissible in ‘emergency circumstances’ and required that there be a report back to a meeting of

637 Warwick Penfold, witness statement, 5/6/15 paras 79-80.
the members of the Fund: see rule 5 of the Fund Rules. Paul Sinclair said that such a report was made. Geoffrey Prime was unable to shed any light on the manner in which the withdrawal of the $60,000 was authorised. Paul Sinclair’s evidence on this point is accepted.

464. The withdrawal and expenditure of this money raise two matters.

465. The first is that to have kept $60,000 in cash on union premises was an unsatisfactory state of affairs. Good corporate governance would not countenance the storing of large sums of money in cash in the absence of some special need. It was not clear why this course was adopted, as distinct from reimbursing Fund members by direct debit.

466. The second and related matter is that the withdrawal, expenditure and administration of the $60,000 involved a use of the resources of the ETU (NSW) for the personal benefit of the Officers. At least the time of Warwick Penfold, an employee of the ETU (NSW), was taken up by administering the Fund. He described his work in that regard ‘as part of my job at the ETU’.

467. There was a question as to the extent to which members of the Fund pursued the purposes of that Fund during the course of the performance of their duties as employees or officers of the ETU (NSW). At various times, for example, members of the Fund went to Melbourne and claimed expenses from the Fund for overnight stays. Warwick

643 See the ‘Overnight’ entries identified in Sinclair MFI-1, 5/6/15, p 2.
Penfold did not question them about what they were doing when they claimed reimbursement.\textsuperscript{644} In his evidence at the hearing on 5 June 2015 Warwick Penfold’s position was that it would be necessary to look at those members’ pay records or annual leave records to determine whether they were on leave at the time of performing work for the benefit of the Fund.\textsuperscript{645} The annual leave records produced to the Commission\textsuperscript{646} indicate that the ETU officers recorded on Paul Sinclair’s reconciliation as having been reimbursed for overnight expenses and a stay in Melbourne were not on annual leave at that time.

468. Subsequent to the hearing on 5 June 2015, the ETU produced further pay records for the individuals in question. There is a controversy about whether they indicate that none of the absences of the relevant members of the Fund occurred at a time when any of those individuals was on leave. As a matter of corporate governance, those controlling the ETU (NSW) should not facilitate a situation where individuals pursuing their own interests were being paid members’ money which should only be used to further the interests of the ETU (NSW). Senior counsel for the ETU NSW, however, submitted that the present state of the evidence does not make it possible to say whether that happened. That submission is accepted.

\textsuperscript{644} Warwick Penfold, 5/6/15, T:894.33-34.
\textsuperscript{645} Warwick Penfold, 5/6/15, T:893.39-43; 912.17-35; 913.44-914.4.
\textsuperscript{646} Sinclair MFI-2, 5/6/15, pp 244-260.
H – ADJECTIVAL MATTERS

‘Case theory’

469. Counsel for Bernard Riordan made numerous criticisms of counsel assisting in what might be called adjectival respects. Many of these, for example the appropriate standard of proof, or accusations of unfairness in cross-examination, call for no attention. A few, perhaps, do.

470. One complaint was that counsel assisting had wrongly pursued a ‘case theory’. It was said that from the start of the hearings into the ETU NSW commencing on 27 April 2015, counsel assisting ‘nailed their colours to the mast and pursued their case theory irrespective of what else emerged in the ETU NSW case study or factual inquiry.’ Counsel assisting submitted that these complaints were circular, pointless, obscure and, to the extent comprehensible, wrong. They were said to be:

[C]ircular because they take the following form: ‘counsel assisting have ignored X (or focused on Y) because X does not suit their case theory (or because Y suits their case theory)’. But the only explanations proffered (although often no explanation at all is proffered) for the assertion that there has been a pursuit of a ‘case theory’ is the ignoring of X (or the focusing on Y).

647 Submissions of Commissioner Riordan, 13/7/15, paras 10, 11(d), 25, 30, 31, 49, 50, 55, 110(f).
648 Submissions of Commissioner Riordan, 13/7/15, para 10.
649 Submissions of Counsel Assisting, 14/8/15, p 1.
These assertions were said to be ‘pointless because the presence of a “case theory” does not make X more probative of any particular issue (or make Y less probative) or give any additional reason for taking X into account (or for not taking Y into account)’.

They were said to be ‘deliberately obscure in [seeming] to hint or suggest something sinister in the work of the Commission without identifying any such thing with the precision which would enable a response.’ And they were said to be wrong, because the key submission of counsel assisting depended on an amalgam of the evidence of Bernard Riordan, Paul Sinclair and Neville Betts. The important contribution of the last of these witnesses only became clear in the course of the hearing. It had nothing to do with some antecedently worked out ‘case theory’.

Counsel assisting’s response is correct. It is hard to understand what the expression ‘case theory’ meant. However, the approach of counsel for Bernard Riordan seems to have been that a ‘case theory’ has been improperly employed in the sense that some precondition outcome had been selected or some pre-ordained analysis made, all the evidence had to be pressed into Procrustean conformity with it, and any evidence which was resistant to that pressure was left out of account.

Counsel for Bernard Riordan has been very far from the only counsel appearing before the Commission to accuse counsel assisting of this fault. There was no material to support it. But it has a fundamental difficulty. Either counsel assisting’s submissions on a given topic

650 Submissions of Counsel Assisting, 14/8/15, p 2.
651 Submissions of Counsel Assisting, 14/8/15, p 2.
652 Submissions of Counsel Assisting, 14/8/15, pp 1-2.
653 Submissions of Commissioner Riordan, 13/7/15, para 11(d).
point to evidence and reasoning said to support a particular conclusion, or they do not. If they do, it does not matter whether the assembling of the evidence and reasoning proceeded from a case theory. All that matters is that the evidence exists and that the reasoning is compelling. And if the submissions of counsel assisting do not point to evidence and reasoning that supports the conclusion because the evidence is misread or incomplete or contradicted by other evidence, or the reasoning is invalid, it is sufficient that these flaws exist: nothing is gained by relying on an allegation that a case theory has been improperly employed.

‘Procedural fairness’

473. Counsel for Bernard Riordan repeatedly claimed that his client had been denied procedural fairness. Most of these complaints seem to relate to an omission to cross-examine Bernard Riordan about his views on whether he had breached a legal duty. On occasion this was done. Thus the proposition that Bernard Riordan ought not to have participated in any decision concerning the ETU Loan was put to him. But it was not necessary to do this. It is not necessary to debate with a witness whether he or she fell below a legal standard, even if that witness is, like Bernard Riordan, legally trained. What it can be necessary to do, if the witness is not on notice of evidentiary material competing with his or her position, is to question the witness on the facts underlying the possible breach of duty. It is not a breach of procedural fairness to put an argument of law in final address.

654 Submissions of Commissioner Riordan, 13/7/15, paras 14-17.

Counsel assisting did this. And counsel for Bernard Riordan met these arguments, often successfully. Some of the complaints made by counsel for Bernard Riordan related to factual matters not raised with him. In truth, they were all raised with him. Indeed he himself had generally given attention to them in his statement.

Abstention from adequate inquiry and failure to lead evidence

Counsel for Bernard Riordan, first, accused counsel assisting of abstaining from adequate inquiry and failing to lead relevant evidence. Secondly, he referred to the Commission’s ‘vast investigative and legal resources’. That second point is a ludicrous exaggeration. As to the first point, there was nothing in most of the alleged omissions. It was open to counsel for Bernard Riordan, if he thought that any omission was important, to request counsel assisting to call further evidence. This was not done. And it was open to counsel for Bernard Riordan to cross-examine any of the many witnesses called in order to amplify the testimonial stock to his satisfaction. This was often not done. The submission that counsel assisting called insufficient evidence does not sit well in the mouth of counsel who could have procured an opportunity to call more evidence from uncalled witnesses or to elicit more evidence from those who were called. To sit back in the hope of exploiting testimonial gaps is not a tactic legitimately attracting sympathy.

656 Submissions of Commissioner Riordan, 13/7/15, para 12.
# CHAPTER 3.2

## CONDUCT OF OFFICIALS OF THE CEPU ACT

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A – INTRODUCTION

1. This Chapter concerns the conduct of some officials of the Plumbing Division of the Communications Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU).

2. The main issue that arises is similar to an issue considered later in connection with site visits by the CFMEU. Do visits by CEPU officials to building sites involve abuses of rights of entry conferred by the Work Health and Safety Act 2011 (ACT)?

3. Up until 1 April 2013 the Plumbing Division had a branch in the Australian Capital Territory. From 1 April 2013 that branch merged with the New South Wales Branch of the Plumbing Division as a sub-branch. That sub-branch will be referred to as ‘the ACT CEPU’.

4. Four officials of the ACT CEPU gave oral evidence at hearings in Canberra. David Broadley has been State Secretary of the New South Wales Branch of the Plumbing Division of the CEPU since 2011. He has therefore been responsible for the ACT CEPU since 1 April 2013. Luke Poskus has, since 22 April 2013, been the NSW Safety Officer of the New South Wales Branch of the Plumbing Division of the CEPU. He and David Broadley work predominately in Sydney. Matthew

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1 See Chapter 6.3.

2 It was submitted by the CEPU that one of the sites referred to in the evidence may have been located in New South Wales, and thus that the Work Health and Safety Act 2011 (NSW) was applicable in respect of that site. As the CEPU stated, the provisions of the NSW Act are relevantly identical to the ACT Act. In these circumstances, for convenience, only the ACT Act will be referred to in this Report.
McCann has worked as a recruitment officer for the ACT CEPU since January 2014, based in Canberra. Damian Kirkwood is no longer a CEPU official. He was secretary of the ACT Branch of the Plumbing Division for about six years until its merger with the New South Wales Branch. He resigned as an official on 19 June 2013. In addition to the above four officials, Daniel Hanford prepared two witness statements which were received into evidence. Daniel Hanford commenced as an organiser for the ACT CEPU in late July 2013. He resigned in October 2013 for personal reasons.

5. The ACT CEPU has a small number of members in the ACT. David Broadley’s evidence was that there are currently 173 financial members in Canberra. The ACT CEPU has been operating with only one or two officials present in Canberra on a full-time basis. Its involvement in the ACT construction industry is thus more limited than that of the CFMEU. The evidence before the Commission focused on the conduct of Luke Poskus and Matthew McCann.

B – LUKE POSKUS

6. Luke Poskus, as indicated above, commenced as the NSW Safety Officer of the Plumbing Division on 22 April 2013. He first visited Canberra in this capacity in July 2013. He arrived in Canberra on 1 July 2013. Luke Poskus was not sure how long he was in Canberra although he said it was possibly four or five days. During that visit,

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he attended a number of construction sites, including four that were the subject of evidence before the Commission.

**Advanced Plumbing**

7. Advanced Plumbing, a hydraulic plumbing company, was operating on two of those sites. Jason Hooper is the principal of Advanced Plumbing. The sites were in Easty Street, Woden and in Antill Street. The builder on both sites was Milin Builders.

8. From about March 2013 Jason Hooper, together with the other major hydraulic contractors, had been engaged in EBA negotiations with the CEPU. There was evidence given by Jason Hooper and by David Broadley and Damian Kirkwood about the content of these negotiations. Their versions of what was said differed, on some points significantly. It is not necessary to refer to that evidence or to resolve these disputes. It is sufficient to note that on 27 May 2013 Jason Hooper told David Broadley that he would not be proceeding with the EBA.

9. On the same day, David Broadley sent Damian Kirkwood to the Easty Street site and the Antill Street site. At the Easty Street site, Damian Kirkwood asked at the site office whether there were any Advanced Plumbing employees present and he was told there were not. He did not enter the site. He then went to the Antill Street project. He did not purport to visit the Antill Street site for safety reasons. He said that he asked Anthony Derouw, the site foreman, if he could speak to the

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*Damian Kirkwood, witness statement, 24/7/15, para 16.*
Advanced Plumbing employees and Anthony Derouw agreed. Anthony Derouw’s evidence was to the same effect. The site visit was consensual. Its stated purpose was to speak to Advanced Plumbing employees about an EBA.

10. On 1 July 2003, Luke Poskus arrived in Canberra from Sydney. On 2 July 2013, he rang Jason Hooper to ask about signing an EBA. According to Jason Hooper, Luke Poskus asked for a meeting ‘ASAP’ about signing the EBA, and then, when Jason Hooper said he wasn’t interested, Luke Poskus said words to the effect that he would be on the Easty Street site in the morning to look for safety concerns. Luke Poskus denied that the conversation happened in this way. He said that David Broadley asked him to call Jason Hooper to set up a meeting about an EBA because Jason Hooper had not been returning David Broadley’s calls. Luke Poskus said that when he called Jason Hooper, the latter abused him until hanging up.

11. David Broadley denied asking Luke Poskus to set up a meeting with Jason Hooper. Luke Poskus was not an impressive witness. For reasons given below, his evidence about the purpose of various site visits cannot be accepted. David Broadley’s evidence is preferred on this issue. It is thus unlikely that Luke Poskus rang Jason Hooper for

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6 Anthony Derouw, 22/7/15, T:665.9-25, 668.28-36; Damian Kirkwood, witness statement, 24/7/15, para 17.
7 Jason Hooper, witness statement, 21/7/15, para 40.
8 Luke Poskus, witness statement dated 17/7/15, 24/7/15, para 11.
10 Paragraphs 13-40.
that purpose, or told Jason Hooper that David Broadley wanted to have a meeting with him.

12. That still leaves the question of whether to accept Jason Hooper’s account of the conversation. Competing submissions were made about that question. For the reasons explained at the conclusion of this Chapter, no finding is made about it.11

13. On 3 July 2013, Luke Poskus went to the Easty Street site. He claimed that he was exercising rights under s 117 of the *Work Health and Safety Act 2011* (ACT), and that he gave notice under s 118. The Milin representatives denied that any notice was given. No notice in fact was produced to the Commission by the CEPU or by Milin. The CEPU in fact submitted that, contrary to his evidence, Luke Poskus was not exercising rights under s 117 and that the site visit was consensual. That submission is considered below.

14. Jason Hooper claimed that, at the end of the visit, he and Luke Poskus had a conversation in which Luke Poskus said words to the effect: ‘If you sign the EBA agreement the union will put pressure on the builder [Milin] to get more money put onto your contract’.12 Luke Poskus denied this in his statement.13 The matter was not taken up with either

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11 Paragraphs 72-81.

12 Jason Hooper, witness statement, 21/7/15, para 46.

witness in oral examination. In the circumstances explained at the conclusion of this Chapter, no finding is made.14

15. Luke Poskus claimed he went to the above site because he had received anonymous complaints about safety. Counsel assisting submitted that the claim is a fanciful one, invented to disguise the true purpose for the visit. For the reasons that follow, that submission is accepted.

16. Luke Poskus said that the anonymous complaints regarding safety at the Easty Street site were received at the New South Wales office.15 He said the complaints were received by Ian Wright, who worked at the front desk. He said that Ian Wright gave him post-it notes with the complaints written on them. He said the complaints recorded on the post-it note for the Easty Street site related to moving plant, a pedestrian issue, access and egress and fall from heights.16 He was unable to say when the complaints were received.17 However, he confirmed that it was prior to his coming to Canberra.18 He said it was possible they were received months before he came to Canberra and also possible that they were received the week before he came to

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14 Paragraphs 72-81.
17 Luke Poskus, 24/7/15, T:1000.43-47.
Canberra. He said that he did not ask Ian Wright when the complaint was made.

17. Luke Poskus accepted that lives were at risk from the safety issues in question. Luke Poskus said in his statement that in the period 2002/2003-2013/2014 almost 70 deaths had occurred in the construction industry as a result of site preparation services (including moving plant issues). He also said that matters such as unsafe access or egress can cause a fatality and that he took them very seriously.

18. Counsel assisting questioned Luke Poskus about why, under these circumstances, he waited for some time until he did anything about the complaints he said he received. Counsel assisting submitted that, if true, Luke Poskus’s approach was a hopeless way to deal with safety, inconsistent with his professed concern about it and inconsistent with the careful ‘site mapping’ undertaken by the union. The ultimate submission made by counsel assisting was that the evidence was confected. They submitted that in fact no complaints were received and the site visits were an attempt to put pressure on Jason Hooper. Submissions to similar effect were made by counsel for John Nikolic.

19. Luke Poskus in oral evidence gave a number of reasons for not doing anything about the anonymous safety complaints until 3 July 2013.

20. First, his evidence was to the effect that anything short of a site visit by him might lead to someone being victimised for being a union member. The CEPU also relied on this proposition in its submissions. It has a number of difficulties. The first is that a union official who receives a complaint and acts on it promptly could with perfect legitimacy say that he or she was entitled to go to the site and investigate the complaint without first bringing it to anyone’s attention. But that is not Luke Poskus’s position. He claimed to receive complaints and then do nothing about them for a significant period. As stated above, his evidence was that the complaints could have been received weeks or even months prior to the visit. The second difficulty is that it is not clear why the arrival of Luke Poskus in person would be less likely to result in victimisation. Luke Poskus accepted that, when he turned up on site, a builder would think that one of his members had made a complaint. However he said that his presence ‘demonstrates that their Union is going to follow up on their complaints and maybe that would make the builder think twice about engaging in that sort of [conduct]’. But ringing Worksafe or ringing the builder would not have prevented Luke Poskus from turning up on site at some later time. This whole approach gives secondary importance to people’s lives: that is not how any competent safety officer would have proceeded.

21. Secondly, Luke Poskus said that without a site visit there would be no guarantee that the builder would take the issue seriously and/or

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perform the necessary rectification works. The CEPU did not embrace this reason in its submissions. It is a spurious reason. It does not explain why he did not ring Worksafe and/or the builder and then follow up the rectification works when he arrived in Canberra.

22. *Thirdly*, Luke Poskus suggested that the builder may not be aware of the relevant Australian Standard or legislation applicable. This reason, too, was not embraced by the CEPU in its submissions. It too was spurious. Even if this unlikely scenario were in fact the case, why could not Luke Poskus tell the builder? Why could not the builder find out from some other source?

23. *Fourthly*, so far as notifying Worksafe was concerned, Luke Poskus’s position was that there was no requirement for him to notify Worksafe and that the anonymous complainant was free to contact Worksafe if he wanted to. Both these propositions were true. But they do not explain why Luke Poskus did not contact WorkSafe (or take some other step) if he had been notified of serious safety issues on the site. In oral evidence, Luke Poskus took offence at the proposition that it was common sense to contact Worksafe if there was a life threatening issue on site that he could not deal with. His position was that he had no need to ring Worksafe unless he needed its assistance on a project where he was having problems. But, if he in fact received safety

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complaints and was unable to deal with them promptly, he did need that assistance.

24. At one point in his oral evidence Luke Poskus said that notifying the employer in advance would defeat the purpose of exercising a right of entry regarding safety. \(^{31}\) The CEPU in its submissions supported this proposition. It suggested that notification in advance would provide an opportunity to take steps to hide the safety breach. \(^{32}\) The proposition cannot explain Luke Poskus’ conduct. It does not explain why no attempt was made to notify WorkSafe. Further, the ultimate purpose of exercising rights under s 117 of the *Work Health and Safety Act 2011* (ACT) must be to assist in ensuring that workers are safe. Doing nothing about a safety complaint for a significant period defeats that purpose. As counsel assisting submitted, doing nothing might even assist an employer in taking steps to hide the breach.

25. Damian Kirkwood gave evidence that if he had received a safety complaint he would go straight to the site concerned and deal with it. He said he went urgently, ‘ASAP’, as fast as he reasonably could. If he could not get there he would ring the head contractor. \(^{33}\) He said ‘If I was in Sydney for whatever reason and I couldn’t get there for a day or two, I’d ring’. \(^{34}\) He would then go to the site and check himself to see whether the matter had been dealt with. He said that this was an

\(^{31}\) Luke Poskus, 24/7/15, T:1008.11-15.


\(^{34}\) Damian Kirkwood, 24/7/15, T:1087.16-18
important thing to do if one was serious about safety.\textsuperscript{35} The CEPU submitted that the mere fact that Damian Kirkwood took such an approach does not mean that Luke Poskus’ approach was unacceptable. But Damian Kirkwood’s approach is only common sense. And it does highlight the defects in the position adopted by Luke Poskus.

26. Counsel assisting submitted that none of Luke Poskus’s explanations for not doing anything about the anonymous complaints until 3 July 2013 was anything like a reasonable explanation for a safety officer who professed to be concerned about safety. They submitted that in truth he invented the anonymous complaints.

27. For the reasons given above, that submission is accepted.

28. It is true that the mere rejection of Luke Poskus’s explanation for the purpose of his visit does not, in the present circumstances, establish the actual purpose of his visit. Counsel assisting submitted that the most reasonable inference to draw is that his reason was to put pressure on Jason Hooper to sign an EBA. Ultimately, however, it does not matter what Luke Poskus’ actual purpose was. If it was not to investigate suspected breaches of the WHS Act, then it may have been an abuse of his rights under that Act.

29. Counsel for the CEPU and its officers submitted that his visits were in truth consensual visits and not exercises of rights under the WHS Act.\textsuperscript{36} This submission was made on behalf of persons including Luke

\textsuperscript{35} Damian Kirkwood, 24/7/15, T:1087.31-43.

\textsuperscript{36} Submissions of the CEPU, 5/11/15, paras 23, 24, 63-66, 70.
Poskus. If accepted, it would amount to the rejection of Luke Poskus’s sworn evidence. His evidence was that he was exercising rights under s 117 and that he gave a notice under s 118 to Richard Hook immediately upon arrival at the site.\textsuperscript{37} Richard Hook’s evidence was that no notice was given, although he described the visit as a ‘site safety inspection’.\textsuperscript{38}

30. Notwithstanding this evidence, there is some evidence to support the submission that the visits were consensual. It was put to Richard Hook by counsel for the CEPU that Luke Poskus approached him and explained that he had concerns that there may have been health and safety contraventions on site.\textsuperscript{39} Richard Hook’s response was:\textsuperscript{40}

\begin{quote}
I can’t recall the specifics of it, but if a Union official approaches me with concerns about safety on site and wants to do a site inspection, I’m quite willing to attend.
\end{quote}

31. This is evidence of practice only. As indicated above, no s 118 notice was produced by either the CEPU or Milin in answer to requests from the Commission. If no notice was given, then it may be that Luke Poskus asked Richard Hook if he could do a safety inspection, and Richard Hook complied. In this context, counsel assisting submitted that ‘strictly’ there was doubt as to whether the visits were exercises of rights under the WHS Act.

\textsuperscript{38} Richard Hook, witness statement, 22/7/15, para 8; Richard Hook, 22/7/15, T:768.5-8.
\textsuperscript{39} Richard Hook, 22/7/15, T:773.43-46.
\textsuperscript{40} Richard Hook, 22/7/15, T:773.47-774.3, 777.8-10.
32. The evidence does not establish that the visit was consensual. Even if it was consensual, then that consent was procured by virtue of Luke Poskus’s position as the holder of a permit under the *Work Health and Safety Act 2011* (ACT). If, as has been found, the purpose was in truth not to investigate a reasonable suspicion of a safety breach, then Luke Poskus was abusing his rights as a permit holder under the *Work Health and Safety Act 2011* (ACT).

33. At some point shortly after visiting the Easty Street site, it is not clear on precisely what day, Luke Poskus visited the Antill Street site. Luke Poskus claimed that this visit was merely for the purpose of checking that the details of the site accorded with CEPU records. Mazen Mehri, the Milin representative, gave evidence in his statement that Luke Poskus asked him if he could do a walk around the site and that he agreed. In oral evidence he gave this description of the visit:  

> Well, he came to site. He introduced himself and that. He told me he was from Sydney, he was a Union plumber, "What contractors are on site?" I told him. "Can we do a walk around the site?" I said, "That's fine". Then we started talking and then he says to me about the plumbers, that he's heard the plumbers aren't happy, some of his employees.

34. The only mention of this being a safety related visit was in a question put to Mazen Mehri by counsel for the CEPU. It was put to Mazen Mehri that he invited Luke Poskus to go on a safety walk, and that Luke Poskus agreed.  

41 Mazen Mehri, 22/7/15, T:700.26-32.

42 Mazen Mehri, 22/7/15, T:700.41-44.
35. In the above circumstances, the evidence is insufficient to establish that this was a safety related visit.

36. It was submitted by counsel assisting that Mazen Mehri’s evidence that Luke Poskus told him during that walk that he had heard the plumbers were unhappy with their boss should be accepted. Luke Poskus denied that evidence. Mazen Merhi was quite firm in this recollection in oral evidence. In light of the unsatisfactory nature of Luke Poskus’s oral evidence, Mazen Merhi’s recollection of the conversation is to be preferred. The CEPU submitted that this evidence should be rejected because it was not in Mazen Mehri’s statement. But it was.

37. The purpose of the comment by Luke Poskus was to denigrate Advanced Plumbing. It was unsatisfactory conduct from a union official.

38. There were further visits by ACT CEPU officials to sites on which Advanced Plumbing was a contractor. Luke Poskus returned to Canberra in late July, when Daniel Hanford commenced at the ACT CEPU. He and Daniel Hanford attended the Antill Street site again on 30 July 2013. This visit, again, was consensual: Luke Poskus and Daniel Hanford arrived at the site and asked Mazen Merhi if they could

43 Mazen Merhi, witness statement, 22/7/15, para 5; Mazen Merhi, 22/7/15, T:700.9-36.
45 Mazen Merhi, 22/7/15, T:700.34-36.
46 Submissions of the CEPU, 5/11/15, para 71.
47 Mazen Merhi, witness statement, 22/7/15, para 5.
go for a safety walk and Mazen Merhi agreed. The question of why it was thought necessary or desirable to go to the site to look for safety issues did not receive attention in submissions. In those circumstances, no finding is made about it.

39. Daniel Hanford and Luke Poskus also visited a site in Fyshwick on Iron Knob Street, on 1 August 2013. They returned to the Easty Street site on 7 August 2013. According to Daniel Hanford the purpose of this visit was ‘site mapping’, and that he spoke to the site manager. Daniel Hanford went to the Easty Street site again on 14 August 2013. Daniel Hanford said in his statement that he was there ‘just to see the project manager’. Daniel Hanford said his entry to all of these sites was consensual, and did not involve the exercise of any rights under the WHS Act. Daniel Hanford was not required for oral examination.

40. Advanced Plumbing signed an EBA a few weeks later.

Capital Hydraulics

41. During his time in Canberra in early July 2013, Luke Poskus also visited two sites. Work was being done on those sites by Capital Hydraulics and Drains Pty Ltd (Capital Hydraulics). The precise date of those visits is not apparent from the evidence. Capital Hydraulics is a hydraulic company operating mainly in the commercial plumbing

48 Mazen Merhi, witness statement, 22/7/15, para 7.
49 Daniel Hanford, witness statement dated 17/7/15, 30/7/15, para 21a.
50 Daniel Hanford, witness statement dated 17/7/15, 30/7/15, para 22c.
51 Jason Hooper, witness statement, 21/7/15, para 68.
sector in Canberra. The principals of Capital Hydraulics are Joe Lo Re and Nikki Lo Re.

42. The Lo Res were asked in around early 2013 by the ACT CEPU to sign up to an EBA. The Lo Res were reluctant. But they did participate in the negotiation process by attending meetings. In around May 2013 their employees went to the ACT CEPU’s offices to vote on the proposed EBA. They voted against it. According to Nikki Lo Re, the Lo Res then had a meeting with ACT CEPU officials, including David Broadley and Damian Kirkwood, to discuss the vote and the EBA. David Broadley and Damian Kirkwood did not recall such a meeting. They disputed Nikki Lo Re’s account of it. Nothing turns on this conflict in the evidence.

43. In July 2013, Luke Poskus visited the Envy Apartments site on Torrens Street. Bloc was the principal contractor on that site. Nikki Lo Re said that on the day of the visit, she was told by a representative of the principal contractor that the union had shut down the site, that she needed to get to the site and that the visit was because of her, or because Capital Hydraulics had not signed an EBA. Nikki Lo Re said she went to the site that afternoon and then again the next morning. She said she was told there were no safety issues regarding Capital Hydraulics’s component of the work.

52 Nikki Lo Re, witness statement, 23/7/15, para 18.
53 Nikki Lo Re, witness statement, 23/7/15, paras 22-23.
54 David Broadley, witness statement, 23/7/15, para 68; Damian Kirkwood, witness statement, 24/7/15, para 39.
55 Nikki Lo Re, witness statement, 23/7/15, para 25; Nikki Lo Re, 23/7/15, T:815.24-29.
44. The representative of Bloc that Nikki Lo Re said she spoke to did not give evidence. Luke Poskus claimed that this visit was prompted by an anonymous safety complaint regarding emergency lighting. He denied that he made a complaint regarding Capital Hydraulics or that he told the Bloc representative that Capital Hydraulics did not have an EBA.\(^56\) Having regard to Luke Poskus’s unsatisfactory evidence regarding anonymous complaints, this denial should be given little or no weight. However, in the absence of evidence from the Bloc representative, no finding is made as to what Luke Poskus said to him.

45. Luke Poskus’s next site visit in relation to the Lo Res was to the 2913 Project. The precise date of this visit is not apparent. Luke Poskus claimed that this visit, too, was prompted by anonymous safety complaints.

46. Counsel assisting submitted that Luke Poskus’s evidence that these visits were prompted by anonymous safety complaints should be rejected. The asserted complaints were a complaint about emergency lighting and a complaint about there being no emergency response system or medical system on the job.\(^57\) Luke Poskus described both of these safety issues as having potentially serious consequences. The first was a ‘life safety device’ which Luke Poskus said led him to advise the builder that the site was unsafe.\(^58\) The second issue was described by Luke Poskus as one which might have had life


\(^57\) Luke Poskus, 24/7/15, T:1035.44-46; witness statement, paras 39, 44.

\(^58\) Luke Poskus, witness statement, 24/7/15, para 41; Luke Poskus, 24/7/15, T:1033.35.
threatening consequences and might have resulted in a fatality.\textsuperscript{59} In fact, according to Luke Poskus, all workers were removed from the 2013 site when he identified this issue.\textsuperscript{60} Luke Poskus said that every safety issue was serious. He agreed that safety requires constant vigilance.\textsuperscript{61} Luke Poskus claimed that he gave notices under s 118.\textsuperscript{62} No notices were produced by the CEPU.

47. For the reasons that have been given in connection with the Easty Street visit, it is impossible to understand why a responsible safety officer who received these complaints would not act on them promptly. But, if Luke Poskus’s evidence is to be accepted, he did not. His evidence should not be accepted. The visits were not made for the purpose of investigating safety issues.

48. If Luke Poskus’s evidence is rejected, what was the true purpose of his visit? Counsel assisting submitted that it was for the purposes of putting pressure on the Lo Res to sign an EBA. No other purposes suggest themselves on the evidence but it is unnecessary to determine the issue. It is sufficient to find that, once his evidence is rejected, his purpose was extraneous to s 117 of the \textit{Work Health and Safety Act} 2011 (ACT).

\textsuperscript{59} Luke Poskus, witness statement, 24/7/15, paras 40, 44.

\textsuperscript{60} Luke Poskus, witness statement, 24/7/15, para 45.

\textsuperscript{61} Luke Poskus, 24/7/15, T:1036.36-47.

\textsuperscript{62} Luke Poskus, witness statement, 24/7/15, para 40.
C – MATTHEW MCCANN

Capital Hydraulics: John Nikolic

49. Matthew McCann and John Nikolic had a conversation in the carpark outside the CFMEU offices in Dickson on 13 June 2014. The Lo Res were at this time in discussions with the CEPU regarding an EBA. They were represented by John Nikolic from the Master Builders’ Association.

50. According to John Nikolic, Matthew McCann asked John Nikolic where Capital Hydraulics was up to with its EBA. John Nikolic said he did not know. Matthew McCann responded with words to the effect that, if they did not sign a union EBA, they would be ‘fair game’. John Nikolic on 25 June 2014 sent an email to Matthew McCann recounting the conversation.

51. Matthew McCann responded to John Nikolic’s email on the same day. He denied saying that if the Lo Res did not sign a union EBA they would be ‘fair game’. His response was in the following terms:

You need to get your hearing checked, that is not what I said to you in the carpark. I did state that I would like an answer either way and that the company should just go and do a non-union agreement if we could not reach an agreement on the other matters. I then said if the company chose the latter option “it would be VERY LAME”. Sorry if you got that wrong mate.

64 Nikki Lo Re, witness statement, 23/7/15, tab 10.
65 Nikki Lo Re, witness statement, 23/7/15, tab 10.
52. In his statement and in oral evidence Matthew McCann adhered to the position that he said ‘it would be very lame’ not ‘they would be fair game’. Both Matthew McCann and John Nikolic said that at the time of the conversation, Matthew McCann was walking away from John Nikolic. John Nikolic said he heard the words clearly.

53. The issue is whether Matthew McCann was threatening the Lo Res or merely expressing disappointment at the state of the EBA negotiations. Counsel assisting submitted that John Nikolic’s evidence should be accepted and that there was a threat. The CEPU took the contrary position.

54. Contrary to the CEPU’s submission, the fact that John Nikolic and Matthew McCann were walking away from each other does not appear material. John Nikolic said he heard the words clearly. Matthew McCann in his email to John Nikolic of 25 June 2014 did not suggest the fact the men were walking away from each other as an explanation for what he claimed was a misunderstanding. Instead, he said ‘[y]ou need to get your hearing checked’.

55. ‘Very lame’ does not sound much like ‘fair game’. Matthew McCann’s explanation for using the former expression was

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66 Matthew McCann, witness statement, 23/7/15, para 76; Matthew McCann, 23/7/15, T:884.5-885.26, 911.5-16.
67 Matthew McCann, 23/7/15, T:909.30-910.9; John Nikolic, 24/7/15, T:1108.35-37.
68 John Nikolic, 24/7/15, T:1094.6-42.
69 Submissions of the CEPU, 5/11/15, para 89.
70 John Nikolic, 24/7/15, T:1094.6-42.
71 Nikki Lo Re, witness statement, 23/7/15, tab 10.
unconvincing. His explanation was, however, adopted by the CEPU in its submissions. His position appeared to be that it would have been ‘very lame’ for the Lo Res to decline to sign an EBA in circumstances where Joe Lo Re had initially indicated that he would consider signing one, or was prepared to sign one. There is no hint of this explanation in Matthew McCann’s email correspondence with John Nikolic. Nor is there any hint in that email correspondence of any such indication having been given by Joe Lo Re. Matthew McCann’s assertion in his email that he said ‘very lame’ is followed by the sarcastic comment: ‘Sorry if you got that wrong mate’. It is preceded by the remark ‘[y]ou need to get your hearing checked’. Matthew McCann’s explanation in his email to John Nikolic reads more like an explanation of why it would be difficult for John Nikolic to prove that Matthew McCann threatened Capital Hydraulics than it does an explanation for why John Nikolic misunderstood what Matthew McCann had said.

56. For the above reasons, counsel assisting’s submissions are accepted. Matthew McCann was threatening Capital Hydraulics.

**Capital Hydraulics: Incident in Office**

57. Matthew McCann also behaved inappropriately when he spoke to Nikki Lo Re directly. Nikki Lo Re said in her statement that, in late March or early April 2014, Matthew McCann came to the offices of

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72 Submissions of the CEPU, 5/11/15, paras 84-90.
73 Matthew McCann, 23/7/15, T:884.5-16, 885.15-26.
74 Nikki Lo Re, witness statement, 23/7/15, tab 10.
Capital Hydraulics unannounced. It was payroll day. Nikki Lo Re said that Matthew McCann came into her office and stood above her, at the side of her desk, and shouted at her. She could not recall precisely what Matthew McCann said, but she recalled that it was about why Capital Hydraulics had not signed an EBA. Nikki Lo Re said that her receptionist, Deana Stegnjaic, walked in and asked what was going on, and then Matthew McCann left. She said that after he left she broke down in tears.

In oral evidence, Nikki Lo Re described the incident in more detail. Some of that detail was not contained in her witness statement. She said that she raised her voice in response to Matthew McCann. She also said that at the end of the discussion when she got up to go around Matthew McCann, he ‘turned and he barged past me’ and that Matthew McCann said something along the lines of ‘you’ll regret this’, to which Nikki Lo Re responded ‘are you threatening me?’ Her evidence then was: ‘whether he accidentally knocked me or barged me, I suppose that depends on who was there’. Deana Stegnjaic, who was working in the office at the time, gave evidence that she saw Matthew McCann shoulder barge Nikki Lo Re.

Matthew McCann did not dispute that he shouted at Nikki Lo Re. He accepted that this was not appropriate. He vehemently denied barging into her with his shoulder. Counsel assisting pointed to difficulties with Nikki Lo Re’s evidence and submitted that, having regard to the

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75 Nikki Lo Re, witness statement, 23/7/15, paras 33-34.
76 Nikki Lo Re, 23/7/15, T:819.9-821.16.
77 Deana Stegnjaic, witness statement, 23/7/15, para 11.
seriousness of the allegation and the nature of the evidence, it would not be safe to make a finding that Matthew McCann barged into Nikki Lo Re with his shoulder. In view of the impressive quality of Deana Stegnjaic as a witness, that is a very benevolent submission. The CEPU also submitted that that finding should not be made.

60. In the circumstances, there is no realistic alternative to accepting those submissions. In the interests of brevity, the matter could be left to rest there. However the CEPU also submitted that there had been ‘significant reputation and stigma damage’ to the CEPU and to Matthew McCann as a result of the allegations ever having been raised. They said that they were aggrieved that counsel assisting ever elected to call the evidence. To address this submission, it is necessary to go further.

61. Counsel assisting submitted that the CEPU’s complaint is misdirected and wrong. That submission is accepted, for the following reasons. The CEPU’s complaint overlooks the fact that Nikki Lo Re’s evidence about the shoulder barging emerged orally and not in her witness statement. It was not a matter of counsel assisting electing to call the evidence: it emerged during the hearing. Counsel assisting drew attention in submissions to the fact that the evidence was not contained in Nikki Lo Re’s witness statement, and that she made no prior complaint. Those were given as reasons why it was unsafe to make a finding. They could not have been reasons not to call Nikki Lo Re as a witness.

62. The CEPU’s complaint also overlooks the evidence of Deana Stegnjaic. Counsel assisting submitted as follows. Her brief
examination by counsel for the CEPU made no real impact on her evidence that the shoulder barging occurred. Only two reasons are put forward in CEPU’s submissions for rejecting her evidence. The first is that she remembered a stool in the room whilst neither Matthew McCann nor Nikki Lo Re did.\textsuperscript{78} This is hardly what CEPU’s submissions describe as a ‘fundamental inconsistency’. And, in any event, the submission assumes without analysis that Deana Stegnjaic was incorrect about the stool. That assumption is not well founded. She was an extremely strong witness. She was a much more impressive witness than Matthew McCann. And she was a more impressive witness on this point than Nikki Lo Re. The second reason put forward for rejecting her evidence is that her evidence was or may have been ‘contaminated’ as a result of discussions with Nikki Lo Re.\textsuperscript{79} The difficulty with this submission is that there is no evidence for it. No suggestion of this kind was made to Nikki Lo Re or to Deana Stegnjaic by counsel for the CEPU. Further, whilst the discussions that occurred between Nikki Lo Re and Deana Stegnjaic shortly prior to Nikki Lo Re giving oral evidence\textsuperscript{80} might have influenced Nikki Lo Re’s testimony (as counsel assisting’s submissions acknowledge)\textsuperscript{81} it is not possible to see how Deana Stegnjaic’s testimony could have been influenced by Nikki Lo Re.

63. The above submissions of counsel assisting are accepted. The CEPU’s submissions are rejected. It was appropriate to call Deana Stegnjaic.

\textsuperscript{78} Submissions of CEPU, 5/11/15, paras 99-101.
\textsuperscript{79} Submissions of CEPU, 5/11/15, paras 96-98.
\textsuperscript{80} Nikki Lo Re, 23/7/15, T:821.38-822.1.
\textsuperscript{81} Submissions of Counsel Assisting, 20/10/15, ch 7, para 53.
The question of whether the evidence established that Matthew McCann deliberately shoulder barged Nikki Lo Re was finely balanced. As stated above, no finding is made that he did.

**Jason Hooper**

64. There was also evidence about Matthew McCann’s activities on a site on Woodberry Avenue. The issue is a narrow one.

65. Clint Burgmann was the Project Manager on the site. He recalled Matthew McCann coming on site in February 2015. He recalled Clint Burgmann saying, in an aggressive manner, words to the effect: ‘you don’t want to be affiliated with Advanced Plumbing. They’re shit, they don’t pay their guys properly’. Clint Burgmann adhered to this account in oral evidence.

66. Matthew McCann’s version of the conversation is that he in fact said that the electrical contractor was a good company that he had known for years and then said ‘I can’t say the same for Advanced Plumbing other than to say that he has an EBA’.

67. Counsel assisting submitted that Clint Burgmann’s evidence should be accepted. Their submissions were as follows. Clint Burgmann had no interest in giving any particular version of the conversation. His oral evidence about what was said and what was not was clear, consistent and convincing. It was inherently unlikely that Matthew McCann

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82 Clint Burgmann, witness statement, 21/7/15, para 5.
83 Clint Burgmann, 21/7/15, T:651.14-46.
84 Matthew McCann, witness statement, 23/7/15, para 44.
would have said what he claims. Why, having said that he has known the electrical company for years and that they are a good company, would someone in Matthew McCann’s position add that he could not say the same for Advanced Plumbing? Why then add ‘other than to say they have an EBA’?

68. The CEPU’s response in submissions was to attack Clint Burgmann’s credit.85 The attack was a complete failure. Clint Burgmann was taken line by line through what appeared in paragraph 44 of Matthew McCann’s statement. That was the paragraph in which Matthew McCann gave his version of the disputed conversation. Clint Burgmann disagreed strongly with some parts of Matthew McCann’s version and agreed with others. In substance, he adhered to his own evidence about what was said.86 He was then examined by counsel for the CEPU. He was asked to read paragraph 44 of Matthew McCann’s statement again and then asked some questions about it. In the seventh question it was put to him that he ‘did have a conversation to that effect with [Matthew] McCann on 26 February [2013]’.87 He agreed immediately. He plainly did not think that he was being asked to agree to the entirety of what appeared in paragraph 44. It is inconceivable that having given the evidence that he did to counsel assisting minutes earlier he would then agree that everything in paragraph 44 was correct.

85 Submissions of the CEPU, 5/11/15, paras 113-117.
86 Clint Burgmann, 21/7/15, T:650.21-653.37.
87 Clint Burgmann, 21/7/15, T:655.33-36.
69. The misunderstanding was clarified immediately in re-examination. Clint Burgmann said ‘I agree we had a conversation but I don’t agree with what’s written down here’.\(^{88}\) He was then asked to point out the parts that he disagreed with and gave evidence entirely consistent with his initial answers to counsel assisting.\(^{89}\) No objection was taken at any point during this re-examination by counsel for the CEPU.

70. The CEPU’s submission is rejected. There is no basis to impugn the credit of Clint Burgmann. His evidence on this issue is accepted.

71. This was another example of Matthew McCann seeking to make a denigrating comment that he in fact made sound innocuous. His behaviour was inappropriate. David Broadley did not regard it as appropriate or professional for an organiser to visit a site and engage in ‘bad-mouthing’ a subcontractor to the head contractor.\(^{90}\) That is what Matthew McCann did.

**D – FURTHER MATERIAL PROVIDED BY THE CEPU**

72. Many of the submissions of the CEPU were devoted to attacking the credit of Jason Hooper. Counsel assisting submitted that ultimately it was not necessary to deal with them. There were only two relevant disputed conversations between Jason Hooper and Luke Poskus. The first was their conversation on 2 July 2013. The other was their conversation at the end of Luke Poskus’ site on 3 July 2013.

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\(^{88}\) Clint Burgmann, 21/7/15, T:656.8-13.

\(^{89}\) Clint Burgmann, 21/7/15, T:656.15-657.13.

\(^{90}\) David Broadley, 23/7/15, T:937.41-938.1.
unsatisfactory nature of Luke Poskus’s evidence means that his version of each conversation can be rejected. It is not necessary, for the purpose of making any of the above findings regarding Luke Poskus’s conduct, to accept Jason Hooper’s evidence of either conversation. No finding is in fact made accepting Jason Hooper’s evidence. That makes it unnecessary to deal with the lengthy attack in the CEPU’s submissions on Jason Hooper’s credit. Counsel assisting’s submission is accepted.

Annexed to the CEPU’s submissions was a further statement from Matthew McCann, which ran to 20 pages including annexures. The CEPU did not seek the Commission’s permission or notify it in advance that it was going to do this. It may be presumed that it did not notify Jason Hooper. A letter sent by the CEPU’s solicitors, referred to below, suggests that the purpose of annexing this material to the CEPU’s submissions was to ensure that it was published on the Commission’s website.

The further statement made complaints about text and telephone messages sent after the Commission’s hearings in Canberra concluded by Jason Hooper to Matthew McCann. It also made complaints about some messages that came from an unidentified phone but which Matthew McCann endeavoured to attribute to Jason Hooper. It is apparent from the statement that a complaint was made to the police about some of these matters on 13 August 2015. Notwithstanding this, as indicated above, the material was only provided to the Commission at a very late stage and without prior notice. On the basis of what appears in the statement, the submissions for the CEPU ask the
Commission to accept (apparently without hearing from Jason Hooper) that he committed criminal offences.

75. At 5:30pm on Friday, 4 December 2015, Maurice Blackburn Lawyers, solicitors for the CEPU sent further material to the Commission. The further material comprised of a statutory declaration, made on 4 December 2015, running to 76 pages including annexures. The declaration is 128 paragraphs long. It was witnessed by a solicitor from Maurice Blackburn. One of the Annexures was itself a statutory declaration, made on 26 November 2015. It was witnessed by a solicitor from a firm other than Maurice Blackburn. The material was sent under cover of a letter. The letter did not explain the circumstances in which the material came to the attention of the CEPU or its solicitors.

76. The letter made an application that the Commission ‘re-opens the evidence’ in the ACT case study. It said that the purpose of that included:

(a) Tendering the statutory declaration.

(b) The tender of the further statement of Matthew McCann.

(c) Further cross-examination of Jason Hooper.

(d) The CEPU and its officials making further submissions.

77. The letter requested in the alternative that (a), (b) and (d), above, should occur irrespective of whether there are public hearings. The
letter emphasises that the CEPU wishes the further material to be ‘located on the Royal Commission’s website’.

78. The letter asserted that a great injustice and denial of procedural fairness would occur unless either the application or its alternative was granted. It referred to counsel assisting’s statement in opening that ‘these case studies would not have been possible without the courage and conviction of the many participants of the ACT construction sector’ and the statement that ‘the Commission welcomes new information on these topics on an ongoing basis’. The solicitor to the Commission responded on 7 December 2015. That letter stated that the applications were dismissed. It stated that reasons for that course would be stated in this Report.

79. The allegations in the 4 December 20125 statutory declaration were very serious. They included allegations that false evidence had been given to the Commission. The statutory declaration also included allegations that are outside the Terms of Reference. The statutory declaration and its annexures were referred by staff assisting the Commission to the Australian Federal Police on Monday 7 December 2015.

80. The time left available to the Commission between receipt of this material and the time for delivery of this Report made it impossible to accede to the application of the CEPU to reconvene public hearings in this matter. To refuse that application but to accede to the alternative application would be to deny the persons whom the statutory declaration named and accused of criminal offences any opportunity to respond to them fully. That would be an injustice.
Rejection of the applications made by the CEPU does not do injustice or deny procedural fairness to the CEPU or its officers. The allegations made in the statutory declaration do not have any impact on the evidence on which the findings made in this Report are based. In particular, the attack on Jason Hooper’s evidence is not necessary for the advancement of the interests of justice, because, as just explained, no finding is made accepting Jason Hooper’s evidence. The applications were rejected for the above reasons.

91 Paragraph 72.
### PART 4: NATIONAL UNION OF WORKERS

#### CHAPTER 4

NATIONAL UNION OF WORKERS, NEW SOUTH WALES BRANCH

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A – INTRODUCTION

1. This Chapter concerns the National Union of Workers, New South Wales Branch (NUW NSW). Among other things it concerns the misuse of NUW NSW credit cards and more general defalcations. It concerns the use of a fund known as a ‘Campaign Fund’, which was for a time operated by way of a bank account in the name of ‘The Derrick Belan Team’. It concerns payments by the NUW NSW to Paul Gibson. It concerns a Deed of Release and Settlement between Derrick Belan and the NUW NSW entered on 26 October 2015 (Deed). It concerns governance issues which flow from the problems
which emerged just before and during the course of public hearings. They emerged very late in the life of the Commission. The Commission’s inquiries have accordingly been less complete than the grave problems uncovered merit.

2. This Chapter concludes that a number of criminal offences and regulatory contraventions may have been committed by a number of the officers or past officers and staff of the NUW NSW. It also identifies serious regulatory problems concerning the NUW NSW.

B – CRIMINAL AND REGULATORY FRAMEWORK

3. Several criminal and civil provisions are relevant to the matters which are discussed in this Chapter.

4. So far as allegations of misuse of credit cards and more general defalcations are concerned, potential criminal provisions include breaches of s 1171 (larceny), s 156 (larceny by clerks or servants) and/or s 192E (fraud) of the *Crimes Act* 1900 (NSW). Other potential offences may lie under s 267 (acting dishonestly in the exercise of duties) and s 268 (improper use of position to gain financial advantage) of the *Industrial Relations Act* 1996 (NSW). The *Industrial Relations Act* 1996 (NSW) contains two relevant provisions. Section 267 provides:

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1 Section 117 must be read with s 118 of the *Crimes Act* 1900 (NSW). It provides that where, on the trial of a person for larceny, it appears that the accused appropriated the property in question to the accused’s own use, or for the accused’s own benefit, or that of another, but intended eventually to restore the same, or in the case of money to return an equivalent amount, such person shall not by reason only thereof be entitled to acquittal.
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.

Section 268 provides:

An officer of a State organisation must not make improper use of the officer’s position as such an officer to gain, directly or indirectly, an advantage for the officer or for any other person or to cause detriment, loss or damage to the organisation.

5. As to civil regulatory provisions, ss 285, 286 and 287 of the *Fair Work Registered Organisations Act* 2009 (Cth) (*FW(RO) Act*) may also apply. They relevantly provide:  

285 Care and diligence—civil obligation only

(1) An officer of an organisation or a branch must exercise his or her powers and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if he or she:

(a) were an officer of an organisation or a branch in the organisation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the organisation or a branch as, the officer.

(2) An officer of an organisation or a branch who makes a judgment to take or not take action in respect of a matter relevant to the operations of the organisation or branch is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if he or she:

(a) makes the judgment in good faith for a proper purpose; and

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2 Section 283 of the FW(RO) Act provides (relevantly) that these sections only relate to the financial management of the organisation or branch.
(b) does not have a material personal interest in the subject matter of the judgment; and

(c) informs himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and

(d) rationally believes that the judgment is in the best interests of the organisation.

The officer's belief that the judgment is in the best interests of the organisation is a rational one unless the belief is one that no reasonable person in his or her position would hold.

286 Good faith--civil obligations

(1) An officer of an organisation or a branch must exercise his or her powers and discharge his or her duties:

(a) in good faith in what he or she believes to be the best interests of the organisation; and

(b) for a proper purpose.

...

287 Use of position--civil obligations

(1) An officer or employee of an organisation or a branch must not improperly use his or her position to:

(a) gain an advantage for himself or herself or someone else; or

(b) cause detriment to the organisation or to another person.

...

Sections 285, 286 and 287 are civil penalty provisions. Subsection 286(2) and subsection 287(2) provide that a person involved in the contravention of subsection 286(1) and subsection 287(1) respectively also contravenes s 286 and s 287 respectively. Section 284 provides that a person is involved in the contravention if various forms of secondary participation take place (eg aiding and abetting).
6. Both paragraph 286(1)(b) and subsection 287(1) require a consideration of the meaning of propriety and impropriety. The High Court has considered what makes certain conduct improper in relation to a similar provision and commented that:\(^3\)

Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case… [I]mpropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do.

C – BACKGROUND INCLUDING STRUCTURE OF NUW NSW

Federal and State legislation

7. This section of the Chapter sets out some background matters, and deals with some preliminary issues. The factual matters are largely based on the submissions of counsel assisting.\(^4\)

8. The NUW NSW operates under both Federal and State legislation. Federally, the National Union of Workers is an employee association registered under the FW(RO) Act. Under that Federal legislation the NUW NSW does not have any legal status independent of the Federal organisation, but rather is a branch of the federal union (NSW Branch).

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\(^3\) \textit{R v Byrnes} (1995) 183 CLR 501 at 514-515 per Brennan, Deane, Toohey and Gaudron JJ.

\(^4\) Submissions of Counsel Assisting, 18/11/15, paras 7-11; Submissions of Counsel Assisting, 4/12/15, paras 20-22.
9. However, the NUW NSW is also registered as an employee organisation under the *Industrial Relations Act* 1996 (NSW). The effect of state registration is to incorporate the NUW NSW as a body corporate with its own legal status under the laws of New South Wales (*State Union*). This dual legal personality is not uncommon for employee associations in states which retain a registration regime independent of the Federal regime.

10. In 1992 the State Union reached an agreement with the federally registered National Union of Workers. The agreement dealt with membership and assets. In a letter dated 17 February 2015 to the Fair Work Commission the then Secretary of the NUW NSW confirmed that all funds were held for the benefit of the State Union and the NSW Branch jointly.

The Belan family

11. This case study illustrates an ‘iron law of oligarchy’ going beyond the analysis underlying the use of that famous phrase by Robert Michels. In 1983 the late Frank Belan became the State Secretary of the Storemen and Packers Union. Then, following an amalgamation process, he became State Secretary of the NUW NSW. He remained in that position until his death in October 2001. His son, Darack (generally known as Derrick), was elected as his father’s replacement. He has been elected unopposed at each subsequent branch election.

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5 NUW MFI-24, 6/11/15, p 490.
7 *Political Parties*, Pt 6, Ch 2.
12. The period of time under consideration is essentially 2010 to the present. In that period:

(a) Wayne Meaney held the position of Assistant State Secretary (until 23 October 2015 when, following the resignation of Derrick Belan, he was appointed State Secretary at an NUW NSW Extraordinary Committee of Management Meeting). On 7 December 2015, it was reported in the press that Wayne Meaney stood aside, not voluntarily, as Secretary for at least two weeks.

(b) Marilyn Issanchon was an employed organiser and honorary President of the NUW NSW. She was and is also the President of Unions NSW.

(c) Derrick Belan’s niece, Danielle O’Brien (née Belan) was the Accounts Manager of the NUW NSW, until on or around 16 October 2015 when she was dismissed from her position.

(d) Derrick Belan’s brother, Nicklouse (Nick) Belan was and is a Branch Organiser.

The powers of the Secretary

13. Derrick Belan drew attention to a number of the objects appearing in Clause 3.1 of the State Rules and a number of other aspects of those rules. Clause 18.1 sets out the duties of the State Secretary. It
provides that the State Secretary is to be in control of the Office of the Union, and of organisers, industrial officers and employees therein.\(^8\)

14. Derrick Belan went on to submit that NUW NSW was a State registered union set up with its own specific objects and rules. He further argued that the State Secretary is ‘entitled to and in fact obligated to further those objects’. It was further argued by him that the State Secretary is empowered to enter into arrangements that further those objects or are incidental to those objects. He contended that arrangements such as the consultancy with Paul Gibson are directly supported by the express objects of the State Rules.\(^9\)

15. In response, counsel assisting noted the submission about NUW NSW being a State registered union set up with its own specific objects and rules. But she contended that that did not give the full picture, since NUW NSW was also a branch of a federally registered union.

16. Further, counsel assisting also acknowledged the correctness of the contention that: ‘[t]he State Secretary was entitled to and in fact obligated to act to further those objects’. However, she noted that it is not apparent on what basis Derrick Belan contended that the ‘State Secretary is empowered to enter into arrangements that further those objects or are incidental to those objects’.\(^{10}\) Derrick Belan cited no source of this power.

\(^8\) Submissions of Derrick Belan, 30/11/15, paras 15-17.
\(^9\) Submissions of Derrick Belan, 30/11/15, paras 21-22.
\(^{10}\) Submissions of Counsel Assisting, 4/12/15, paras 23-30.
17. Counsel assisting also pointed out that in referring to the objects of the NUW NSW,11 Derrick Belan’s submissions do not point to the objects set out at rules 3.1(z) and 3.1(ar) which are directed to the role of the Branch Committee of Management (BCOM):12

(z) To acquire to undertake [sic], to be concerned in and to dispose of any business or businesses or business or commercial activity or activities which the Committee of Management considers to be conducive to the objects of the Union or to the welfare or benefit of the members of the Union or likely to promote the interests or income of the Union.

(ar) To enter into agreements with such organisations as the Committee of Management deems appropriate with a view to establishing co-operative membership, administrative and financial structures. (emphasis added)

18. Further, Derrick Belan’s submissions appeared to ignore the terms of clause 10 of the State Rules, which include ‘[t]he Committee of Management is the supreme governing authority of the Union and shall manage and control the affairs of the Union…’.13

19. It was the contention of counsel assisting that in light of the fact that the NUW NSW operated concurrently as the State Union and the NSW Branch (being a branch of the federally registered union), the NUW NSW (and its officers) were bound not only by the State Rules but also the National Rules. It could not simply choose to comply with one set of rules over the other.

11 Submissions of Derrick Belan, 30/11/15, para 14.
13 NUW MFI-13, 5/11/15, p 188.
20. Counsel assisting pointed to parts of the rules also referred to in her principal submissions.\textsuperscript{14} Rule 34(e) of the National Rules provided that ‘[m]oneys of the Branch of the Union shall only be disbursed upon a resolution of the Committee of Management of the Branch’, subject only to an exception for expenditure on the general administration of the branch.\textsuperscript{15}

21. Counsel assisting also pointed to rule 37A\textsuperscript{16} which provided that ‘…the government, management and control of the affairs of each Branch of the Union shall be vested in a Branch Committee of Management’ and that the BCOM has the power to:

\begin{itemize}
  \item[(2) (ii)] vote and expend any money that may be necessary in connexion with the business of the Branch; and
  \item[(iii)] Determine such assistance as it deems necessary to employ to carry on the work of the Branch.
\end{itemize}

22. Counsel assisting submitted that Derrick Belan’s failure to address the National Rules limit the weight which can be given to this aspect of his submissions.\textsuperscript{17} This submission by counsel assisting is correct.

\textbf{Derrick Belan’s health}

23. Another matter to be considered in this part of this Chapter is the issue of Derrick Belan’s health. Derrick Belan submitted that counsel assisting’s submissions do not seek to address or acknowledge the

\textsuperscript{14} Submissions of Counsel Assisting, 18/11/15, paras 191, 239.
\textsuperscript{15} NUW MFI-13, 5/11/15, p 47-A.
\textsuperscript{16} NUW MFI-13, 5/11/15, p 49.
\textsuperscript{17} Submissions of Counsel Assisting, 4/12/15, para 30.
evidence that Derrick Belan had been under considerable stress and was unwell for much of 2015 and earlier. The submissions pointed to evidence from various witnesses about sources of his personal stress in recent years. They said that he had been unwell for a considerable period of time. The submissions also pointed to evidence that he was admitted to a private psychiatric hospital before the hearings in this case study and travelled from the hospital to the Commission to give evidence.

24. Counsel assisting did in fact acknowledge that for some time Derrick Belan had been experiencing ‘personal difficulties’. That general term clearly encapsulates health issues. But the length of time over which these difficulties had been experienced was the subject of varying estimates by Derrick Belan.

25. Counsel assisting also responded to the submission by Derrick Belan that:

[t]he unchallenged evidence is that Mr Belan had been subject to considerable personal difficulties and stressors for several years, and by 2015, other officials had noticed a decrease in his functioning and that he was not well.

26. Counsel assisting contended that that submission is apparently at odds with the submission which includes an assertion that he had given

18 Submissions of Derrick Belan, 30/11/15, paras 23-25.
19 Submissions of Counsel Assisting, 18/11/15, para 273.
20 Submissions of Derrick Belan, 30/11/15, para 25.
21 Submissions of Derrick Belan, 30/11/15, para 5.
outstanding service to NUW NSW for more than 15 years as its Secretary.²²

27. Counsel assisting also submitted that Rule 44(b) of the National Rules provides that the Secretary shall ‘be competent to discharge all duties assigned to him by the Branch Committee of Management’.²³ If in truth Derrick Belan was incapable of fulfilling the role competently, it shows a failure of governance that he was allowed to continue. If his difficulties did not affect his competence, the relevance of the ill-health submission is not obvious.

28. These submissions of counsel assisting must be accepted.

A discrimination complaint

29. Derrick Belan submitted²⁴ that the Commission has adopted different approaches to the investigation of issues of interest to the Commission. He contended that an opportunity was given to some witnesses to comment upon issues of interest by way of preparation of statements, after notice of the matters to be explored.

30. Derrick Belan complained that in relation to him, counsel assisting only produced material upon which it was proposed to examine him when he was in the witness box, even though she was aware that he was in a hospital and would need to leave hospital in order to give

²² Submissions of Counsel Assisting, 4/12/15, para 34.
²³ Submissions of Counsel Assisting, 18/11/15, para 231.
²⁴ Submissions of Derrick Belan, 30/11/15, paras 26-32.
evidence. He argued that at no time before the hearing did she advise him of the matters of interest to the Commission. He was not provided with the opportunity to make a statement on public matters. Consequently, issues were explored with him without prior notice at a time when he was unwell. He further submitted that on occasions various accommodations of his condition were requested. Accordingly, he submitted that caution should be exercised before seeking to criticise inconsistencies in evidence given, or draw inferences from the inconsistencies, or to make suggestions of ‘unreliability’ or ‘inherent lack of credibility’ as contended for by counsel assisting.

31. In response, counsel assisting rejected any criticism of her behaviour. She contended that a witness summoned by the Commission could always offer to provide a statement. Counsel assisting further submitted that in a Royal Commission or other commission of inquiry counsel assisting is entitled to approach different witnesses differently. A Royal Commission is not required to provide particulars of specific lines of inquiry to persons being examined, or to provide them with relevant evidence in advance of their examination. That type of disclosure could undermine the purposes of the factual inquiry being undertaken. In the case of Derrick Belan, counsel assisting was entitled not to give Derrick Belan notice of the material ultimately put to him in order to test his evidence in an appropriate fashion.

32. Counsel assisting further noted that while Derrick Belan was in the witness box he was offered a number of opportunities to take a break.

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As he acknowledged in his submissions, he availed himself of such opportunities. Counsel assisting correctly rejected the suggestions of unfair treatment. It might be added that before Derrick Belan gave evidence, he made two adjournment applications on medical grounds. Both succeeded. He made no application for an adjournment on the day he actually gave evidence.

**Difficulties in assessing the extent of wrongdoing**

33. Another submission made by Derrick Belan is that counsel assisting described Danielle O’Brien’s wrongdoing in the context of her familial relationship with Derrick Belan. He submitted that it is improper to conclude that because Danielle O’Brien, who admitted to misuse of credit cards, is Derrick Belan’s niece, ‘the Commission has not “been able to determine the extent of his activities nor has it been able to ascertain what, if any, involvement in his activities others had”’.

34. As counsel assisting submitted, it is apparent that this last submission is based upon a misreading of counsel assisting’s submissions. The familial relationship did not underpin the submission of counsel assisting that it was not possible to determine the extent of Derrick Belan’s activities.²⁶

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²⁶ Submissions of Counsel Assisting, 4/12/15, para 39.
The notices to produce and summonses

35. It is convenient at this point to set out a brief chronology of the Commission’s investigations into the NUW NSW and what has flowed from them. That is because it is apparent that these investigations triggered a major upheaval within the NUW NSW.

36. On 3 September 2015, the Commission served two notices to produce. The first notice was addressed to the NUW NSW and was served on Derrick Belan in his capacity as an official of the NUW NSW. The second was addressed to Derrick Belan personally.

37. Over the course of September and early October 2015 further notices to produce were served on the NUW NSW.

38. On Friday 16 October 2015, six NUW NSW officials and employees were served with summonses to appear before the Commission. They were served at the NUW NSW office in Granville. On the same day another official was served at his place of residence. A further official was served the following Monday, 19 October 2015.

27 Except where indicated, this summary is based on the summary in the Submissions of Counsel Assisting, 18/11/15, paras 12-30.
28 A list of Notices to Produce issued to the State Union and the NSW Branch is annexed to this Chapter and is referred to as Appendix 4.
29 NUW MFI-42, 17/11/15.
The departure of Danielle O’Brien

39. On or around 16 October 2015, Danielle O’Brien met Derrick Belan at his home and ‘confessed’ to using union credit cards to buy herself some things.

40. Danielle O’Brien gave evidence that she has not returned to the union office nor has she been contacted by the union since that day.

The Belan-Meaney negotiations

41. On Monday, 19 October 2015, Derrick Belan called Wayne Meaney to say that he would need to come and see him the next day.

42. On Tuesday, 20 October 2015, Derrick Belan met Wayne Meaney at the union office. They went across the road to a coffee shop to talk. Derrick Belan told Wayne Meaney that he had ‘terminated’ Danielle O’Brien’s ‘services’ because she had confessed to him that she had been ‘misappropriating funds using union credit cards’.

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30 Danielle O’Brien, 10/11/15, T:403.6-16; Wayne Meaney, 10/11/15, 416.5-17.
32 Danielle O’Brien, 10/11/15, T:401.28-34, 396.21-23.
33 Wayne Meaney, 10/11/15, T:415.41-43.
34 Wayne Meaney, 10/11/15, T:416.10-17.
43. On the morning of Wednesday, 21 October 2015, Wayne Meaney received a text message from Derrick Belan asking him to meet him at the Coffee Club in Penrith. They agreed to meet at 8 o’clock.\footnote{Wayne Meaney, 10/11/15, T:416.24-27, 416.35-37.}

44. Wayne Meaney gave evidence that during that meeting Derrick Belan told him that his ‘position was untenable’; that the situation looks one of two ways: — ‘that I’m involved or that it happened under my watch’.\footnote{Wayne Meaney, 10/11/15, T:419.1-6.} At that meeting, Derrick Belan said ‘he would resign’, he agreed that he ‘should resign’.\footnote{Wayne Meaney, 10/11/15, T:6-7.} He told Wayne Meaney he had done nothing wrong.\footnote{Wayne Meaney, witness statement, 2/12/15, para 5.}

**The Extraordinary Meeting of BCOM**

45. On Friday, 23 October 2015, a NUW NSW Branch Extraordinary Committee of Management Meeting was held. The meeting convened at 1.10pm.\footnote{NUW MFI-24, 6/11/15, pp 779-781.}

46. The minutes of that meeting record that ‘arising from the discovery of apparent misuse of credit cards within the organisation’ and ‘following admissions of wrong doing’, an employee had been summarily dismissed.\footnote{NUW MFI-24, 6/11/15, p 779.}
47. The minutes also record that ‘the Committee recognises that there has been an enormous toll taken on Derrick Belan’s health and well-being in recent times by the pressure of the job, as well as the personal issues he has had to deal with in recent years’ and that it had been agreed that he ‘should leave his position as Secretary’.41

48. Further, a resolution was passed that, ‘[i]n light of his outstanding service to the organization [sic] over more than 20 years it is deemed appropriate that [Derrick Belan] receive termination payments based on the same package as that available to other officials but subject to appropriate taxation’.42

49. At that meeting Wayne Meaney was appointed, ‘pursuant to clause 27 of the State Rules of the Union’, to fill the casual vacancy of the position of State Secretary.43

50. On 26 October 2015, NUW NSW and Derrick Belan entered a deed of settlement and release (the Deed).44 The Deed is the subject of further examination at section I.

The National Office

51. On 27 October 2015, Wayne Meaney and Stefan Mueller (Senior Industrial Officer) visited the National Office. They met General

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41 NUW MFI-24, 6/11/15, p 780.
42 NUW MFI-24, 6/11/15, p 780.
43 NUW MFI-24, 6/11/15, p 780.
44 NUW MFI-26, 10/11/15.
Secretary Tim Kennedy and Assistant General Secretary Paul Richardson to tell them what had happened;\(^{45}\) to ‘report on the Union’s current situation; and to notify them of Derrick Belan’s decision to leave the Union’.\(^{46}\)

52. Some time\(^{47}\) shortly before the Extraordinary Meeting, Wayne Meaney had orally engaged McLeod Campbell & Associates Pty Ltd, the NUW NSW’s accountants (who also acted as their auditors), to review the union’s transactions in light of what ‘Mr Belan told [him] about Danielle’.\(^{48}\)

**McLeod Campbell & Associates**

53. On 28 October 2015, McLeod Campbell & Associates wrote to Wayne Meaney, as State Secretary of the NUW NSW, providing an interim report about their ‘Investigation into unauthorised transactions’.\(^{49}\) The letter indicated that they had been engaged to review transactions in ‘light of a recent admission by Danielle O’Brien … that she had utilised NUW’s credit cards for private expenditure’.\(^{50}\)

\(^{45}\) Wayne Meaney, 10/11/15, T:422.34-41.

\(^{46}\) NUW MFI-24, 6/11/15, p 781.

\(^{47}\) Clarified to be 22 October 2015 in Wayne Meaney, witness statement, 2/12/15, para 8.


\(^{49}\) NUW MFI-26, 10/11/15, part 2, p 1.

\(^{50}\) NUW MFI-26, 10/11/15, part 2, p 1.
E – MISUSE OF UNION FUNDS – CREDIT CARDS AND OTHER DEFALCATIONS

The credit cards described

54. This section of the Chapter deals with the Commission’s investigations into the misuse of NUW NSW credit cards issued in the name of Danielle O’Brien and also other officials of the union, together with other defalcations admitted by Danielle O’Brien.51

55. The NUW NSW used two types of corporate credit/charge cards: American Express Corporate cards and Commonwealth Bank MasterCards.

56. Officials of the union were issued with American Express Corporate Cards.52

57. From 2010, Commonwealth Bank MasterCards linked to a corporate card account in the name of the National Union of Workers were issued to and operated by Derrick Belan, Wayne Meaney, Danielle O’Brien and Stefan Mueller.53

58. The Commonwealth Bank MasterCards operated by the NUW NSW, were corporate charge cards.54 It was a requirement of the bank that

51 Unless otherwise indicated, the summary which follows is based on the Submissions of Counsel Assisting, 18/11/15, paras 31-106.
54 NUW MFI-3, 4/11/15, p 1.
the balance of a corporate charge card facility was cleared each month by direct debit from a nominated bank account. The bank account nominated by the NUW NSW was its general account.55 The facility was set up to permit the direct debiting of that account on the fifteenth day of each month.56

59. In contrast the invoices issued by American Express, in relation to the American Express Corporate Card, were paid manually by either cheque or by electronic funds transfer.57

Danielle O’Brien

60. In 2010, Danielle O’Brien was issued with a Commonwealth Bank MasterCard linked to a corporate card account in the name of the National Union of Workers.58

61. Her evidence was that she was never provided with anything in writing about the appropriate usage of union credit cards.59 She said that if the staff needed to ‘buy something for work, we usually just did it’.60

Danielle O'Brien admitted that she had used her union MasterCard to pay for non-union expenses. Some examples of this use to pay personal expenses included hairdressing, coaching for family members and regular holidays to a holiday park called Mecca Village. To take the last example, between November 2011 and March 2015, Danielle O'Brien paid a total of $17,732.99 to Mecca Village on her union MasterCard.

There were some purchases that Danielle O'Brien could not specifically recall making. But in evidence she said that she assumed that those purchases, including some made on the cards of her uncles, were made by her and that they were personal items. These included tickets to the Royal Easter Show, travel to the Show and ride coupons.

Danielle O'Brien gave evidence that Derrick Belan had given her permission to have her iTunes account linked to her union MasterCard, and to use it for purchases from the iTunes store. Between 2010 and 2015, Danielle O'Brien charged over $1,500 in iTunes purchases to her union MasterCard. Derrick Belan submitted that Danielle O'Brien’s evidence was that he did not tell her that she could purchase whatever

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62 Danielle O'Brien, 4/11/15, T:44.5-7; NUW MFI-1, 4/11/15, p 18.
64 See Appendix 1 and NUW MFI-1, 4/11/15, pp 36, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, 72, 74, 76, 78, 82, 84, 86, 90, 92, 94, 96, 98, 100, 103, 104, 106, 109, 110, 112, 115, 116.
66 Danielle O'Brien, 4/11/15, T:47.11-12, 47.44-48.3.
67 See Appendix 2.
she wanted, but did say that she could put iTunes purchases for her phone and computer on the card.68

65. In addition to the monies spent on holidays and iTunes, over $22,000 of other apparently personal expenditure has been identified on Danielle O’Brien’s union MasterCard. Details of those transactions are set out at Appendix 3.

_Credit cards in the name of other officials_

66. As the Accounts Manager for NUW NSW, Danielle O’Brien had access to the card details of most of the union credit cards.69

67. Danielle O’Brien gave evidence that she used a union MasterCard in the name of Anthony O’Donnell to make purchases (or other payments), for herself and others, after Anthony O’Donnell had left the employ of the union.70

68. Some of these purchases were clearly for her own use. One example is the payment for a skip bin delivered to her address.71 Another comprises purchases from Big W of close to $1,400.72

68 Submissions of Derrick Belan, 30/11/15, para 38.
70 Danielle O’Brien, 4/11/15, T:72.31-45.
At least one of the payments on the union credit card in the name of Anthony O’Donnell, in the amount of $800, was for the benefit of her uncle, Nick Belan. Danielle O’Brien admitted to using this credit card to book a holiday house in the Daintree for Nick Belan. Both Danielle O’Brien and Nick Belan gave evidence that Nick Belan had repaid that amount by way of regular deductions from his wages. The credibility of that evidence is an open question. In that respect it is in the same position as a great deal of the evidence given by members of the Belan family.

According to Danielle O’Brien, other charges were made by her at the direction of and for use by Derrick Belan, including:

(a) a payment of $2,719.20 to Sydney Cricket Ground, for a casual open air corporate box for the A-League Grand Final, with catering, and

(b) a payment of $1,600 to Stadium Australia, Homebush Bay, for a Corporate Package for Monster Jam, which was attended by Derrick Belan and his children, Danielle O’Brien and her children and a couple of delegates and their children.

71. As is discussed further below, Derrick Belan denied that any personal
payments made on his behalf were improper.

72. Danielle O’Brien also admitted that she made some payments using a
union card in the name of Charlie Morgan.

73. Certain of the payments using this card were purely personal. For
example Danielle O’Brien admitted to spending $669.89 at Toys “R”
Us.77

74. Some of those payments using this card were union related. When
asked why Charlie Morgan’s card was used, Danielle O’Brien
responded that it was ‘random’, that in her mind ‘the cards just belong
to the Union, they don’t belong to people because the Union pays the
bill, therefore, they're not - I'm not using someone else's card, I'm using
the Union's card’.78

75. Other payments, with a tenuous union connection, had, according to
Danielle O’Brien, apparently been approved by Derrick Belan. For
example, Danielle O’Brien was shown a charge on the credit card in
Charlie Morgan’s name, for a hotel room at Rydges Sydney, which
was booked in her name. Danielle O’Brien said that room booking
was for use after the union’s Christmas Party and that the expenditure
had been approved by Derrick Belan.79 She also said that other

77 Danielle O’Brien, 4/11/15, T:91.1-13; NUW MFI-9, 4/11/15, p 97; NUW MFI-2, 4/11/15,
pp 250-252.
78 Danielle O’Brien, 4/11/15, T:88.7-16.
79 Danielle O’Brien, 4/11/15, T:92.23-40; NUW MFI-9, 4/11/15, p 101; NUW MFI-2,
4/11/15, p 256.
officials also stayed in Sydney following the party, apparently at the union’s expense.\footnote{Danielle O’Brien, 4/11/15, T:92.42-47.}

However, one payment of $2,740 to Dalcross Adventist Hospital was, on Danielle O’Brien’s evidence, a payment she made at the direction of Derrick Belan. According to Danielle O’Brien, it related to surgery for Derrick Belan.\footnote{Danielle O’Brien, 4/11/15, T:88.39-89.9, 90.2-29; NUW MFI-9, 4/11/15, p 91.} Her evidence was that Derrick Belan asked her to put it on the union credit card. When asked if she questioned him about this expense she said ‘of course not’, ‘because he is the State Secretary and the money is spent at the Secretary’s discretion, as far as I’m aware’.\footnote{Danielle O’Brien, 4/11/15, T: 90.23-25.} The surgery was actually for Paula Lancaster, Derrick Belan’s former de facto wife.\footnote{NUW MFI-36, 17/11/15.}

In a number of instances Danielle O’Brien recorded the payments of wages or salaries in MYOB as if they were to be paid to certain officials. In fact they were directed by her to be sent to her own personal account.\footnote{NUW MFI-2, 4/11/15, pp 43-81; Danielle O’Brien, 4/11/15, T:94.28-101.37.} When material relating to this was first put to Danielle O’Brien in the public hearing she became particularly distressed, punctuating her answers with cries of ‘Oh my God’. She claimed that she did not remember doing it. But she went on to apologise for doing it.\footnote{Danielle O’Brien, 4/11/15, T:97.14.} She also gave the following evidence:\footnote{Danielle O’Brien, 4/11/15, T:97.21-98.10.}
Q. It has taken some effort, hasn’t it, to put these details into MYOB in someone else’s name and then to direct the payment into your own personal account?

A. It would – I would have had to change the details, yes.

Q. And that would have taken some deliberate action, yes?

A. Yes.

Q. You couldn’t have done that by mistake?

A. I assume not, no. […] All I can say is that I must have done it and I’m sorry. That’s all I can say, and if you say it’s all of these, then it probably is.

78. The total amount that has been redirected in this fashion was $68,395.56.\(^{87}\) However, Danielle O’Brien stated that some of those transfers were authorised by Derrick Belan. In this regard she said: ‘There were a few times when Derrick actually asked me to deposit money into my account for things that I had to pay for him, so – I think it was like, $1,100 or $1,300 a couple of times.’\(^{88}\)

79. It is contended by counsel assisting that Danielle O’Brien may have committed offences against ss 117, 156 and/or 192E of the \textit{Crimes Act} 1900 (NSW). Although Danielle O’Brien was represented at the hearing, she has filed no submissions opposing the submissions of counsel assisting. The contention is upheld. The matter requires police investigation, including an investigation of what role in her activities was played by others.

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

\(^{87}\) NUW MFI-2, 4/11/15, pp 43-81 (excluding pp 58, 74).

referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Danielle O’Brien in relation to possible offences against ss 117, 156 and/or 192E of the *Crimes Act* 1900 (NSW).

**Nick Belan**

81. Nick Belan is an organiser for the NUW NSW. He was provided with a union American Express credit card.

82. During the public hearing Nick Belan was taken to a number of transactions on his credit card statement that were for apparently personal purposes.

83. Nick Belan’s evidence was that a number of charges to his union credit card at restaurants in and around Sydney were (or could have been) for union purposes. He said that those expenses were authorised in advance, usually by Derrick Belan, either in person or over the phone. In his evidence, however, he made the following points. He did not make a record of receiving the authorisation. He did not make it known to the union’s bookkeeper that he had received authorisation. It was not his usual practice to keep a list of the guests that he took to dinner.

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84. There were transactions at restaurants and fast food outlets which he said he simply could not recall at all.\textsuperscript{92} He could not recall if other transactions were for union business or personal purposes.\textsuperscript{93}

85. Counsel assisting drew Nick Belan’s attention to a Jetstar Airways purchase in the amount of $255 on his union credit card. The details on the credit card statement indicated that the passenger was Emma Belan.\textsuperscript{94} Nick Belan said that Emma Belan was his daughter. He did not know why ‘[his] daughter is on a Jetstar Airways [charge] on [his] card’.\textsuperscript{95}

86. Various transactions recorded on Nick Belan’s union credit card were at department stores and supermarkets.\textsuperscript{96} He could not recall some of the purchases. But he agreed with counsel assisting that some of those transactions were likely to be in-store purchases and were likely to have been made by him.\textsuperscript{97} He was unable to say whether these purchases were personal or union related.\textsuperscript{98}

87. When questioned about charges on his credit card for ‘Rentaskip’ and ‘Rent a Bin’,\textsuperscript{99} Nick Belan admitted that he had, on more than one occasion, had a skip bin delivered to his home and paid for it using his

\textsuperscript{92} Nick Belan, 5/11/15, T:132.37-40, 133.7-23, 134.18-20.
\textsuperscript{93} Nick Belan, 5/11/15, T:140.28-37.
\textsuperscript{94} NUW MFI-5, 4/11/15, p 18.
\textsuperscript{95} Nick Belan, 5/11/15, T:129.32-130.3.
\textsuperscript{96} See, eg, NUW MFI-5, 4/11/15, pp 138-139.
\textsuperscript{97} Nick Belan, 5/11/15, T:145.6-28, 145.37-47.
\textsuperscript{98} Nick Belan, 5/11/15, T:146.2-3.
union credit card. He said that the purchase was not authorised. But he said that he was paying it back in the sense that he had arranged a payment plan with Danielle O’Brien, by which a regular amount would come out of his wages.

88. Counsel assisting asked Nick Belan if the payment plan related only to the hire of skip bins. His answer was: ‘No, a couple of other things too’.

89. When taken to a payment of $933.28 paid to Ticketmaster Australasia on his union credit card, Nick Belan said that he paid it back straight away.

90. The NUW NSW’s financial records confirm that in financial years 2012 to 2015 regular amounts were deducted from Nick Belan’s wage. However, it is not clear whether these deductions were sufficient to cover the private expenditure incurred by Nick Belan, or by Danielle O’Brien on his behalf, using union credit cards.

91. Ultimately, when pressed, Nick Belan admitted that he had, on a few occasions, made personal purchases using his union credit card, for which he did not reimburse the NUW NSW.

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100 Nick Belan, 5/11/15, T:132.4-14, 143.17-29.
103 Nick Belan, 5/11/15, T:139.5-16.
104 NUW MFI-12, 5/11/15.
105 Nick Belan, 5/11/15, T:146.13-44.
92. Nick Belan submitted that it was not clear whether the regular deductions from his wages, as recorded in the 2012-2015 financial records of NUW NSW, may remedy or even over-compensate for any private expenditure incurred by him on his union credit card.\textsuperscript{106} He also submitted that Danielle O’Brien clearly made personal purchases for her own benefit.\textsuperscript{107} These submissions do not overcome admission he made that he made a couple of purchases which have not been reimbursed. And the submissions assume that he was telling the truth sincerely and accurately about repayment through regular deductions from his wages.

93. Counsel assisting submitted that Nick Belan may have committed offences against ss 117, 156 and/or 192E of the \textit{Crimes Act} 1900 (NSW) and ss 267 and 268 of the \textit{Industrial Relations Act} 1996 (NSW). That submission is accepted. Counsel assisting submitted that it had not yet been possible to determine the extent of Nick Belan’s activities or the extent of any involvement in his activities others had. Counsel assisting submitted that the matter should be referred to the police for further investigation. That submission is accepted. Pursuant to s 6P of the \textit{Royal Commissions Act} 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales and the Executive Director of New South Wales Industrial Relations so that consideration can be given to the institution of proceedings against Nick Belan in relation to possible offences against ss 117, 156 and/or 192E of the \textit{Crimes Act}.

\textsuperscript{106} Submissions of the NUW, 28/11/15, para 14.

\textsuperscript{107} Submissions of the NUW, 28/11/15, para 15.
1900 (NSW) and ss 267 and 268 of the Industrial Relations Act 1996 (NSW). Further, pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against Nick Belan for pecuniary penalty orders in relation to possible contraventions of ss 285, 286 and 287 of the Fair Work (Registered Organisations) Act 2009 (Cth).

Marilyn Issanchon

94. Marilyn Issanchon gave evidence that she understood that union credit cards could appropriately be used for petrol, parking and stationery and other work related expenses that had been passed by the Secretary.108

95. When asked if the union credit cards could be used to pay bills at restaurants, Marilyn Issanchon gave the following evidence:109

Yes, I would be using it in restaurants. I don’t think I ever went to a restaurant without Derrick or Wayne there, and Derrick would say, he would just look at me and say, ‘Let’s put it on the card’, so I would.

96. Counsel assisting took Marilyn Issanchon to a number of charges at restaurants in and around Sydney and Melbourne. In relation to the restaurant in Melbourne, she said that the charge would have been made while attending a conference. When shown various charges on her union credit card at a restaurant called the El-Phoenician, she said words to the effect of: ‘I’ve never been to the El-Phoenician with my

family; I've never been on my own',

97. Generally, in relation to restaurant charges, she said ‘I have never taken anybody to dinner or any function on my own without Derrick or Wayne’.

98. No submission was made by counsel assisting that Marilyn Issanchon’s conduct in relation to credit cards may have contravened any criminal provisions. On the evidence, counsel assisting’s course is correct.

**Wayne Meaney**

99. Since the public hearing, allegations have been made of inappropriate credit card use by Wayne Meaney.

100. On 26 November 2015, the allegations (as at that date) were put to Wayne Meaney for comment. In response, Wayne Meaney has claimed that some of the expenditure was for approved union purposes. He has also claimed what appears to be personal expenditure was either approved by Derrick Belan, or was later repaid by Wayne Meaney.

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111 Marilyn Issanchon, 6/11/15, T:348.42.
112 Marilyn Issanchon, 6/11/15, T:347.44-47.
113 Submissions of Counsel Assisting, 4/12/15, paras 15-18.
114 NUW MFI-46, 1/12/15.
115 NUW MFI-47, 1/12/15.
101. Subsequent to that response, further allegations of credit card misuse were made in the media on 2 December 2015.

102. Counsel assisting submitted that the issue of inappropriate union credit card use by Wayne Meaney should be referred to the police for further investigation. That submission is correct. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales and the Executive Director of New South Wales Industrial Relations for further investigation of possible misappropriation of union funds contrary to ss 117, 156 and/or 192E of the Crimes Act 1900 (NSW) and ss 267 and 268 of the Industrial Relations Act 1996 (NSW). Further, pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission for further investigation of possible misappropriation of union funds contrary to ss 285, 286 and 287 of the Fair Work (Registered Organisations) Act 2009 (Cth).

Derrick Belan

103. Derrick Belan had the use of two union cards: a CBA MasterCard and an American Express credit card.  

104. Derrick Belan was questioned by counsel assisting about the usage of credit cards by officials and office staff. He said that ‘day-to-day’

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116 Derrick Belan, 10/11/15, T:453.9-23.
payments like electricity and utilities were ‘generally allowed to be paid by the staff’, but that anything ‘outside of that, or extraordinary, was generally raised with [himself] or Wayne’. In relation to organisers, Derrick Belan said that they could use their credit cards for parking and accommodation without seeking approval. He added:

Anything outside of that, [the organisers] would have to ring myself or Mr Meaney and get it approved. If we weren't available, they could then make their own decision, but it would be questioned when it came in at the end of the month.118

105. However, Derrick Belan gave evidence that these rules did not apply to himself or to Wayne Meaney.119 The ‘general rule’ that applied to Derrick Belan, in his words, was ‘that if I believed it was to benefit the Union, or for the good of the Union, I could use that expenditure’.120

106. When counsel assisting sought clarification about what Derrick Belan believed he was entitled to use his union credit cards for, he gave the following evidence:121

A. Whatever I believe would benefit the Union.

Q. Can you give some examples, please?

A. Well, I suppose sponsorship, a meal with a delegate who looks after a shed. I mean - I mean - I mean I could probably give you a hundred examples, but is there anything specific you're looking for?

Q. There will be. How about holidays?

117 Derrick Belan, 10/11/15, T:449.11-16.
118 Derrick Belan, 10/11/15, T:449.29-34.
120 Derrick Belan, 10/11/15, T:451.39-42.
121 Derrick Belan, 10/11/15, T:452.5-39.
A. Holidays?
Q. Yes.
A. No.
Q. How about cruises?
A. No.
Q. How about tattoos?
A. No.
Q. You don't think they're appropriate to put on the Union credit card?
A. Absolutely not.
Q. Is it the case that you have ever put any such items on a Union credit card?
A. No.
Q. No?
A. No.
Q. You're certain about that, are you?
A. I'm positive.

107. Derrick Belan, however, later contradicted this unequivocal evidence. He admitted using a union credit card in relation to these items, as now will be set out.

South Coast Holidays

108. Between October 2010 and October 2012 payments to Lake Conjola Entrance Tourist Park were charged to Derrick Belan’s union MasterCard. In addition to the payments to the tourist park for accommodation, various payments were made using Derrick Belan’s
union MasterCard and his union issued American Express card in or around the Lake Conjola area, at times which coincided with his holidays. Those payments, and the payments to the tourist park, are set out in the table below:

<table>
<thead>
<tr>
<th>Date</th>
<th>Card charged</th>
<th>Description on statement122</th>
<th>Amount $</th>
</tr>
</thead>
<tbody>
<tr>
<td>17-Oct-10</td>
<td>MasterCard ...0045</td>
<td>Lake Conjola Ent Tour Lake Conjola AUS</td>
<td>$1,438.00</td>
</tr>
<tr>
<td>29-Dec-10</td>
<td>MasterCard ...0045</td>
<td>Lake Conjola Ent Tour Lake Conjola AUS</td>
<td>$1,537.00</td>
</tr>
<tr>
<td>05-Jan-11</td>
<td>AMEX...23007</td>
<td>Caltex Milton Depot Fuel</td>
<td>$66.13</td>
</tr>
<tr>
<td>29-Aug-11</td>
<td>MasterCard ...0045</td>
<td>Lake Conjola Ent Tour Lake Conjola AUS</td>
<td>$1,475.00</td>
</tr>
<tr>
<td>02-Jan-12</td>
<td>AMEX...25002</td>
<td>Riteway Milton Merchandise</td>
<td>$126.74</td>
</tr>
<tr>
<td>08-Jan-12</td>
<td>MasterCard ...0045</td>
<td>Stewarts Catering NSW Ulladulla NSW</td>
<td>$166.80</td>
</tr>
<tr>
<td>09-Jan-12</td>
<td>MasterCard ...0045</td>
<td>Bacchus at Milton Milton NSW</td>
<td>$78.40</td>
</tr>
<tr>
<td>12-Jan-12</td>
<td>AMEX ...25002</td>
<td>Allens Stores Ulladulla - Music</td>
<td>$148.00</td>
</tr>
<tr>
<td>12-Jan-12</td>
<td>MasterCard ...0045</td>
<td>Bowling Club Bistros Lake Conjola AUS</td>
<td>$93.00</td>
</tr>
<tr>
<td>23-Feb-12</td>
<td>MasterCard ...0045</td>
<td>Lake Conjola Ent Tour Lake Conjola AUS</td>
<td>$260.00</td>
</tr>
<tr>
<td>16-Mar-12</td>
<td>MasterCard ...0045</td>
<td>Lake Conjola Ent Tour Lake Conjola AUS</td>
<td>$260.00</td>
</tr>
<tr>
<td>03-Oct-12</td>
<td>MasterCard ...0045</td>
<td>Lake Conjola Ent Tour Lake Conjola AUS</td>
<td>$1,425.00</td>
</tr>
<tr>
<td>03-Jan-13</td>
<td>MasterCard ...0045</td>
<td>Stewarts Catering NSW Ulladulla NSW</td>
<td>$173.70</td>
</tr>
<tr>
<td>03-Jan-13</td>
<td>MasterCard ...0045</td>
<td>Lake Conjola PO store Lake Conjola NSW</td>
<td>$69.25</td>
</tr>
</tbody>
</table>

109. Counsel assisting questioned Derrick Belan about a number of those payments:

(a) When asked about $1,537 paid to Lake Conjola Entrance Tourist Park, at first he denied paying it, and said it must have been Danielle from the office, or maybe she paid it from
home. However, after being shown the tax receipt he said: ‘I am not aware that I paid that, but it looks like I did’.  

(b) When questioned about the garage/service station charges, Derrick Belan’s evidence was that he was able to use the union credit card for fuel even when he was on holidays.

(c) In relation to the charge at the Bowling Club he said: ‘I would say that if I’ve done that, I would have informed Danielle that it was done and asked her to remove it out of my wages’.

(d) In relation to a $368.30 payment at Woolworths, which he admitted was a personal expense, Derrick Belan said ‘Again I would have spoken to Danielle about that…I would have rang [sic] Danielle again and asked her to take that from my pay…’.

(e) When asked about the charges on the credit card at Target Ulladulla, he said ‘if they were personal purchases, which I believe they were, I would have informed Danielle that that was the case and would have asked her to remove it out of my next pay’.

123 Derrick Belan, 10/11/15, T:455.3-40.
125 Derrick Belan, 10/11/15, T:460.44-361.5.
126 Derrick Belan, 10/11/15, T:462.28-45.
(f) Counsel assisting asked him about the purchases at Woolworths and Harris Scarfe and he responded ‘same answer’.

(g) When asked about the transaction at Coles, he could not recall whether he rang Danielle O’Brien about this purchase but believed he would have and said ‘it was always something [he] did’.

(h) In relation to the $225 spent at International Restaurant Ulladulla on his union credit card, he said he would have done the same thing.

(i) In relation to further purchases at Harris Scarfe and Woolworths, he stated that ‘[t]his only would have been because I’ve ran out of money on holidays […] I’m waiting for my holiday pay’.

Cruise

110. Counsel assisting asked Derrick Belan about a number of charges on a union American Express card in his name. They related to a cruise ship called ‘Pacific Jewel’. The charges were for on-board

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128 Derrick Belan, 10/11/15, T:463.24-36.
129 Derrick Belan, 10/11/15, T:463.32-43.
130 Derrick Belan, 10/11/15, T:463.47-464.1.
131 Derrick Belan, 10/11/15, T:464.3-9.
132 NUW MFI-6, 4/11/15, p 420.
purchases of food and beverages, between 14 and 18 December 2014, for him and Paula Lancaster, his then de facto wife.133

111. Derrick Belan’s evidence was that those items were purchased whilst on board using a ‘ship card’, which was provided to him when he boarded the ship.134 He explained that the ship card was connected to a credit card.135 When asked if he knew which credit card it was connected to, he said that the cruise was a gift and that he was ‘told by Danielle that it was all sorted and that I should just go and enjoy myself’.136 However, when pressed, Derrick Belan admitted that he signed to settle the account.137

112. In spite of this, Derrick Belan insisted that he had ‘no idea that that cruise was on the Union credit card’.138 Counsel assisting showed Derrick Belan the charge on the credit card statement. He said that ‘it never came to his attention on the American Express statements’.139

Tattoo

113. After his initial denial as set out above,140 Derrick Belan admitted that he had used his union credit card to pay for a tattoo for himself.141

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133 NUW MFI-27, 10/11/15, pp 423-432.
134 Derrick Belan, 10/11/15, T:468.10-22.
135 Derrick Belan, 10/11/15, T:468.24-25.
136 Derrick Belan, 10/11/15, T:468.27-29.
137 Derrick Belan, 10/11/15, T:468.37.
138 Derrick Belan, 10/11/15, T:469.22-23.
139 Derrick Belan, 10/11/15, T:469.44-470.12.
140 Paragraph 106.
114. However, he gave evidence that he believed that ‘that money was taken back or was taken out of [his] wages’. He said that he ‘informed Danielle to take the money back’.

115. Derrick Belan also stated that the bank he went to in order to pay for that tattoo ‘wouldn’t release the funds’. By that he meant, according to him ‘[w]ell, the ATM didn’t have money in it’. When asked about his private credit card, he stated that it was left at the office.

PayPal

116. Documents produced to the Commission show that the following union credit cards were, at various stages, linked to PayPal accounts in the name of Derrick Belan:

(a) American Express Corporate Card, in the name of Derrick Belan, with card number 3760-XXXXXX-26000; and

(b) American Express Corporate Card, in the name of Derrick Belan, with card number 3760-XXXXXX-27008.

117. Some of those payments, funded by the union American Express card in Derrick Belan’s name, were made to Danielle O’Brien, by way of her PayPal account.

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142 Derrick Belan, 10/11/15, T:465.36-37.
143 Derrick Belan, 10/11/15, T:466.16.
144 Derrick Belan, 10/11/5, T: 465.28-46.
146 NUW MFI-27, 10/11/15, pp 233-252.
Danielle O’Brien asserted that Derrick Belan transferred money into her PayPal account for her to ‘withdraw, to pay for his – to pay for bills’.

Counsel assisting asked Derrick Belan whether or not this had occurred. He denied it.

It was Derrick Belan’s evidence that his PayPal accounts were set up for him by someone else, and a person other than him also set up the credit cards that were linked to those accounts.

There were a number of gift addresses listed on Derrick Belan’s PayPal accounts, which on their face all appeared to be personally connected to him. He denied linking those addresses to his account.

He further denied being personally responsible for making purchases using the PayPal account.

Short term accommodation

Counsel assisting asked Derrick Belan if he had ever arranged short term accommodation for himself at an address in Penrith using a union credit card. He denied it. But he said that he may have booked some

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147 NUW MFI-27, 10/11/15, pp 233, 243, 244, 246, 247, 250. See also NUW MFI-2, 4/11/15, p 307.
149 Derrick Belan, 10/11/15, T:480.44-481.5.
151 Derrick Belan, 10/11/15, T:474.9-17.
152 Derrick Belan, 10/11/15, T:475.35-476.6.
short term accommodation for delegates who had travelled down for
conferences.\footnote{153 Derrick Belan, 10/11/15, T:488.13-17.} However, when counsel assisting took him to a letter
from Western Sydney Accommodation\footnote{154 NUW MFI-27, 10/11/15, p 357.} he recalled the
accommodation, and the period in question, as being a time when he
had been ‘removed from [his] premises for legal reasons’, but said that
the accommodation was paid for on his personal cards.\footnote{155 Derrick Belan, 10/11/15, T:488.19-43.}

124. Counsel assisting then took Derrick Belan to a signed receipt for
$2,100.\footnote{156 NUW MFI-27, 10/11/15, p 354.} She showed him a corresponding amount on his union
American Express statement.\footnote{157 NUW MFI-27, 10/11/15, p 350.} Then his evidence changed again. He
said the $2,100 was a deposit that he paid for on his union card, but
that the majority of payments were made on his personal card or out of
his personal account.\footnote{158 Derrick Belan, 10/11/15, T:489.20-22.}

125. Derrick Belan was then taken to two further charges on his union card
for that temporary accommodation, for which he could give no proper
explanation. The response he gave was:\footnote{159 Derrick Belan, 10/11/15, T:489.29-47.}

> [I]t would not be the intention, nor would it have been my intention, to
make any payments on the Union card without them being paid back,
and/or for some reason I couldn’t do it on my personal card.

126. Counsel assisting showed Derrick Belan one further charge for
temporary accommodation on his union American Express card, in the

\footnote{153 Derrick Belan, 10/11/15, T:488.13-17.}
\footnote{154 NUW MFI-27, 10/11/15, p 357.}
\footnote{155 Derrick Belan, 10/11/15, T:488.19-43.}
\footnote{156 NUW MFI-27, 10/11/15, p 354.}
\footnote{157 NUW MFI-27, 10/11/15, p 350.}
\footnote{158 Derrick Belan, 10/11/15, T:489.20-22.}
\footnote{159 Derrick Belan, 10/11/15, T:489.29-47.}
amount of $6,336. Derrick Belan said that he ‘believed that that it was paid out of [his] own personal money’. But he acknowledged that in fact it was not.  

Long term rental accommodation

127. On Derrick Belan’s American Express statements a number of transactions were entered using ‘DEFT Payment Systems Sydney’. Those payments are set out in the table below:

<table>
<thead>
<tr>
<th>Date</th>
<th>Card charged</th>
<th>Description on statement</th>
<th>Amount $</th>
<th>Amount $ ex surcharge</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-May-15</td>
<td>AMEX…27008</td>
<td>DEFT Payment Systems Sydney</td>
<td>$878.05</td>
<td>$850</td>
</tr>
<tr>
<td>9-May-15</td>
<td>AMEX…27008</td>
<td>DEFT Payment Systems Sydney</td>
<td>$4,390.25</td>
<td>$4,250</td>
</tr>
<tr>
<td>4-Jun-15</td>
<td>AMEX…28006</td>
<td>DEFT Payment Systems Sydney</td>
<td>$878.05</td>
<td>$850</td>
</tr>
<tr>
<td>4-Jun-15</td>
<td>AMEX…28006</td>
<td>DEFT Payment Systems Sydney</td>
<td>$878.05</td>
<td>$850</td>
</tr>
<tr>
<td>22-Jun-15</td>
<td>AMEX…28006</td>
<td>DEFT Payment Systems Sydney</td>
<td>$2,634.15</td>
<td>$2,550</td>
</tr>
<tr>
<td>10-Jul-15</td>
<td>AMEX…28006</td>
<td>DEFT Payment Systems Sydney</td>
<td>$1,756.10</td>
<td>$1,700</td>
</tr>
<tr>
<td>3-Aug-15</td>
<td>AMEX…28006</td>
<td>DEFT Payment Systems Sydney</td>
<td>$1,756.10</td>
<td>$1,700</td>
</tr>
<tr>
<td>6-Aug-15</td>
<td>AMEX…28006</td>
<td>DEFT Payment Systems Sydney</td>
<td>$1,781.93</td>
<td>$1,725</td>
</tr>
<tr>
<td>14-Aug-15</td>
<td>AMEX…28006</td>
<td>DEFT Payment Systems Sydney</td>
<td>$1,756.10</td>
<td>$1,700</td>
</tr>
</tbody>
</table>

160 Derrick Belan, 10/11/15, T:490.2-11.
128. These transactions were payments made in relation to a residential property leased in the name of Derrick Belan and Paula Lancaster, his then de facto wife.  

129. When asked about the first of the above payments, Derrick Belan gave the following evidence:

That may be my Union credit card being used for that but I assure you I did not authorise that. Danielle was responsible for paying my rent and I believe it was being paid out of my personal accounts.

130. Counsel assisting showed Derrick Belan a copy of an American Express statement, produced by NUW NSW, which had handwritten annotations. The annotations included a notation next to the payment on 9 May 2015 using DEFT Payment Systems. The notation

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The transcript recorded the exchange between Derrick Belan and counsel assisting as follows:

Q. Was it the case that Ms O’Brien, if she was unsure of what payments related to, put questions on statements such that you could clarify it?

A. Yeah.

... 

Q. It is clear from this, is it not, that Ms O’Brien was not aware of the nature of the payment, would you agree with that?

A. Well, maybe she wasn't but it doesn't mean that I seen [sic] it or had it brought to me.

Q. You are saying, as I understand it, correct me if I am wrong, that Ms O’Brien was looking after the payments for you and that's why it went on the Union credit card, but it appears she didn't know what this was for.

A. Well, this is a - well, I don't know. "Airfares", she's put. I mean, maybe she was putting "Airfares" to make people think it was airfares.

Catchoftheday

131. The Commission identified various purchases made on the online shopping website ‘catchoftheday.com’, using Derrick Belan’s union credit cards. Catchoftheday records show that:

(a) a total of $4,973.74 was charged to the CBA MasterCard in his name in the years 2012, 2013 and 2015; and

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168 Derrick Belan, 10/11/15, T:493.31-34; T:493.43-494.8.
(b) a total of $30,515.80 was charged to the union American Express cards in his name in the years 2013-2015.  

132. Derrick Belan denied ever making a Catchoftheday purchase using his union credit cards. He was taken to the invoices for a number of these purchases. Some of them were delivered to residential addresses associated with him. But he could not explain why they were charged to his corporate card. Nor could he explain why they were delivered to those addresses. In relation to one of the purchases, of a children’s swing set and seesaw, he said:

Yes, and I'm aware of what this one is. I made arrangements for these things to be purchased and delivered to that address. I did not believe it was on the Union card; nor did I authorise for it to be on the Union card; nor would I authorise it to be on the Union card. I believed it was on my own personal card.

Dating Websites

133. The sum of $2,271.70 in dating website fees appeared on Derrick Belan’s union MasterCard, between 2011 and 2015.

134. When asked if he had ever subscribed to match.com, Derrick Belan said ‘No, not to my knowledge’.

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171 Derrick Belan, 10/11/15, T:483.43-485.9
172 NUW MFI-27, 10/11/15, p 281.
174 An extract of the charges for dating websites on the CBA MasterCards (account numbers 5550 XXXX XXXX 0045 and 5550 XXXX XXXX 4088) is at Appendix 3. This extract was prepared by Commission staff using the statements for those CBA MasterCards, found at NUW MFI-6, 4/11/15, pp 4-117.
Danielle O’Brien’s evidence regarding Derrick Belan’s credit cards

135. Danielle O’Brien denied ever:

(a) being asked by Derrick Belan to send money using his Corporate credit card to any people;\(^\text{176}\)

(b) making payments from Derrick Belan’s Corporate American Express card to anyone via PayPal;\(^\text{177}\)

(c) subscribing to match.com;\(^\text{178}\)

(d) being asked to purchase a cruise on Derrick Belan’s behalf;\(^\text{179}\)

(e) organising or paying for or using Derrick Belan’s union credit card on his behalf, for any short-term or long term rental accommodation;\(^\text{180}\) or

(f) discussing with Derrick Belan the payment for any rental accommodation in 2015.\(^\text{181}\)

\(^{175}\) Derrick Belan, 10/11/15, T:456.41-45.


\(^{178}\) Danielle O’Brien, 10/11/15, T:405.47-406.2.


\(^{180}\) Danielle O’Brien, 4/11/15, T:63.3-17.

Repayments

136. On a number of occasions Derrick Belan gave evidence that he believed the amounts charged to his union credit card, for personal purchases, were paid back to the union. For example, during questioning concerning his spending in and around Lake Conjola, while on holidays, he said:

If I did anything, like incurred an expense that I believed was a private expense on my card, I would inform Danielle to remove that from my wages or I would pay it the day after.

137. The NUW NSW’s payroll records for 2012 to 2015 show that regular deductions were made from Derrick Belan’s wages. Some of those deductions are recorded in the payroll system as relating to child support, the ‘Campaign Fund’ and NUW Official’s union fees. However, in relation to other amounts totalling $26,084.05 referred to as ‘Staff repayment’ or ‘Derricks wage deduction’, it is unclear on the face of the records how or when those amounts were applied.

138. On his own evidence, Derrick Belan took no steps to make sure that the money was repaid to the NUW NSW. He only used vague words. Thus he said: ‘I believe so. It was meant to have happened’. And

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182 See, eg, Derrick Belan, 10/11/15, T:461.3-5; 465.36-466.13.
183 Derrick Belan, 10/11/15, T:461.11-15.
184 NUW MFI-44, 17/11/15.
185 See also Danielle O’Brien, 4/11/15, T:67.28-43.
186 Derrick Belan, 10/11/15, T:461.11.
he said: ‘Well, I’d hope so. I’d hope that it happened … in the ledger’.187

139. Counsel assisting submitted that Derrick Belan’s evidence about his union credit card usage changed over time in important respects. Its reliability is thus in question. Aspects of his evidence were also inherently incredible.

140. Derrick Belan submitted188 that counsel assisting did not suggest that all of the purchases listed on the credit cards issued to him were proper. Derrick Belan noted that the evidence did identify some purchases that were suspicious or potentially improper. But he contended that the evidence did not permit a finding that he executed or authorised all of the purchases identified as potentially improper purchases.

141. Derrick Belan further submitted that Danielle O’Brien had access to his credit cards and other credit cards issued to officials, that she kept records of the details of the credit cards issued to him and other officials, that she used his credit cards and those of others to make NUW related and improper purchases, that she misused her position as the NUW’s bookkeeper to make cash payments to herself and that she made false entries in the accounting software programme (MYOB) to disguise those payments. This submission is true in part. But so far as the uncle attempts to blame the niece for wrongdoing which would otherwise be sheeted home to him, it is highly controversial.

187 Derrick Belan, 10/11/15, T:463.3-7.
188 Submissions of Derrick Belan, 30/11/15, para 9.
142. Derrick Belan admitted using his NUW credit cards for some personal purchases.\(^{189}\) He acknowledged that the evidence may warrant further investigation of the credit card and other transactions. Derrick Belan submitted that when he used his credit card for a personal expense, he told Danielle O’Brien to make arrangements to pay the money to the NUW. Derrick Belan cited evidence where Danielle O’Brien agreed that he may have called her to tell her about a Lake Conjola expense, but that she could not recall.\(^{190}\)

143. He said that he believed that he was authorised to approve a loan up to $1000. He also said that at the time of using the card he had no intention of permanently depriving the NUW NSW of the funds. He argued that there was evidence to corroborate his evidence. It included deductions from his wages consistent with repayment of loans. It also included the evidence of Danielle O’Brien that he would give her money to pay bills and the credit card.\(^{191}\)

144. Derrick Belan argued that a belief that he could authorise an advance or loan would be a defence if the facts established that he did not expressly authorise the use of a NUW NSW card for an expense. He also argued that a lack of intention to deprive the union of the funds may afford a defence under ss 117 or 156 of 192E of the *Crimes Act* 1900 (NSW). He also submitted that there was insufficient evidence to permit a conclusion that he ‘may have’ committed any offence under ss 267 or 268 of the *Industrial Relations Act* 1996 (NSW).

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\(^{189}\) Submissions of Derrick Belan, 30/11/15, paras 9 (9); 46-59.

\(^{190}\) Submissions of Derrick Belan, 30/11/15, para 50.

\(^{191}\) Submissions of Derrick Belan, 30/11/15, para 9 (9).
145. He submitted that Danielle O’Brien gave evidence that he never asked her to steal union funds. He submitted that a finding should be made that Danielle O’Brien’s evidence was that he never asked her to use NUW NSW credit cards to buy him personal items. He submitted that ‘[i]t is clear from a close examination of Danielle O’Brien’s evidence that she could not think of a single instance of Derrick Belan asking her to use NUW credit cards for personal purchases or her observing personal purchases on his cards’.

146. Derrick Belan also argued that he denied making arrangements for PayPal payments from the NUW NSW account to Danielle O’Brien. He noted that Danielle O’Brien stated that she did not make PayPal payments to herself and that he made the payments. He submitted that Danielle O’Brien was visibly upset when giving her evidence; that on multiple occasions she gave evidence which she thought accorded with what she thought counsel assisting’s views of the documents were; and that some of her evidence was not fact but assumption.

147. Derrick Belan also submitted that Danielle O’Brien’s evidence on the PayPal payments was unclear. He submitted that whilst she at first appeared to be giving evidence that the PayPal funds transfers were payments made by him to her to pay bills, it is not possible to reach any conclusion about what her evidence was in relation to the PayPal transfers. He submitted that when asked by counsel assisting about 3 transfers, Danielle O’Brien said ‘I assume they’re all for him’. He submitted that ‘[t]hat could hardly be the basis to find that Derrick

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192 Submissions of Derrick Belan, 30/11/15, para 55.
193 Submissions of Derrick Belan, 30/11/15, para 57.
194 Submissions of Derrick Belan, 30/11/15, para 58.
Belan made or authorised the payments’. He contended that the evidence did not support a finding that he authorised PayPal transfers of NUW funds to Danielle O’Brien. He suggested that the conflict need not be resolved now if the payments are to be subject to further investigation.

148. In response to the submissions about Derrick Belan’s use of union credit cards, counsel assisting pointed to a number of matters. One was Derrick Belan’s admissions. Another was the circumstances surrounding the admitted use of the union credit card. One of those circumstances concerned his initial adamant denial of personal usage, followed by his later admission about its use for his tattoo. Yet another matter concerned the nature of charges made such as the short-term and longer term personal accommodation. Another was the pattern of purchases whilst on holiday despite holding a personal credit card. Another was the unreliability of his evidence. Another was the fact that in some parts it was inherently lacking in credibility.

149. Counsel assisting submitted that Derrick Belan may have committed offences against ss 117, 156 and/or 192E of the Crimes Act 1900 (NSW) and ss 267 and 268 of the Industrial Relations Act 1996

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195 Submissions of Derrick Belan, 30/11/15, para 58.
196 Submissions of Derrick Belan, 30/11/15, para 59.
197 Derrick Belan, 10/11/15, T:452.5-39.
198 Submissions of Counsel Assisting, 18/11/15, paras 88-93.
199 Derrick Belan, 10/11/15, T:481.21-22, 485.26, 492.40-43. It is also noted that Danielle O’Brien was only asked, by counsel for Derrick Belan, about Derrick Belan ringing her in relation to Lake Conjola expenses in ‘one year’ whereas the evidence shows that the union credit card was used for such expenses in multiple years: NUW MFI-6, 4/11/15, pp 4, 10, 26, 38, 52, 58; NUW MFI-27, 10/11/15, pp 80-197; See Danielle O’Brien, 10/11/15, T:392.25.
Counsel assisting also referred to s 118 of the *Crimes Act* 1900 (NSW).\(^{200}\)

150. Counsel assisting noted that Derrick Belan’s summary of Danielle O’Brien’s evidence was incorrect. Derrick Belan submitted\(^ {201}\) that the evidence showed that he ‘would give her money to pay bills and the credit card’ (emphasis added). Counsel assisting submitted that this incorrectly implied that the reference to ‘the credit card’ was a reference to Derrick Belan’s union credit card(s). Counsel assisting contended that the proper reading of her evidence is that Danielle O’Brien was referring to payment for Derrick Belan’s personal credit card bills. Counsel assisting referred to the exchange between counsel assisting and Danielle O’Brien:\(^ {202}\)

\[\text{Q. Have you ever received money via PayPal to your knowledge from Derrick Belan?} \]

\[\text{A. Yes.} \]

\[\text{Q. Can you tell the Commission about that?} \]

\[\text{A. So, the PayPal account obviously transfers money into your PayPal account so that you can withdraw it.} \]

\[\ldots\]

\[\text{A. So he transferred it into my PayPal account for me to withdraw, to pay for his - to pay for bills.} \]

\[\ldots\]

\[\text{Q. Randomly you had money come into your PayPal account; is that right?} \]

\(^{200}\) Submissions of Counsel Assisting, 18/11/15, paragraph 4, footnote 1. It is summarised at para 4.

\(^{201}\) See para 143.

Q. Well, what was "blah, blah, blah"?
A. Like, bills or - like his - I pay his personal bills and stuff. Like, I do all that stuff for him, so --

Q. You pay Mr Belan's personal bills?
A. Yes.

Q. Using what money?
A. Using his money, what he gives me, or from wages or whatever.

Q. What sort of bills?
A. Like credit card and phone bills and stuff like that.

151. In relation to Derrick Belan’s submission that he believed that he was authorised to approve a loan up to $1000, counsel assisting argued that neither rule 14.2 of the State Rules nor rule 35 of the National Rules gave the Secretary the express power to make loans of amounts less than $1,000. Counsel assisting submitted that if it is the case that the Secretary was somehow authorised under the rules to approve unlimited numbers of loans to himself of amounts under $1000, such a situation would be novel. It would also highlight governance problems and a need to amend the rules.

152. As to Derrick Belan’s contention in relation to PayPal that ‘it is not possible to reach a concluded view of what [Danielle O’Brien’s] evidence was’ in relation to those transfers, counsel assisting submitted
that this submission is based upon incomplete portions of her evidence.\footnote{Submissions of Counsel Assisting, 4/12/15, para 54.} Counsel assisting contended that Danielle O’Brien was asked about a number of payments of that nature and was quite clear that the majority of those payments were provided to her by Derrick Belan for her to pay his bills or other personal payments on his behalf. After taking her through a series of payments, counsel assisting confirmed with Danielle O’Brien that all of the payments going via PayPal to her were for payments to be made on Derrick Belan’s behalf.\footnote{Danielle O’Brien, 4/11/15, T:71.35-37.} Some of the relevant evidence is extracted above.\footnote{Paragraph 150.} In addition she gave this evidence:\footnote{Danielle O’Brien, 4/11/15, T:69.12-16; T:69.25-31; T:69.44-70.12; T:70.47-72.10.}

Q. You recall getting something from PayPal?
A. Yes.

Q. On how many occasions?
A. I don’t know. I’m sorry, I don’t.

…

Q. Do you see there it is a message, apparently "Derrick Belan via PayPal"?
A. Correct.

Q. There is a message:
Derrick Belan sent you $4,000.00 AUD.

…

Q. Did this happen on more than one occasion?
A. Yes.
Q. Was this in relation to him providing funds for you to pay his bills?
A. Yes.
Q. Anything else?
A. Just - I would just take the money out, pay his bills or whatever.
Q. What does "or whatever" mean?
A. Whatever he asked me to do.
Q. Like what?
A. Mostly pay his bills.

... 

Q. ... can I invite you please to go to page 243.
A. Yes.
Q. Just below halfway down the page there's a payment to your name for $2,500 on 18 September this year?
A. Yes.
Q. Do you recall getting that payment?
A. Yes, I do.
Q. What was that for?
A. I think it was to pay a bill for him.
Q. Can I ask you please to turn to page 244.
A. Yes.
Q. Do you see about three quarters of the way down that page, on 25 August 2015, $3,000 is sent to you via PayPal?
A. Yes.
Q. What was that for?
A. To pay something for him.

Q. Can I ask you please to turn to page 246. We're going in reverse chronological order, by the way. Page 246, about a third of the way down the page, 10 July 2015, a payment of $2,000 to you via PayPal. What was that for?

A. That was for him.

Q. Then page 247, there are a number of payments on this page. The second one, 26 June, for $340, what was that for?

A. I assume they're all for him.

Q. Is that the situation, that all payments going via PayPal to you were for payments to be made on his behalf?

A. Yes.

Q. There's another one on that page, about the fifth entry down, 19 June, for $2,000?

A. The same thing.

Q. And then almost halfway down the page, 4 June 2015, for $2,000?

A. The same.

Q. The last entry on that page for $4,000?

A. Yes.

Q. And that was on 12 May?

A. $4,000?

Q. $4,000.

A. Yes, I remember that.

Q. That's for him too?

A. Yes.

...
153. Counsel assisting’s submission that Derrick Belan’s evidence is unreliable is accepted. This is to describe it mildly. One example suffices: his initial vehement denial of his personal use of union credit cards, then later his admission to multiple uses of the union credit card for personal purposes. This cannot be explained by his bad health.

154. Counsel assisting’s submission that there is an inherent lack of credibility in some of Derrick Belan’s evidence is also accepted. Again, one example is sufficient: the payment for his tattoo.

155. Derrick Belan made an admission that he used the union credit card in his name for personal purchases. He later claimed to have arranged repayment of the value of the purchases made in this way. Otherwise he disclaimed knowledge of the purchases. Given his admission, even if an arrangement to repay had been established, it would not necessarily entitle him to an acquittal.209 Whilst there is some evidence that some regular deductions were authorised from his salary for purposes over and above child support, it is not clear what these deductions were for.

156. Counsel assisting’s submissions that Derrick Belan may have committed offences against ss 117, 156 and/or 192E of the Crimes Act 1900 (NSW) and ss 267 and 268 of the Industrial Relations Act 1996 (NSW) are accepted. In the time available it has not been possible to determine the extent of his activities or the involvement of others. Counsel assisting recommended that the matter should be referred for further investigation. Pursuant to s 6P of the Royal Commissions Act

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209 See s 118 of the Crimes Act 1900 (NSW), quoted at para 4 footnote 1.
1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales and the Executive Director of New South Wales Industrial Relations so that consideration can be given to the commencement of a prosecution of Derrick Belan in relation to possible offences under ss 117, 156 and/or 192E of the *Crimes Act* 1900 NSW) and ss 267 and 268 of the *Industrial Relations Act* 1996 (NSW) in relation to credit card use. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against Derrick Belan for pecuniary penalty orders in relation to possible contraventions of ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

**F – ULTIMATE TRAINING CENTRE**

157. Inquiries were made into the relationship between the NUW NSW and the Ultimate Training Centre (UTC). The UTC is a gym at St Marys in Western Sydney. It is operated by a company called Elite Fight Club Pty Ltd.210

158. In July 2013 the NUW NSW entered into a ‘sponsorship’ agreement with UTC. The minutes of the BCOM meetings held in or around the

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210 Unless otherwise indicated, the summary which follows is based on the Submissions of Counsel Assisting, 18/11/15, paras 109-112.
relevant period\textsuperscript{211} do not appear to record any approval of the sponsorship agreement.\textsuperscript{212}

159. Between July 2013 and May 2015, the NUW NSW paid $197,007.40 to the UTC. A little over $48,000 of that was designated as ‘Sponsorship’. The sum of $92,000 was for the UTC’s rent. The sum of $17,000 was for tickets or tables at fight nights. The remainder was recorded as advertising, printing, apparel, memorabilia, staff training and other ‘general expenses’. The NUW NSW was also invoiced for, and paid, the cost of information technology services supplied to UTC.\textsuperscript{213} In that period a further $3,000 was paid to Lincoln Hudson personally as ‘consultant’s fees’.\textsuperscript{214} Lincoln Hudson was one of the identities behind the UTC.

160. The sponsorship agreement obliged the UTC to display NUW logos, posters and promotional material in the gym, to place NUW logos on the helmets of UTC fighters and to offer all members of the NUW NSW discounted membership rates to join the UTC. The UTC offers a 30% discount off each membership category to members of the Branch. Currently, there are 68 members receiving the discount.\textsuperscript{215} Aside from this, it appears that there is no financial benefit to the union.\textsuperscript{216}

\textsuperscript{211} NUW MFI-24, 6/11/15, pp 674-698.
\textsuperscript{212} Submissions of Counsel Assisting, 18/11/15, para 110.
\textsuperscript{214} NUW MFI-39, 17/11/15.
\textsuperscript{215} NUW MFI-14, 5/11/15, p 230.
\textsuperscript{216} Mark Ptolemy, 6/11/15, T:267.2-5.
161. Counsel assisting noted that Mark Ptolemy, Communications and Training officer for the NUW NSW, was involved in the initial negotiations of the terms of the agreement between the NUW NSW and UTC. He did not think that the agreement between the NUW NSW and UTC was a good commercial arrangement. He gave evidence that he raised his concerns with Derrick Belan, but he was not responsive.

162. But counsel assisting did not submit that either party to the sponsorship agreement had behaved illegally.

163. In his submissions, Derrick Belan pointed to evidence of Mark Ptolemy. He acknowledged that the UTC was a good idea in terms of promoting the union which would have beneficial financial spinoffs in the longer term; that he had been asked by Derrick Belan to investigate the credentials of the person running the venture; and that it was not likely that Derrick Belan had drafted the agreement. Derrick Belan submitted that he acted in good faith in investigating and advancing, with other officials, a financial arrangement for the UTC for the direct benefit of the health of members, and for the flow on financial benefit to the NUW NSW and its members by branding and exposure. Let it be assumed that those submissions are correct. The problem is that

\[\text{\textsuperscript{217} Submissions of Counsel Assisting, 18/11/15, para 113.}\]
\[\text{\textsuperscript{218} Mark Ptolemy, 6/11/15, T:265.27-30.}\]
\[\text{\textsuperscript{219} Mark Ptolemy, 6/11/15, T:267.40-268.9.}\]
\[\text{\textsuperscript{220} Mark Ptolemy, 6/11/15, T:268.11-24.}\]
\[\text{\textsuperscript{221} Submissions of Derrick Belan, 30/11/15, paras 82-84.}\]
Derrick Belan contended that there is no warrant for criticism of the governance of the NUW NSW in the arrangements for the UTC.  

164. Counsel assisting correctly submitted that that last submission about governance is of concern. It is illustrative of the type of arrogance which has contributed to the problems faced by the NUW NSW. There is no record of the arrangement with UTC being approved by the BCOM. That arrangement should have been submitted for approval by the BCOM. The absence of a record of approval in the minutes indicates that it was not approved. If it were approved, it indicates that the minutes were not properly kept. Either way, it reflects poorly on the governance of the NUW NSW.

G – CAMPAIGN FUND

The Terms of Reference

165. At least from 1994, money was collected from a number of individual officials of NUW NSW to go into a ‘Campaign Fund’. The factual summary which follows is largely based on the submissions of counsel assisting.

166. Derrick Belan and Wayne Meaney raised no issue about the factual summary. They did contend that the Commission should not be examining funds containing money that the State Secretary and other

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222 Submissions of Derrick Belan, 30/11/15, paras 83.
224 Submissions of Counsel Assisting, 18/11/15, paras 115-153.
contributors voluntarily saved for their own purposes. The NUW NSW put a more qualified submission – that it is obviously a matter for concern that, even for a brief period, the campaign fund may have contained union funds, not merely legitimate contributions from the wages of officials, but that this appears to have been remedied.

167. In response, counsel assisting contended:

(a) Fighting funds and the funding of union elections are central to the Commission’s Terms of Reference. Part 4 of the 2014 Interim Report was devoted to an analysis of a range of union fighting funds.

(b) The Terms of Reference require and authorise the Commission to inquire into and report on various matters concerning ‘relevant entities’, which are defined to be ‘separate entities established by employee associations or their officers’.

(c) A bank account in the nature of ‘The Derrick Belan Team’ is a ‘separate entity’ as that term is defined in the terms of reference, in that it includes a ‘fund’ or an ‘account’ or ‘other financial arrangement’. The Derrick Belan Team account

225 Submissions of Derrick Belan, 30/11/15, paras 85-88; Submissions of the NUW, 28/11/15, para 44.
226 Submissions of the NUW, 28/11/15, para 45.
227 Submissions of Counsel Assisting, 4/12/15, paras 57-61.
was established by officers of the NUW NSW. This is within paragraphs (a), (c), (d), (f), (i) and (j) of the Terms of Reference.

(d) In addition, subparagraph (g)(i) of the Terms of Reference requires and authorises the Commission to inquire into and report on conduct by any officer of an employee association which may amount to a breach of any law, regulation or professional standard, in order to procure an advantage for the officer or another person or organisation.

(e) Finally, paragraph (k) of the terms of reference applies to matters which are ‘reasonably incidental’ to the matters caught by the Terms of Reference just referred to.

168. These submissions of counsel assisting are accepted.

The Derrick Belan Team Account

169. The uncontested facts are that the sum of $50 per fortnight per official was deducted from each official’s wages.\(^{230}\) In the relevant period, these ‘deductions’ were recorded in NUW NSW financial records (in MYOB) in a dedicated ledger account.

170. From September 2007 until October 2013 there was a bank account operated with the Commonwealth Bank of Australia in the name of

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\(^{230}\) See the written authorisations which were made available to the Commission at NUW MFI-11, 5/11/15, pp 78-92. Whether these authorisations are comprehensive, and represent the authorisations of all contributors to the fund, is not known.
‘The Derrick Belan Team’ (Derrick Belan Team Account).\(^{231}\) The persons authorised to operate that account were Wayne Meaney, Ronald Herbert and Marilyn Issanchon.\(^{232}\)

171. From time to time monies were transferred from the NUW NSW general account to the Derrick Belan Team Account. They were accounted for as debits against the ‘Campaign Fund’ ledger account.

172. Following the closure of the Derrick Belan Team Account in October 2013, ‘Campaign Fund’ monies continued to be collected into and withdrawn from the NUW NSW general account. Those withdrawals were all by cheques paid to cash.

173. On occasion the monies withdrawn from the NUW NSW general account for the ‘Campaign Fund’ exceeded the liability recorded in the ‘Campaign Fund’ ledger in MYOB.\(^{233}\) The effect of those transactions was to transfer branch funds to the ‘Campaign Fund’. Counsel assisting tendered a graph showing the balance of the ‘Campaign Fund’ MYOB account at any point in the period comprising financial years 2010-2015.\(^{234}\)

174. At each NUW NSW election in the years 2002, 2006, 2010 and 2014, there has been no contest for any elected position in the branch.\(^{235}\)

\(^{231}\) NUW MFI-11, 5/11/15, pp 2, 76.
\(^{233}\) NUW MFI-21, 6/11/15, pp 1-34.
\(^{234}\) NUW MFI-25, 10/11/15.
Payments to Holweg

175. Two payments were made out of the Derrick Belan Team Account to an account in the name of ‘John Peter Holweg and Michelle Holweg’. The first payment was on 5 February 2010 in the amount of $15,000. The second was made on 1 March 2010 in the amount of $10,000.

176. In 2010, there was a dispute between the National Office of the NUW and some state branches. In Queensland this led to an attempt to establish a breakaway union. Michelle Holweg became the Secretary of the breakaway union for a short period.

177. Michelle Holweg gave evidence that this money was transferred to her account so that she could pay the wages of officials in the breakaway union established in Queensland, and pay for office space.

178. Michelle Holweg told the Commission that her only contacts in relation to the money were Derrick Belan and ‘our legals’. She could not recall, however, any specific discussions with Derrick Belan concerning the monies, just that the breakaway union had been offered some support.

179. Counsel assisting asked Michelle Holweg if the monies provided to her by Derrick Belan were a loan or a gift. She said that she did not know

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236 Michelle Holweg, 5/11/15, T:118.28-32, 120.6-12, 121.37-41.
237 Michelle Holweg, 5/11/15, T:120.10.
239 Michelle Holweg, 5/11/15, T:120.39-42.
what Derrick Belan’s intentions were, but that her intention ‘if the [breakaway] Union was to continue, would have been to repay the money’. The money was not repaid to the ‘Campaign Fund’.

180. Michelle Holweg’s oral evidence at the public hearing was the first explanation provided as to how the money transferred to her account was spent. It has not been possible to ascertain whether that money was in fact used to pay wages and office expenses for the breakaway union.

181. Counsel assisting contended Derrick Belan was clearly prepared to allow monies from the ‘Campaign Fund’ to be used for purposes unconnected with any campaign for office within NUW NSW.

**Purchase of a car using campaign funds**

182. Money from the Derrick Belan Team Account was used as a part payment toward the purchase of a car for Derrick Belan. A summary of the evidence is set out below:

(a) Account statements for the Derrick Belan Team Account show a withdrawal of $14,900 on 18 March 2013.241

(b) The Commonwealth Bank’s records for this withdrawal indicate that a bank cheque made out to Sinclair Ford in the

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240 Michelle Holweg, 5/11/15, T:121.46-122.4.

241 NUW MFI-11, 5/11/15, p 60.
amount of $14,900 (plus a $10 fee) was purchased by Marilyn Issanchon.\footnote{NUW MFI-21, 6/11/15, pp 53, 87-88.}

\begin{enumerate}
\item[(c)] Records produced by Sinclair Ford show that this bank cheque was used to pay the balance of the purchase price of a V8 Ford sedan\footnote{NUW MFI-21, 6/11/15, pp 90-1.}, following the trade-in of two cars (one in the name of Ian Dalziel\footnote{NUW MFI-21, 6/11/15, pp 100-101, 105.  Ian Dalziel, an employee of Action Workforce at the relevant times, gave evidence that he did not know that there was a car of that make registered in his name: Ian Dalziel, 6/11/15, T:289.20-46, 290.20-291.21.} and one in the name of Danielle O’Brien\footnote{NUW MFI-21, 6/11/15, p 102-103, 106.  Danielle O’Brien gave evidence that the car had been transferred to Paula Lancaster in or around 2012: Danielle O’Brien, 10/11/15, T:405.3-45.}.

\item[(d)] The V8 Ford was purchased in the name of ‘Mr Darack Belan’.\footnote{NUW MFI-21, 6/11/15, pp 91-99.}
\end{enumerate}

183. Derrick Belan admitted that he had used $14,900 from the Derrick Belan Team Account to buy a car.\footnote{Derrick Belan, 10/11/15, T:521.14-16.} He said that this money was lent to him by the ‘trustees on the account’.\footnote{Derrick Belan, 10/11/15, T:521.22.} He said that they gave him a bank cheque because the dealer would not take cash.\footnote{Derrick Belan, 10/11/15, T:521.22-23.} He said that he
paid the money back the following week.\textsuperscript{250} It has not been possible to identify any repayment of this money by Derrick Belan.

184. Marilyn Issanchon had no recollection of:

(a) a bank cheque made out to Sinclair Ford;\textsuperscript{251}

(b) any withdrawal from the Derrick Belan Team Account concerning Sinclair Ford;\textsuperscript{252}

(c) any desire on Derrick Belan’s part for assistance in purchasing a car;\textsuperscript{253} or

(d) any discussion with Derrick Belan about these matters around March 2013.\textsuperscript{254}

**Cash withdrawals from the Derrick Belan Team Account**

185. Counsel assisting took Wayne Meaney to some instances when cash had been withdrawn from the Derrick Belan Team Account. When asked if he knew what the cash withdrawals on 23 March 2011 and on

\textsuperscript{250} Derrick Belan, 10/11/15, T:521.34, 521.47-522.1.
\textsuperscript{251} Marilyn Issanchon, 6/11/15, T:340.24-27.
\textsuperscript{252} Marilyn Issanchon, 6/11/15, T:341.37-41.
\textsuperscript{253} Marilyn Issanchon, 6/11/15, T:341.43-46.
\textsuperscript{254} Marilyn Issanchon, 6/11/15, T:342.1-6.
29 April 2011 in the amounts of $3,000 and $3,200 respectively related to, he said:

No, I wouldn't recall. I would have been involved in getting that money out and it would have been because Derrick asked me to get it out, yes.

When asked if he knew anything about the cash withdrawal of $4,500 on 14 February 2012 and the cash withdrawal of $3,900 on 30 August 2012, he said:

No, not offhand. It would be the same as what I told you before. Derrick probably asked me to get the money… [Derrick] would have asked me to get the money out and I would have got it out and given it to him.

186. Marilyn Issanchon was also taken by counsel assisting to various cash withdrawals and payments out of the Derrick Belan Team Account but she was unable to assist. She acknowledged that despite being a signatory to the account she did not know much about the withdrawals from it.

Withdrawal of balance of Derrick Belan Team Account — and subsequent deductions

187. On 23 October 2013, the Derrick Belan Team Account was closed. The sum of $25,304.57 was withdrawn in cash at the Granville branch of the Commonwealth Bank.261

188. Thereafter, ‘Campaign Fund’ donations continued to be deducted from union officials’ wages and recorded in the ‘Campaign Fund’ ledger in the NUW NSW MYOB records. Money continued to be withdrawn from the NUW NSW General account and recorded as debits against the ‘Campaign Fund’ ledger account.262 However, rather than being paid into a bank account, these withdrawals were by cheque paid to cash.263 These withdrawals come to a total of $26,590.

189. What became of this money? What became of the $25,304.57 withdrawn from the Derrick Belan Team Account?

Evidence of Marilyn Issanchon

190. Marilyn Issanchon gave evidence that Derrick Belan decided to close the Derrick Belan Team Account and move the money to the safe at the NUW NSW offices.264

262 NUW MFI-21, 6/11/15, pp 22, 26, 27, 29, 34.
191. Marilyn Issanchon said that she, Wayne Meaney and Ronald Herbert all attended the bank because they were all signatories on the account.\textsuperscript{265} They withdrew the money and brought it back to the union office.\textsuperscript{266} She witnessed the money being put in the safe. She was told that ‘it would stay in a safe place’.\textsuperscript{267}

\textit{Evidence of Wayne Meaney}

192. When asked why the account was closed Wayne Meaney said that ‘Derrick just said, “We will close the account, get the cash out and just leave it in the safe”’.\textsuperscript{268} Wayne Meaney said that he did not really ‘go into details’ with Derrick Belan about why they were taking this course of action.\textsuperscript{269}

193. This evidence stands in contrast to Derrick Belan’s evidence. He implied that the decision to close the account and move the monies was not made by him alone.\textsuperscript{270}

194. Wayne Meaney recalled that in or around February or March 2015,\textsuperscript{271} he asked Derrick Belan about the money that they had withdrawn from the Derrick Belan Team Account:\textsuperscript{272}

\begin{footnotesize}
\begin{enumerate}
\item Marilyn Issanchon, 6/11/15, T:338.45-47.
\item Marilyn Issanchon, 6/11/15, T:338.19-20.
\item Marilyn Issanchon, 6/11/15, T:336.32-34.
\item Wayne Meaney, 6/11/15, T:378.30-31.
\item Wayne Meaney, 6/11/15, T:378.32-33.
\item See para 200.
\item Wayne Meaney, 6/11/15, T:379.7-12.
\item Wayne Meaney, 6/11/15, T:378.39-45.
\end{enumerate}
\end{footnotesize}
A little bit later on I recall asking Derrick, ‘Is the money still in the safe?’ And he said no, he had he [sic] taken it into his safe at home and it is in a secure - it is in a secure - he guaranteed me it was in a secure spot in the safe at home and any time I wanted to view the money I could, but I never ever needed to go and view it.

195. He did not ask Derrick Belan why the money had been moved to his personal safe. He testified that Derrick Belan said to him that it was ‘probably not appropriate to keep it in the Union safe, so he put it in his safe at home’.273

196. Wayne Meaney confirmed that the ‘Campaign Fund’ continued after the closure of the Derrick Belan Team Account. It continued even after the money had been moved to Derrick Belan’s home safe.274 He explained what he understood had happened to the money collected.275

The money was still taken out of the people who contribute pay and it was put into … the general ledger and then when it builds up to a certain amount, amounts were withdrawn and then I was giving it to Derrick for Derrick to keep in his safe.

197. He gave evidence that Danielle O’Brien would let him know when money had accumulated in the ‘Campaign Fund’. She would then raise and cash a cheque. She would give him the money in an envelope. He would pass the money on to Derrick Belan.276

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274 Wayne Meaney, 6/11/15, T:408.8-409.5.
198. When asked why it was being passed to Derrick Belan, Wayne Meaney said that it was because Derrick Belan said to him ‘[w]hen the money comes in just give it to me’.277

199. This evidence278 stands in contrast with Derrick Belan’s evidence as to when the cash was moved to his home safe.279

Evidence of Derrick Belan

200. Counsel assisting noted that in giving evidence about the closure of the Derrick Belan Team Account and withdrawal of the balance of that account to the safe located in the NUW NSW office, Derrick Belan used vague plural personal pronouns:280

(a) ‘It was a decision that we made to close the fund and not have a bank account’; and

(b) ‘We thought it best to keep our money that way’ (emphasis added).

201. It was not clear, however, who ‘we’ was. It was not clear who was involved in the decision to deal with the money collected from various officials of the NUW NSW in that way. It was money which Derrick

278 At paras 192-198.
279 See para 202.
280 Derrick Belan, 10/11/15, T:518.4-8.
Belan described, on more than one occasion, as money belonging to both him and the officials.\textsuperscript{281}

202. When asked where the money was now, Derrick Belan said that he withdrew the money from the safe at the NUW NSW office, in or around the week that the NUW NSW began receiving notices to produce from the Commission.\textsuperscript{282} That was on 3 September 2015.

203. Derrick Belan said that it was his decision to remove the money from the safe at the union office. He said that there was no disagreement from the people who were signatories to that account.\textsuperscript{283} He said that he did so because he ‘did not think it was the appropriate place to leave it’.\textsuperscript{284}

204. Derrick Belan admitted that he had taken from the safe ‘a bulk amount once they [sic] had built up in the safe’. This included the amount originally withdrawn from the Derrick Belan Team Account and various amounts put in to the safe since.\textsuperscript{285} He said that he thought the amount he held was $25,000.\textsuperscript{286} He did not know where the rest of the

\textsuperscript{281} Derrick Belan, 10/11/15, T:520.20-22, 521.7-8.

\textsuperscript{282} Derrick Belan, 10/11/15, T:520.29-35. This does not fit with the evidence given by Wayne Meaney, who testified that in or around February or March 2015 Derrick Belan told him that the money had been taken to his safe at home: Wayne Meaney, 6/11/15, T:379.7-12. See paras 194-198.

\textsuperscript{283} Derrick Belan, 10/11/15, T:518.32-34.

\textsuperscript{284} Derrick Belan, 10/11/15, T:518.44-47.

\textsuperscript{285} Derrick Belan, 10/11/15, T:523.32-41.

\textsuperscript{286} Derrick Belan, 10/11/15, T: 523.43-47.
money was. He did not know when it had been spent. He did know what it had been spent on.  

205. Derrick Belan gave evidence that he had the $25,000 with him on the day that he appeared before the Commission. He said that it was in his car.

206. Counsel assisting submitted that the fund contained money that was in some sense held on behalf of the contributors. However, whether this was pursuant to some contractual, agency or trust arrangement is unclear. Apparently there was no supporting documentation, no annual reporting and no record keeping at all. The keeping of the cash in Derrick Belan’s personal safe to which the other contributors have no access other than via the goodwill of Derrick Belan shows at least an extraordinary and complete failure of accountability, and perhaps much worse. The withdrawal of funds from the union general account, which on some occasions meant that the union funds were drawn on, also raises the possibility of other breaches by Derrick Belan and the signatories to the bank account.

207. The observations of counsel assisting on this issue are correct. The conduct established against Derrick Belan and the signatories to the Derrick Belan Trust Account is conduct which falls below the professional standards of a trade union official.

287 Derrick Belan, 10/11/15, T:524.2-8.
H – PAYMENTS BY THE NUW NSW TO PAUL GIBSON

Background

208. This section of the Chapter concerns more than $250,000 in payments made by the NUW NSW to a former New South Wales Labor Member of Parliament, Paul Gibson.

209. The factual summary which follows is largely based on the submissions of counsel assisting. Where it is in contention, that is noted.

210. Paul Gibson is a former New South Wales Labor Member of Parliament. He served as a member of the New South Wales parliament for 23 years between 1988 and 2011.

211. Paul Gibson was a close friend of the late Frank Belan, formerly the Secretary of the NUW NSW and its precursor for some 21 years.

212. Frank Belan was succeeded as Secretary of the NUW NSW in 2001 by his son Derrick Belan. Paul Gibson was also close to Derrick Belan.

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289 Submissions of Counsel Assisting, 18/11/15, paras 154-200.
293 Derrick Belan, 10/11/15, T:448.17-23.
213. The NUW NSW provided support to Paul Gibson at every election he contested.\textsuperscript{296}

**Payments to Paul Gibson**

214. In 2012, after he ceased serving as a Member of Parliament, Paul Gibson began receiving money from the NUW NSW. He had been a member of the NUW for many years.\textsuperscript{297}

215. Between 17 August 2012 and 21 July 2014, Paul Gibson received regular amounts of money from the NUW NSW as set out in the following table:

<table>
<thead>
<tr>
<th>Date</th>
<th>MYOB Description</th>
<th>Account Name</th>
<th>Amount Inc GST</th>
</tr>
</thead>
<tbody>
<tr>
<td>17-Aug-12</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$16,534.88</td>
</tr>
<tr>
<td>16-Oct-12</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,580.00</td>
</tr>
<tr>
<td>25-Oct-12</td>
<td>LUCRF</td>
<td>Salaries LUCRF</td>
<td>$44,491.20</td>
</tr>
<tr>
<td>26-Nov-12</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>29-Nov-12</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>08-Jan-13</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>13-Feb-13</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>01-Mar-13</td>
<td>Commercial bills</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>05-Apr-13</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>09-May-13</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>11-Jun-13</td>
<td>Commercial bills</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>10-Jul-13</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
</tbody>
</table>

\textsuperscript{295} Paul Gibson, 5/11/15, T:213.43-47.
\textsuperscript{297} Paul Gibson, 5/11/15, T:219.7-12.
\textsuperscript{298} NUW MFI-16, 5/11/15, pp 78, 80, 83, 84, 86-89, 91-95, 97-100.
<table>
<thead>
<tr>
<th>Date</th>
<th>MYOB Description</th>
<th>Account Name</th>
<th>Amount Inc GST</th>
</tr>
</thead>
<tbody>
<tr>
<td>06-Aug-13</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>06-Sep-13</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
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</tr>
<tr>
<td>10-Oct-13</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>12-Nov-13</td>
<td>Commercial bills</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>09-Dec-13</td>
<td>Paul Gibson Consultancy</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
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<tr>
<td>14-Jan-14</td>
<td>Paul Gibson Consultancy</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
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<td>05-Feb-14</td>
<td>Commercial bills</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>11-Mar-14</td>
<td>Commercial bills</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>01-Apr-14</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>06-May-14</td>
<td>Paul Gibson Consultancy</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>06-Jun-14</td>
<td>Paul Gibson Campaign Fund</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td>21-Jul-14</td>
<td>Paul Gibson Consultancy</td>
<td>Consultants Fees</td>
<td>$8,800.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td><strong>$254,406.08</strong></td>
</tr>
</tbody>
</table>

216. The only documentation the NUW NSW and Paul Gibson produced in relation to this arrangement was the various invoices which had been provided to the NUW in support of Paul Gibson’s payment for ‘Consultant Services’. Many of these invoices were emailed by Paul Gibson himself to Danielle O’Brien and Derrick Belan.299

217. Counsel assisting have noted several problems with the invoices produced:

(a) the invoices described the services performed as ‘Consultant Services’ or ‘Consultation Services’ but gave no other details about what the services were or when they were supplied;

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(b) no invoices were produced in support of the two largest payments:

(i) $16,534.88; and

(ii) $44,491.20.

218. An invoice has been produced by Paul Gibson dated 3 April 2012 for the amount of $34,650.00. This invoice was emailed to Derrick Belan on the same day. The description on the invoice is:\footnote{NUW MFI-33, 17/11/15, p 2.}

\textit{AS DISCUSSED WITH THE GENERAL SECRETARY OF THE ALP SAM DASTYARI AS PART OF CAPITATION FEES.}

\textit{Paul Gibson’s evidence}

219. Paul Gibson gave evidence that he was offered a job as a consultant. He said the nature of the consultancy was ‘to talk to two bodies and try to get them to live in harmony with one another’.\footnote{Paul Gibson, 5/11/15, T:215.39-216.2.} The two bodies he identified were the NSW ALP and the NUW NSW.\footnote{Paul Gibson, 5/11/15, T:216.4-6.} He gave evidence that he wanted to get the NUW NSW, through Derrick Belan, and the NSW ALP, through its then General Secretary Sam Dastyari, to speak to each other,\footnote{Paul Gibson, 5/11/15, T:217.16-19.} ‘bring peace between the union … and the
Labor Party’. 304 He said the idea to enter into the consultancy ‘was probably Derrick’s and … probably … backed up by Sam Dastyari’. 305

220. He said that the consultancy agreement was negotiated between him and Derrick Belan. 306 He acknowledged that the agreement was not reduced to writing. 307 His evidence was that he negotiated a fee of $8,000 per month for his services with Derrick Belan. 308

221. Paul Gibson could not give any indication of how long it took for him to bring the NUW NSW and the NSW ALP together. He said ‘it wasn’t a job that was paid for by the hours that you work’. 309 He gave evidence that he ‘did the very best [he] could to make sure that these two people started working together … by talking to them mainly’. 310 He said he was on call 24 hours a day and ‘did whatever was asked of him’. 311 He gave evidence that it was not an hourly job and he might see people every day for a couple of days and then not for three or four weeks. 312 He denied that he would ring Derrick Belan on an almost daily basis to discuss the consultancy. 313

305 Paul Gibson, 5/11/15, T:217.32-37. Without any intended disrespect, Sam Dastyari will be referred to by that name despite his subsequent appointment to the Senate.
222. Paul Gibson was questioned by counsel assisting regarding certain large payments that he received in addition to the consultancy fees that he said he was paid.

223. He could not recall what the sum of $16,534.88 he received on 17 August 2012 was for. He speculated it may have been ‘extra consultancy fees’ from prior to his start. He said he would have to ‘look it up’ and ‘investigate’ to determine what it was for. But he could not explain where he would look and what investigations he would make.

224. Similarly he was asked why the payment of $44,491.20 was made to him. He said that it ‘may have been to do with extra consultancy.’ He again commented that he did not know what it was for and would ‘have to go back and have a look’. As with the earlier payment for $16,534.88 he was unable to clearly articulate where he would look and what he would look at to assist him to determine why he was paid the money. He said he did not take notes of the conversations he had. He said he did not provide any record of the work he did to the NUW NSW. But he said he did report back to Derrick Belan.

315 Paul Gibson, 5/11/15, T:220.22-44.
320 Paul Gibson, 5/11/15, T:221.27-29.
225. Similarly he gave evidence that, save for Derrick Belan, he did not speak to anyone on the NUW NSW’s BCOM nor provide a report to the NUW NSW’s BCOM about this arrangement at any time during the period he received payments.322

226. Counsel assisting submitted that the unstructured nature of Paul Gibson’s arrangement with the NUW NSW was exemplified by the email his accountant sent to the NUW NSW on 6 August 2013. He asked:323

Since when have payments been made to Paul or his company? Does Paul or his company give you invoices? Please provide a summary of payments made to Paul and or his company since he began providing consultancy services.

227. Paul Gibson was unable to explain why his accountant was requesting this information from the NUW NSW rather than from himself.324

228. The amounts paid to Paul Gibson were largely assigned to a MYOB account known as the ‘Paul Gibson Campaign Fund’.325 Paul Gibson could offer no explanation for why this description was used.326

229. Paul Gibson gave evidence that by mid to late 2013 harmony between the NUW NSW and the NSW ALP had been reached but that he still continued to receive his consultancy fee despite not having to do

326 Paul Gibson, 5/11/15, T:223.35-42.
anything for that money. He said that he was being paid a ‘retainer’ and it was not his decision to end the consultancy agreement. Paul Gibson could not recall when he was told that the agreement had come to an end but he thought that Derrick Belan had informed him that his services were no longer needed. He agreed that the arrangement to pay him had continued for some eight or more months after harmony between the NUW NSW and NSW ALP had been reached.

_Derrick Belan’s evidence_

230. Derrick Belan said that he had known Paul Gibson for 20 years.

231. He gave evidence that the NUW NSW was having difficulty with the NSW ALP and Paul Gibson was a bridge between the NUW NSW and the NSW ALP. He said that during the period of the dispute, the NUW NSW ceased to pay its ALP affiliation fees without ‘their’ agreement and instead it was agreed, or perhaps he had decided, to pay the equivalent of those fees to Paul Gibson. He clarified that he was talking about the NSW ALP’s agreement.

331 Paul Gibson, 5/11/15, T:228.8-12.
332 Derrick Belan, 10/11/15, T:495.17-19.
333 Derrick Belan, 10/11/15, T:495.28-40.
232. Derrick Belan did not seek the union’s agreement to engage Paul Gibson. He said he did not do so on the basis that he was allowed to employ whoever he wanted.\footnote{335} However, in later evidence he stated that he ‘believed [he] did put it past the BCOM’\footnote{336}. It was put to him that the BCOM minutes did not reveal such a disclosure. He could not account for why that disclosure was not in the minutes.\footnote{337}

233. He went on to add that there was no detriment to the union because ‘the same amount of money was paid’ and ‘the union was still recognised as being affiliated’\footnote{338}.

234. Derrick Belan gave evidence that for a period of 18 months Paul Gibson was bridging the gap between the NUW NSW and the NSW ALP by meeting with both parties and talking about the issues between the parties such as gay marriage and weekend penalty rates.\footnote{339} He said that he had never seen a report from Paul Gibson about the work that he had done but believed that he was meant to do a formal report to Mark Ptolemy.\footnote{340}

235. He admitted that it would have been ‘nice’ to receive a report from Paul Gibson on the work he was doing and acknowledged that it was not appropriate for the union not to have received a report. He cited this as ‘another lapse in [his] judgment … another one of the things

\footnote{335} Derrick Belan, 10/11/15, T:496.20-27.  
\footnote{336} Derrick Belan, 10/11/15, T:497.16-18.  
\footnote{337} Derrick Belan, 10/11/15, T:497.36-44.  
\footnote{338} Derrick Belan, 10/11/15, T:495.37-40.  
\footnote{339} Derrick Belan, 10/11/15, T:496.33-46.  
\footnote{340} Derrick Belan, 10/11/15, T:498.1-3.
[he’ll] have to live with’. But he maintained that it was still a good idea to engage Paul Gibson.341

236. Derrick Belan accounted for the large payment of $16,534.88 paid to Paul Gibson on 17 August 2012 as probably being Paul Gibson’s pay for the preceding month.342 In October 2012 there were three payments made to Paul Gibson: two of $8,580 and one of $44,491.20. Derrick Belan accounted for the first two payments as being for the same reason, namely, payment for the preceding month.343 However, counsel assisting contended that he was unable to offer any cogent explanation for the additional payment of $44,491.20. Initially, he gave evidence that this payment was probably because Paul Gibson ‘was owed money from a significant time before’.344 On being reminded that this was not consistent with the records produced he gave the following evidence:345

At the time I’m sure there would have been good reason, I’m sure there’s records of good reason. I’m not able at this stage to tell you what it was because I don’t have those records in front of me. I don’t know.

Wayne Meaney’s evidence

237. Wayne Meaney gave evidence that he was not involved in any of the negotiations for the arrangement with Paul Gibson.346 He said that he

342 Derrick Belan, 10/11/15, T:498.34-37.
343 Derrick Belan, 10/11/15, T:498.39-42.
344 Derrick Belan, 10/11/15, T:498.44-499.2.
345 Derrick Belan, 10/11/15, T:499.11-15.
346 Wayne Meaney, 10/11/15, T:412.31-32.
was not involved in any meetings between Derrick Belan and Paul Gibson.347

238. He said that he recalled seeing ‘some payments in the journal for the Committee of Management’.348 Following this, he said he once asked Derrick Belan privately what the arrangement was about and was told that he had engaged Paul Gibson as a consultant to deal with relationships between the ALP and the NUW. He said once he had been provided with that explanation he did nothing further.349

239. Wayne Meaney said he trusted Derrick Belan and did not think that the Assistant Secretary should question the day-to-day movements of a Secretary.350 However, he accepted that this was not really the day-to-day doings of a Secretary.351 Despite this he maintained that he did not think he needed to inquire further about the arrangement.352

240. Similarly, he acknowledged that it was up to the BCOM on behalf of the Branch to approve payments of money.353 Despite this, he stated that he himself had never seen any reason to raise the question of whether this expenditure was an appropriate use of union funds at the BCOM meetings.354 Counsel assisting contended that he seemed to

348 Wayne Meaney, 10/11/15, T:412.32-33.
349 Wayne Meaney, 10/11/15, T:412.32-44.
350 Wayne Meaney, 10/11/15, T:413.20-23.
351 Wayne Meaney, 10/11/15, T:413.31-33.
353 Wayne Meaney, 10/11/15, T:414.3-5.
354 Wayne Meaney, 10/11/15, T:414.7-12.
think that it was enough that the amounts appeared in the accounts. He reiterated that he did not feel the need to question the arrangement.\textsuperscript{355}

241. He gave evidence that he never enquired of anyone whether or not Paul Gibson was doing anything in order to receive the money, and did not want a report as to what was being done.\textsuperscript{356} He admitted that there was a degree of informality when issues were raised between the BCOM members.\textsuperscript{357}

242. Wayne Meaney could not recall any conversation with Derrick Belan regarding the use of affiliation fees to pay Paul Gibson.\textsuperscript{358}

\textit{Marilyn Issanchon’s evidence}

243. Marilyn Issanchon chaired the BCOM meetings.\textsuperscript{359} She gave evidence that she did not know anything about the arrangement concerning Paul Gibson\textsuperscript{360} and could not remember ever having any discussions about Paul Gibson in the meetings.\textsuperscript{361}

244. She said she would have expected the arrangement between Derrick Belan and Paul Gibson to have been discussed at BCOM meetings.\textsuperscript{362}

\textsuperscript{355} Wayne Meaney, 10/11/15, T:414.30-415.8.
\textsuperscript{356} Wayne Meaney, 10/11/15, T:414.38-415.1.
\textsuperscript{357} Wayne Meaney, 10/11/15, T:436.6-13.
\textsuperscript{358} Wayne Meaney, 10/11/15, T:438.1-4.
\textsuperscript{359} Marilyn Issanchon, 6/11/15, T:353.12-18.
\textsuperscript{360} Marilyn Issanchon, 6/11/15, T:354.36-38.
\textsuperscript{361} Marilyn Issanchon, 6/11/15, T:354.40-46.
\textsuperscript{362} Marilyn Issanchon, 6/11/15, T:355.1-5.
Nature of arrangement considered

245. Counsel assisting submitted that the nature of the arrangement between NUW NSW and Paul Gibson was unsatisfactory in a number of ways. These included:

(a) The agreement for Paul Gibson to provide consultancy services was not reduced to writing. Neither Paul Gibson nor Derrick Belan could recall the circumstances of its creation.

(b) Derrick Belan did not seek the approval of BCOM, not did he adequately disclose the arrangement to engage Paul Gibson to it.

(c) Save for the oral evidence of Paul Gibson and Derrick Belan, there was no evidence to support the suggestion that there was ever any disharmony between the NUW NSW and the NSW ALP, let alone on a scale justifying such large expenditure from the union.

(d) Save for the oral evidence of Paul Gibson and Derrick Belan, there was no evidence apart from the invoices that Paul Gibson performed any work for the NUW NSW at all. A notice to the NUW NSW seeking production of all documents concerning the work performed by Paul Gibson was answered on 28 October 2015: it stated that it had no documents to produce. Paul Gibson did not take notes of any conversations

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365 Submissions of Counsel Assisting, 18/11/15, para 190.
that he had. He did not provide any reports to the NUW NSW regarding the work that he had allegedly performed.

(e) Paul Gibson could not identify the whereabouts of any information that would assist in determining what he was paid for.

(f) Derrick Belan’s evidence that the NUW NSW ceased paying the ALP affiliation fees does not appear to be supported by other evidence. The NUW NSW paid various ‘affiliation fees’ which are recorded in its annual reports. The affiliation fees paid by the NUW NSW to the NSW ALP were much less than the amounts paid to Paul Gibson. The NUW NSW paid affiliation fees to the NSW ALP before and during the period of Paul Gibson’s engagement as follows:

(i) 19 August 2009  $61,397;
(ii) 25 February 2010  $70,948.44;
(iii) 22 July 2011  $2,954; and
(iv) 17 October 2012  $53,090.70.

(g) Neither Derrick Belan nor Paul Gibson could explain the payments of $16,534.88 and $44,491.20 made to Paul Gibson over and above his consultancy fees. Neither produced any

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documentation to support the payment of these fees. Paul Gibson could not explain where any such information would be located.

(h) Paul Gibson continued to receive payment from the NUW NSW for some eight months after he acknowledged that he had completed the work required of him.

246. Derrick Belan submitted that he acted in good faith and in the interests of members in entering into the consultancy. He contended that there was no evidence to the contrary. Further, he contended that both Derrick Belan and Paul Gibson believed that the consultancy had been of benefit.366

247. Derrick Belan submitted that there was no evidence that contradicted the evidence of both men in relation to the need for and success of the consultancy.367

248. Derrick Belan submitted that it should not have been contended by counsel assisting that apart from the evidence of the two men, there was no evidence to support the suggestion that there was ever any disharmony between the NUW NSW and the NSWALP. He submitted that if there was some cogent evidence that contradicts the evidence of the Derrick Belan and Paul Gibson it was incumbent upon counsel assisting to call it.368

366 Submissions of Derrick Belan, 30/11/15, paras 2, 60.
367 Submissions of Derrick Belan, 30/11/15, paras 61-62.
368 Submissions of Derrick Belan, 30/11/15, paras 63-64.
249. Derrick Belan further contended whether counsel assisting viewed the arrangement as beneficial is not the issue for determination. Rather the issue is whether Derrick Belan, at the time he entered the arrangement, did so in good faith believing it to be of benefit to NUW members.\textsuperscript{369} He contended that there was no basis upon which the arrangement could be criticised.

250. Derrick Belan went on to acknowledge there was a ‘degree of informality’ in the way in which issues were discussed between Derrick Belan and the BCOM. He submitted that the arrangement with Paul Gibson was discussed with Wayne Meaney and disclosed to the BCOM by its inclusion in the accounts. He submitted that the payments were taken to the BCOM as they were in the accounts presented to the BCOM and were passed.\textsuperscript{370}

251. Derrick Belan further submitted that he gave evidence that he believed there were minutes recording the arrangement with Paul Gibson and that the evidence of Wayne Meaney suggests the same.\textsuperscript{371} He further submitted that (a) the arrangement was taken to the BCOM and passed by the BCOM; and (b) the unchallenged evidence of Paul Gibson and Derrick Belan was that the arrangement was needed and was beneficial to the NUW NSW. Hence no contravention of ss 285, 286 and 287 of the FW(RO) Act should be suggested.

\textsuperscript{369} Submissions of Derrick Belan, 30/11/15, para 66.
\textsuperscript{370} Submissions of Derrick Belan, 30/11/15, para 74.
\textsuperscript{371} Submissions of Derrick Belan, 30/11/15, para 75.
252. Derrick Belan further submitted\(^{372}\) that it is possible that the entry in the MYOB records of $44,491.20 and payment of that amount may have been incorrectly made. He noted that the detail ‘LUCRF’ recorded against it refers to a superannuation fund and the entry is similar to other MYOB entries that purport to record payments by NUW NSW for superannuation entitlements of employees. Given, however, that the payment was actually received by Paul Gibson, and it is not an insignificant amount of money, this suggestion seems highly unlikely.

253. It was also contended by Derrick Belan that his response to questions about this payment was cogent given he did not have the records in front of him, had no notice of the questions, and that he was in ill health.\(^{373}\)

### Possible contraventions

254. Counsel assisting submitted that the following union rules may be relevant to an assessment of contraventions under ss 285, 286 and 287 of the FW(RO) Act.

255. Rule 34 of the National Rules provides that:\(^{374}\)

\[
\ldots \\
(a) \text{ Each Branch shall have a Branch Fund which shall be managed and controlled in accordance with the Rules…}
\]

\(^{372}\) Submissions of Derrick Belan, 30/11/15, para 77.

\(^{373}\) Submissions of Derrick Belan, 30/11/15, para 78.

\(^{374}\) NUW MFI-13, 5/11/15, pp 47, 47-A.
(b) All funds and property of a Branch shall be vested in the Branch.

(d) All cheques and other instruments for the withdrawal of any funds of a Branch of the Union from any bank or other account shall be signed by the Secretary of that Branch and one of the members of the Committee of Management of the Branch.

(e) Moneys of a Branch of the Union shall be disbursed only upon a resolution of the Committee of Management of the Branch, provided that, for the expenditure of the funds of the Branch on the general administration of the Branch or for purposes reasonably incidental to the general administration of the Branch, the prior authority of the Committee of Management of the Branch or a general meeting of members of the Branch shall not be necessary before cheques are signed and/or accounts are paid.

256. Rules 13 and 14 of the State Rules relevantly provide that:

13.1 The Finance Committee shall consist of the President, or their nominee, the State Secretary, or their nominee, the Financial Officers of the Union and one representative from each of the areas of industrial pursuits...

13.2 The Finance Committee shall meet monthly and at such other time as may be required by the State Secretary.

13.4 The Finance Committee shall advise the Committee of management on all matters concerned with finances, shall inspect all accounts in connection with the Union, and recommend to the Committee of Management of the Union the disbursement of funds. A monthly statement of the financial transactions of the Union shall be presented to the Committee of Management of the Union and to each General Meeting.

14.1 ...No money other than the ordinary working expenses of the Union shall be voted unless the matter has been recommended by the Committee of Management.

257. Counsel assisting criticised Derrick Belan’s conduct in authorising the payments to Paul Gibson. Under the State Rules, Derrick Belan was

‘in control of the office of the Union and of organisers, industrial officers and employees therein’.

Counsel assisting contended that he owed fiduciary duties.

258. Counsel assisting noted, as set out further below, that Derrick Belan was apparently of the view that the Finance Committee was formed at the discretion of the Secretary and it was not mandatory that a meeting be held each month. There is no record in evidence of separate Finance Committee meetings being held after 2009.

259. Counsel assisting submitted that it is apparent that Derrick Belan used his position as Branch Secretary to cause the NUW NSW to make payments to Paul Gibson. He did so without prior BCOM approval. The moneys paid to Paul Gibson were only submitted to the BCOM after their payment. Any approval of the BCOM would have been retrospective and made without the benefit of the scrutiny of a stand-alone Finance Committee. Seeking the approval of the BCOM to the NUW NSW’s expenditure was an integral step in seeking approval to make the payments to Paul Gibson. If Derrick Belan did not know that (a) the advice of the Finance Committee to the BCOM regarding expenditure was required before the BCOM could grant approval of expenses, and (b) he needed to seek the approval of the BCOM before authorising those expenses then he ought to have known of these limitations on his authority.

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377 Paragraph 317.
260. Counsel assisting emphasised the following:  

(a) Informal discussions that Derrick Belan may or may not have had with individual members of the BCOM did not constitute appropriate disclosure of the proposed arrangement.

(b) To enable the BCOM to provide its approval, the proposed arrangement should have been submitted to the BCOM, debated and ultimately voted prior to it being acted upon.

(c) The rules of the union require expenditure of union monies to be approved prior to expenditure, not after. Expenses which the NUW NSW had already incurred without the BCOM’s consent could not be retrospectively approved simply by inclusion in the accounts summary.

261. These criticisms made by counsel assisting are cogent and unanswerable. A more difficult question is, however, whether or not Derrick Belan’s actions in organising the payments to Paul Gibson amount to a civil contravention.

262. Counsel assisting first went to s 285. She submitted that in failing to appreciate the limitations on his authority, Derrick Belan did not exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if he or she were an officer of the NUW NSW and had the same responsibilities as

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379 Submissions of Counsel Assisting, 4/12/15, para 55.

Derrick Belan. A reasonable person in Derrick Belan’s position would have, amongst other things:

(a) caused a contract for Paul Gibson to have been drafted which included a term of engagement and set out precisely what Paul Gibson had been engaged to achieve on behalf of the NUW NSW;

(b) required Paul Gibson to submit a report identifying the time spent on the work, and his achievements and their benefit to NUW NSW members;

(c) requested the approval of the Finance Committee and the BCOM before engaging Paul Gibson and expending any money on him; and

(d) at the very least ceased paying Paul Gibson upon learning that he had completed the work required of him.

263. Counsel assisting’s submissions are correct. The central point is the failure to comply with the Rules. Ignorance or disobedience of the Rules fell below the applicable standard of care and diligence. The primary duty of a trustee is to ascertain the terms of the trust. The primary duty of a fiduciary is to ascertain the terms of the fiduciary relationship. The primary duty of a trade union official who is a fiduciary is to ascertain the terms of the trade union’s rules. To fail to ascertain them, or to ascertain them but then forget them, or to remember them but then ignore them, reveals a lack of care and diligence. It has not been established that there was BCOM approval.
The asserted belief of Derrick Belan and Wayne Meaney in minutes recording the Gibson arrangement does not prove that they existed, nor what they minuted. There is no persuasive evidence that the arrangement was taken to and approved by BCOM. There is no persuasive evidence that the arrangement was beneficial to the NUW NSW. Hence there was a failure to comply with Rule 34(e) of the National Rules. That rule was not capable of being satisfied by retrospective approval, and even if it could be, approval of the accounts was unlikely to amount to retrospective approval unless it could be demonstrated that it was fully informed approval. There was also a failure to comply with Rule 13.4. and Rule 14.1 of the State Rules. They could not be satisfied by retrospective approval either. Hence a contravention of s 285 may have occurred.

264. As to s 286, counsel assisting contended that it should be noted that s 286(1) of the FW(RO) Act refers to an officer of the union such as Derrick Belan exercising his powers and discharging his duties:

(a) in good faith…; and

(b) for a proper purpose (emphasis added).

265. Counsel assisting also states that it is not necessary to show that Derrick Belan breached both (a) and (b) of subsection (1) for him to be in breach of s 286. It is enough (relevantly) simply to show a breach of subsection (1)(b): that is that he did not exercise his powers and discharge his duties for a proper purpose. Derrick Belan caused more than $250,000 of NUW NSW members’ funds to be paid to Paul Gibson in circumstances where neither he nor Paul Gibson could
clearly articulate the work Paul Gibson was to perform in exchange for a relatively large sum of money and where neither could state persuasively that any work had been done. A responsible officer of a trade union would not commit his or her organisation to a liability of this size without proper documentation and the approval of the BCOM.

266. Counsel assisting was correct. The evidence of Paul Gibson and Derrick Belan was profoundly unsatisfactory. Each completely failed to explain the nature and advantages of the arrangement. Hence a contravention of s 286 might have occurred.

267. In relation to s 287, a contravention may be made out if there is evidence to the requisite standard that in entering into the arrangement with Paul Gibson, Derrick Belan improperly used his position to gain an advantage for Paul Gibson. Given the evidence shows that the arrangement was made without the prior approval of the BCOM, and with no written terms of engagement, the submission of counsel assisting that a contravention of s 287 may have occurred is accepted. Section 268 of the Industrial Relations Act 1996 (NSW) is similar to s 287 of the FW(RO) Act. Hence Derrick Belan may have committed a contravention of it as well. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against Derrick Belan for pecuniary penalty orders in relation to possible contraventions of ss 285, 286 and 287 of the Fair Work (Registered Organisations) Act 2009 (Cth). Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials
have been referred to the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales and the Executive Director of New South Wales Industrial Relations so that consideration can be given to whether proceedings should be instituted against Derrick Belan for possible contravention of s 268 of the *Industrial Relations Act* 1996 (NSW). No recommendation is made against Paul Gibson. To succeed in proceedings under ss 285, 286 and 287 read with s 284, it would be necessary to establish that he had knowledge of the primary facts which may have constituted Derrick Belan’s contraventions. The evidence to hand does not suggest that he knew that Derrick Belan was acting in breach of the Rules. His conduct does deserve severe criticism, however. In collusion with ‘an officer of an employee association’ who was in ‘breach of [a] professional standard’, to use the words of paragraph (g) of the Terms of Reference, he took a lot of money out of the union of which he was a member without being able to demonstrate that he gave back services of equivalent, or indeed of any, value.

**I – DERRICK BELAN’S SEVERANCE TERMS**

268. This section of the Chapter is concerned with the terms upon which Derrick Belan’s tenure as State Secretary of the NUW NSW ended.
The ending of Derrick Belan’s tenure as State Secretary of the NUW NSW

269. The evidence of the facts and circumstances surrounding the cessation of his tenure is recounted above.\textsuperscript{381} The facts which follow are based on the submissions of counsel assisting, except where indicated.\textsuperscript{382}

270. It has not been possible to find any written record of the terms and conditions under which Derrick Belan served as Secretary.\textsuperscript{383} Before becoming the Secretary of the NUW NSW, Derrick Belan was an organiser.\textsuperscript{384} He was first employed by the NUW NSW on or about 3 March 1995.\textsuperscript{385}

271. Marilyn Issanchon testified that Derrick Belan had not been well for many months prior to his resignation on or about 23 October 2015. She also testified that she was aware that Derrick Belan wanted to resign through the year.\textsuperscript{386}

272. Wayne Meaney’s evidence was that he had a meeting with Derrick Belan at the Coffee Club in Penrith on 21 October 2015. Derrick

\textsuperscript{381} See paras 36-53.

\textsuperscript{382} Submissions of Counsel Assisting, 18/11/15, paras 203-223.

\textsuperscript{383} Under Notice to Produce 1935, schedule 1 category 2, the Commission sought a copy of the most current contract of employment entered into by the NUW with each of its Officers. ‘Officer’ was defined to mean a person who is the holder of an office in the Union or an employee of the Union. The NUW NSW responded, by way of letter on 14 October 2015, that it had no documents to produce. The notice also requested any record of the approved remuneration and other entitlements, including non-cash benefits, of Derrick Belan from 1 October 2005 to the date of the notice. The only documents produced in response to this category were PAYG statements: NUW MFI-37, 17/11/15, pp 17–24-1.

\textsuperscript{384} Derrick Belan, 10/11/15, T:448.11-15.

\textsuperscript{385} NUW MFI-26, 10/11/15, p 1.

\textsuperscript{386} Marilyn Issanchon, 6/11/15, T:362.12-14.
Belan said that his position as State Secretary was ‘untenable’ and said to Wayne Meaney that he agreed that he should resign.\(^{387}\) He told Wayne Meaney he had done nothing wrong.\(^{388}\)

273. The minutes of the Extraordinary Committee of Management Meeting held on 23 October 2015 do not state that Derrick Belan resigned from his position, but rather that ‘it has been agreed that Derrick should leave his position as Secretary’\(^{389}\) (emphasis added). In those circumstances, the terms on which Derrick Belan left NUW NSW are unclear.

274. That meeting also resolved that ‘it is deemed appropriate that he [Derrick Belan] receive termination payments based on the same package as available to other officials but subject to appropriate taxation’.\(^ {390}\) It is unclear on the current state of the evidence whether the terms upon which Derrick Belan’s termination payments were to be calculated under the Deed are in fact based on the same package available to other officials of the NUW NSW.

275. When cross-examined by counsel for Derrick Belan, Wayne Meaney gave evidence that a ‘similar deed’ had been used by the NUW NSW when other officials had been made redundant. However, there is no evidence that the terms of the Deed to which Derrick Belan was a party releasing him from any claim made against him by the NUW NSW

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\(^{388}\) Wayne Meaney, witness statement, 2/12/15, para 5.

\(^{389}\) NUW MFI-24, 6/11/15, p 780.

\(^{390}\) NUW MFI-24, 6/11/15, p 780.
was included in any ‘similar’ agreement concerning the termination of any other official.

276. It can also be observed, and it is to be hoped, that it is highly unlikely that other officials would have left the union in similar circumstances.

277. When Derrick Belan was asked about how he came to leave the position of State Secretary, he gave evidence that he only ‘resigned after it was found that one of my administrative staff was committing fraud’. Derrick Belan did not give any notice of his intention to resign. The National Rules provide that 28 days’ written notice of intention to resign must be given. When examined about his awareness of the 28 days’ notice requirement, Derrick Belan’s answer was: ‘I am also aware that the rules provide that that notice could be paid out or not paid’. Counsel assisting have noted that it is not clear to which rule he was referring. Derrick Belan’s submissions do not offer any clarification of this issue.

The Deed made on 26 October 2015

278. On 26 October 2015 the NUW NSW entered into the Deed with Derrick Belan. The Deed was executed ‘for and on behalf of the National Union of Workers, New South Wales Branch … registered pursuant to the Industrial Relations Act 1996 (NSW)’ by Wayne

392 Derrick Belan, 10/11/15, T:448.31-37; NUW MFI-13, 5/11/15, p 57.
394 Submissions of Counsel Assisting, 18/11/15, para 209.
395 NUW MFI-26, 10/11/15.
Meaney, in his capacity as State Secretary of the NUW NSW. Wayne Meaney testified that he obtained legal advice prior to entering into the Deed. He also testified that legal advice was also sought by the NUW NSW.

Wayne Meaney stated that the Deed was entered into prior to the completion of any full investigation being done into the finances of the NUW NSW and the matters concerning the misappropriation of funds by Danielle O’Brien and/or Derrick Belan. He also stated that McLeod Campbell & Associates Pty Ltd (McLeod Campbell), which was already generally retained as the accountants and auditors of the NUW NSW, was also specially retained to undertake the investigation. Wayne Meaney gave the following evidence in relation to the limited scope of the investigation by McLeod Campbell:

So, I verbally said to them what I want them to do in light of what Mr Belan told me about Danielle, I wanted them to do the investigation and see - start seeing what the extent was of what Danielle had – what she was up to.

However, Wayne Meaney also stated that another firm called ‘Pario Solutions’ based in Canberra had been engaged to complete an ‘independent’ due diligence on accounts and fraud and forensic

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396 NUW MFI-26, 10/11/15, p 4.
397 Wayne Meaney, 10/11/15, T:424.2-4.
398 Wayne Meaney, 10/11/15, T:423.6-14.
400 Wayne Meaney, 10/11/15, T:430.1, 430.11-14.
accounting.\textsuperscript{402} As both firms were at least initially engaged orally by Wayne Meaney, the terms and scope of each engagement are not known.\textsuperscript{403}

281. Wayne Meaney stated that although the Extraordinary Committee of Management meeting was held on Friday, 23 October 2015, McLeod Campbell and Pario Solutions were only formally engaged after that date to commence their investigatory work into the financial affairs of the NUW NSW.\textsuperscript{404}

282. It is clear that the Deed was entered into prior to the NUW NSW receiving any information back from either McLeod Campbell or Pario Solutions. The interim report by McLeod Campbell is dated Wednesday, 28 October 2015, two days after the Deed was entered into.\textsuperscript{405}

283. Wayne Meaney stated that at the time of obtaining the BCOM’s ‘endorsement’ of the Deed at the meeting on 23 October 2015:\textsuperscript{406}

\begin{quote}
I reported to them that at that point in time there was no evidence of any wrongdoing by Derrick, other than he took his eye off the ball, if I can put it that way, I suppose, and it happened under his watch…
\end{quote}

284. However, Wayne Meaney also stated that as at 23 October 2015, and once he had been elevated to the position of State Secretary of the

\textsuperscript{402} Wayne Meaney, 10/11/15, T:429.24-26.
\textsuperscript{403} Wayne Meaney, 10/11/15, T:430.9-20.
\textsuperscript{404} Wayne Meaney, 10/11/15, T:431.33-34.
\textsuperscript{405} Wayne Meaney, 10/11/15, T:429.4-8; NUW MFI-26, 10/11/15; NUW MFI-24, 6/11/15, p 780.
\textsuperscript{406} Wayne Meaney, 10/11/15, T:420.39-43.
NUW NSW, he had not tried to find out whether there was any evidence of direct wrongdoing by Derrick Belan. He agreed that he ‘just took [Derrick Belan’s] word for it’.\textsuperscript{407} He also agreed that in hindsight it might not have been an appropriate thing to do in the circumstances.\textsuperscript{408}

285. The Deed defines ‘Union’ as including ‘the National Union of Workers - New South Wales Branch being a branch of the Federal Organisation registered pursuant to the \textit{Fair Work (Registered Organisations Act) 2009}'.\textsuperscript{409} Accordingly, the Deed purports to bind the federally registered entity.\textsuperscript{410}

286. Wayne Meaney testified that he did not inform the National Office about the issues in his branch until Tuesday 27 October 2015, when he and Stefan Mueller visited the National Office.\textsuperscript{411} Wayne Meaney said that he did not think it appropriate to consult the National Office prior to entering the Deed.\textsuperscript{412} He said that this was ‘[b]ecause [the NUW NSW] can - our Branch works independent. We have the authority to work independent from the National Office’.\textsuperscript{413}

287. Despite this, Wayne Meaney gave evidence that the Deed ‘has not been acted upon’.\textsuperscript{414} That is because after meeting the National

\textsuperscript{407} Wayne Meaney, 10/11/15, T:421.5-8.
\textsuperscript{408} Wayne Meaney, 10/11/15, T:421.10-12.
\textsuperscript{409} NUW MFI-26, 10/11/15, p 1.
\textsuperscript{410} Wayne Meaney, 10/11/15, T:424.16-19.
\textsuperscript{411} Wayne Meaney, 10/11/15, T:422.18-41.
\textsuperscript{412} Wayne Meaney, 10/11/15, T:423.43-46.
\textsuperscript{413} Wayne Meaney, 10/11/15, T:423.1-4.
\textsuperscript{414} Wayne Meaney, 10/11/15, T:421.18.
Secretary on 27 October 2015 in Melbourne, he received a letter from the National Secretary asking him to refrain from acting on the Deed until a National Committee of Management meeting was held.\(^{415}\) That course was agreed to.\(^{416}\) It is unclear whether such a meeting has since been held.

288. Although the NUW NSW’s BCOM has the power to deal with the NUW NSW’s finances,\(^{417}\) questions arise whether the terms of the Deed that are favourable to Derrick Belan (in particular, his release from claims by the NUW NSW) are in the interests of members, consistently with the NUW NSW’s objects.\(^{418}\)

The release of Derrick Belan under the Deed

289. As previously indicated above, the Deed provides for the release of Derrick Belan from claims by the ‘Union’ (adopting the expansive definition in the Deed).

290. There are several relevant clauses of the Deed relating to the release of Derrick Belan. Those clauses provide as follows:\(^{419}\)

3. MUTUAL RELEASES FROM CLAIMS

3.1 The Official agrees that this Deed fully satisfies the rights (however described and however arising) that the Official, and

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\(^{415}\) Wayne Meaney, 10/11/15, T:431.36-37, 432.1-9.


\(^{417}\) NUW MFI-13, 5/11/15, p 49.

\(^{418}\) NUW MFI-13, 5/11/15, pp 4-6.

\(^{419}\) NUW MFI-26, 10/11/15, p 2.
everyone who claims through the Official, has or may have against the Union in connection with the Employment or the Termination and the Union agrees that this Deed fully satisfies the rights (however described and however arising) that the Union and everyone who claims through the Union has or may have against the Official in connection with the Employment or the Termination.

3.2 The Official releases the Union from all claims and liability arising directly or indirectly out of the Employment or the Termination and the Union releases the Official from all claims and liability arising directly or indirectly out of the Employment or the Termination.

…”

3.4 These releases cover all claims and liability, however described and however arising in connection with the Employment or the Termination. …

4. BAR TO PROCEEDINGS

The Official and the Union may use this Deed, including as a bar, against the Official or the Union in any court or in any other proceedings brought by the Official or the Union (or anyone who claims through the Official or the Union).

291. Counsel assisting questioned Wayne Meaney about the prudence of agreeing to those provisions of the Deed on behalf of the Union, and especially prior to the outcome of any investigation into the NUW NSW’s finances, Wayne Meaney repeatedly answered: ‘I thought it was okay’.420

292. Counsel assisting submitted that in circumstances where an investigation was ongoing, the agreement to the releases in the Deed was clearly imprudent. The nature and extent of Derrick Belan’s potential liability to the NUW NSW was unknown at the time of the execution of the Deed. Counsel assisting pointed to serious questions

to be answered about Derrick Belan’s responsibility to the NUW NSW in respect of the misappropriation of NUW NSW funds. These questions potentially arose, not only in relation to misappropriation by Derrick Belan himself, but, on his own admission, in relation to misappropriation by others during a period of months if not years while he was in charge.

293. Counsel assisting submitted that in the circumstances the union should not have agreed to the release of Derrick Belan from all claims that it may have against him, as is provided for in the Deed. It is apparent that the releases of Derrick Belan in the Deed were included to protect his interests. They were not included to protect the interests or advance the benefit of the members of the NUW NSW. The terms of the Deed, especially the release clauses, are unjustifiably favourable to Derrick Belan. That is particularly so in light of the circumstances surrounding the cessation of his tenure as State Secretary.

294. In his submissions,\(^{421}\) Derrick Belan made a number of short points. He noted that the Deed was in the same form as similar deeds used by the NUW for other officials. He noted that the Deed also contained restrictions imposed upon Derrick Belan. He noted that prior to entering the Deed, the NUW had the benefit of legal advice from Counsel in relation to its terms.

295. Wayne Meaney contended that in all the circumstances it would be ‘unfair’ for any recommendation to be made regarding his actions arising from the Deed because he acted in ‘good faith’ and ‘his

\(^{421}\) Submissions of Derrick Belan, 30/11/15, paras 89-92.
intention [was] to try and act in the best interests of the organisation’. The submissions also noted that the ‘Commission should not only consider Wayne Meaney’s actions, which include the fact that no payment has been made nor will be without the informed consent of the BCOM but also that Mr Meaney is clearly the major driver of positive change in the NUW, NSW’.

296. Since that submission was made, as noted above there have been press reports that Wayne Meaney has stood aside for at least two weeks as of 7 December 2015.

297. Counsel assisting submitted that given the Deed was entered into before any results of any inquiry made into the credit card issues, and prior to discussing the matter with the national office, Derrick Belan and Wayne Meaney (as the signatory on behalf of the NUW NSW) may have contravened ss 285 and 286 of the FW(RO) Act.

298. Counsel assisting’s submissions on this issue are accepted. But Derrick Belan and Wayne Meaney may have contravened s 287 as well. Derrick Belan improperly used his position to gain an advantage for himself. Wayne Meaney improperly used his position to gain an advantage for Derrick Belan. Similar reasoning suggests that they may have contravened s 268 of the Industrial Relations Act 1996 (NSW). Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager instituting

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422 Submissions of the NUW, 28/11/15, para 31.
423 Submissions of the NUW, 28/11/15, para 32.
proceedings against Derrick Belan for pecuniary penalty orders in relation to possible contraventions of ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act* 2009 (Cth). Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission for consideration of whether proceedings should be instituted against Wayne Meaney for possible contraventions of ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act* 2009 (Cth). Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales and the Executive Director of New South Wales Industrial Relations for consideration of whether proceedings should be instituted against Derrick Belan for possible contravention of s 268 of the *Industrial Relations Act* 1996 (NSW). Finally, pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales and the Executive Director of New South Wales Industrial Relations for consideration of whether proceedings should be instituted against Wayne Meaney for possible contravention of s 268 of the *Industrial Relations Act* 1996 (NSW).

**J – GOVERNANCE**

299. This part of the Chapter deals with issues involving governance of the NUW NSW which have emerged from the case study.
300. Counsel assisting contended that several of the matters which have emerged from the NUW NSW case study show grave failures of governance.\(^{424}\) It was submitted that these failures have come about through a combination of facts and circumstances including:

(a) the concentration of practical day-to-day power in the State branch of the union in the Secretary;

(b) the lack of clarity in the rules in part arising from the complications of an overlapping federal and state system;

(c) the personal shortcomings of the Secretary, his brother and his niece; and

(d) the abrogation of responsibility by other senior officials and the BCOM.

To that may be added Derrick Belan’s force of personality. However ill he was or was not when giving evidence, while he could not be said to have projected charm, like quite a few other trade union Secretaries who have given evidence, he had an undeniable presence. And various witnesses spoke of their admiration for his past achievements. He cannot have been an easy man to stand up to. He gave the impression that he would be unlikely to forgive a slight. He certainly maintained an attitude of unrelenting aggression towards counsel assisting.

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\(^{424}\) Submissions of Counsel Assisting, 18/11/15, para 227.
301. Counsel assisting submitted that it is not clear precisely how the National Rules and the State Rules work together. In her public hearing testimony, Marilyn Issanchon certainly appeared to have been uncertain about how the two entities worked together. Counsel assisting argued that what is apparent, however, is that both the terms of the National and State Rules and the way they were applied in practice caused the day-to-day duties of running the union to fall largely on the Branch Secretary. In that sense power devolved to him to the point that it became very heavily concentrated in him. To the extent that the NSW BCOM had a role in management and governance, counsel assisting further submitted that the evidence demonstrated that its oversight was severely lacking.

302. Counsel assisting referred to several rules. Rule 44 of the National Rules provided, inter alia, that ‘Notwithstanding anything contained elsewhere in these Rules [the Secretary] shall also be in sole charge of the Branch office and those employees connected with the work thereof’. Rule 44(d) of the National Rules further provided that the Branch Assistant Secretary shall be under the direct control and supervision of the Branch Secretary, who shall assist the Branch

426 Rules of the National Union of Workers, New South Wales Branch registered under the Industrial Relations Act 1996 (NSW): NUW MFI-13, 5/11/15, p 177. The most up-to-date State Rules the Commission has obtained are as at November 1997. No more up-to-date document appears to be in existence.
427 It is noted that r 26 of the State Rules provides that each of the persons elected to the NSW branch of the NUW registered under the Commonwealth legislation shall be taken to be validly elected to the corresponding office of the NUW, NSW Branch: NUW MFI-13, 5/11/15, p 201. It is further noted that financial members of the Federal NSW Branch are deemed to be financial members of the State branch: NUW MFI-13, 5/11/15, p 212 (r 44.6). Nevertheless it is not clear how the two sets of rules work together.
secretary in the performance his duties; carry out the directions and
instructions of the Branch Secretary; and in the absence of the Branch
Secretary, the Branch Assistant Secretary shall carry out the duties of
the Branch Secretary.\textsuperscript{431} Rule 44(b) of the National Rules provided
that the Secretary shall ‘be competent to discharge all duties assigned
to him by the Branch Committee of Management’.\textsuperscript{432} Rule 44(f) of the
National Rules provided that Branch Organisers ‘shall be under the
direct control and supervision of the Branch Secretary’ and ‘carry out
the directions and instructions of the Branch Secretary’.\textsuperscript{433}

303. Similarly, Rule 18 of the State Rules provided that the Secretary’s
duties included, at 18.1(i):\textsuperscript{434}

\begin{quote}
Be in control of the office of the Union and of organisers, industrial
officers and employees therein. He shall be responsible for the engagement
in employment of any clerical and research staff who shall be under the
direct control and supervision of the State Secretary and shall perform
such duties as may be allotted to them.
\end{quote}

The duties also include: ‘Appoint delegates for the purpose of enrolling
members and delegates and collectors for collecting money due by
members’.\textsuperscript{435}

304. Counsel assisting also noted that the evidence of the witnesses in
relation to the powerful position held by the Branch Secretary accords,

\begin{itemize}
\item[429] Submissions of Counsel Assisting, 18/11/15, paras 229-245.
\item[430] NUW MFI-13, 5/11/15, p 60.
\item[431] NUW MFI-13, 5/11/15, p 60.
\item[432] NUW MFI-13, 5/11/15, p 59.
\item[433] NUW MFI-13, 5/11/15, p 61.
\item[434] NUW MFI-13, 5/11/15, p 194.
\item[435] NUW MFI-13, 5/11/15, p 193.
\end{itemize}
in this respect, with the position set out in the National Rules and the State Rules.

305. Thus Danielle O’Brien stated that ‘of course’ she did not question Derrick Belan’s purchases on the union credit card ‘because he’s the State Secretary and the money is spent at the Secretary’s discretion, as far as I’m aware’.436 Wayne Meaney stated:437

whenever [Derrick Belan] asked me to do something because of our trust, you don’t – when you’re Assistant Secretary to a Secretary, you don’t really question the Secretary that much. You just put your faith in that they are doing the right thing and that’s what I always did with Derrick.

306. Counsel assisting also contended that it is notable that the words ‘faith’ and/or ‘trust’ were used a number of times during the course of their evidence by both Marilyn Issanchon and Wayne Meaney. Examples of such usage appear further below.

307. Further rules referred to by counsel assisting include r 37D of the National Rules.438 It provided that the NSW BCOM shall be composed of the Secretary, President, Assistant Secretary (if any), Vice-President and ‘the three Trustees’, together with members from specified ‘areas of eligibility’. It appears that ‘the three Trustees’ were also referred to as ‘Finance Officers’ or ‘Financial Officers’.439 Each member of the

436 Danielle O’Brien, 4/11/15, T:90.20-25; see also T:92.31-33.
BCOM was entitled to one vote, save for the President who had a deliberative vote and a casting vote.440

308. The National Rules also provided that ‘[t]he Union and its branches shall have in operation appropriate policies relating to the expenditure of the organisation and each branch’.441

309. Rule 34 of the National Rules provided that each Branch shall have a Branch Fund which shall be managed and controlled in accordance with the Rules. Rule 34(d) provided that:442

[all cheques and other instruments for the withdrawal of any funds of a Branch of the Union from any bank or other account shall be signed by the Secretary of that Branch and one of the Committee of Management of the Branch.]

310. The National Rules further provided that:443

Moneys of a Branch of the Union shall be disbursed only upon a resolution of the Committee of Management of the Branch, provided that, for the expenditure of the funds of the Branch on the general administration of the Branch or for purposes reasonably incidental to the general administration of the Branch, the prior authority of the Committee of Management of the Branch or a general meeting of members of the Branch shall not be necessary before cheques are signed and/or accounts are paid.

311. The National Rules further provided that the government, management and control of the affairs of each branch of the union shall be vested in a BCOM to be elected in accordance with the rules.444 Rule 37A(3) provides that ‘all officers, Organizers [sic] and employees of a Branch

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440 NUW MFI-13, 5/11/15, p 52 (r 37D(2)).
441 NUW MFI-13, 5/11/15, p 34 (r 14E).
442 NUW MFI-13, 5/11/15, p 47.
443 NUW MFI-13, 5/11/15, p 47-A (r 34(c)).
444 NUW MFI-13, 5/11/15, p 49 (r 37A(1)).
or of a Sub-Branch shall be subject to the control and direction of Branch Committee of Management as expressed through the Branch Secretary’. Counsel assisting noted that the meaning of this latter phrase is not clear and, in particular, that it is not clear how it sits with r 44 above.

312. It was submitted by counsel assisting that whilst the National Rules provide for compulsory financial management training, the rule only applied to ‘Officers of the Union and each branch’. At least according to the definition of ‘officer’ in the State Rules, such a rule would not have applied to people such as Danielle O’Brien as she was not an ‘officer’ of the union, but simply an employee. Danielle O’Brien claimed that she never received any financial training, other than ‘on the job’ training whilst she was in the position of bookkeeper.

313. Counsel assisting further observed that the State Rules provided that the BCOM is the ‘supreme governing authority of the Union and shall manage and control the affairs of the Union’. It was to consist of the Secretary, the Assistant Secretary (if any), the President, and the Vice President, three financial officers and members of various areas of ‘industrial pursuits’. The State Rules provided that the BCOM shall

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446 NUW MFI-13, 5/11/15, p 34 (r 14D).
447 Officers are defined in r 17 of the State Rules as meaning the Secretary, the Assistant Secretary (if any) the President, Vice-President, a member of the BCOM, elected organisers and Financial Officers, but do not include employees: NUW MFI-13, 5/11/15, p 193.
449 NUW MFI-13, 5/11/15, p 188 (r 10.1).
450 Or their nominees.
meet quarterly ‘and as often as required by the State Secretary’.\textsuperscript{451} Rule 10.12 provided that the BCOM shall be subject to the direction or the express wish of the members of the union in a General Meeting of members assembled.\textsuperscript{452}

\section*{314.}

As noted by counsel assisting in her submissions about the Paul Gibson arrangement,\textsuperscript{453} the State Rules provide for a ‘Finance Committee’. Rule 13.1 provided that the President, Secretary, the Financial Officers and one representative from each of the areas of industrial pursuit (or their nominees) were to make up the Committee.\textsuperscript{454} It was to meet monthly,\textsuperscript{455} to advise the BCOM on all matters concerned with finance, to inspect all accounts in connection with the union, and to recommend to the BCOM the disbursement of funds.\textsuperscript{456} A monthly statement of the financial transactions of the union was to be presented to the BCOM and to each General Meeting.\textsuperscript{457} It was to advise the BCOM upon all financial matters and the financial stability of the union, and how that might be maintained and strengthened.\textsuperscript{458} It was to be subject to the control and direction of the BCOM on all matters and the BCOM was not to be bound to accept any advice or recommendation provided to it by the Finance Committee.\textsuperscript{459}

\begin{footnotesize}
\begin{enumerate}
\item NUW MFI-13, 5/11/15, p 189 (r 10.3).
\item NUW MFI-13, 5/11/15, p 189.
\item Paragraph 256.
\item NUW MFI-13, 5/11/15, p 191.
\item NUW MFI-13, 5/11/15, p 191 (r 13.2).
\item NUW MFI-13, 5/11/15, p 191 (r 13.4).
\item NUW MFI-13, 5/11/15, p 191 (r 13.4).
\item NUW MFI-13, 5/11/15, p 191 (r 13.4).
\item NUW MFI-13, 5/11/15, p 191 (r 13.5).
\end{enumerate}
\end{footnotesize}
315. Rule 33 provided that three financial officers were to be elected and hold office in accordance with the rules. All orders for withdrawals of monies from the bank were to be signed by any two financial officers. But in the event of two financial officers not being available, withdrawals might be signed by one financial officer and the State Secretary.\footnote{NUW MFI-13, 5/11/15, p 204 (r 33).}

316. The general expenses of the union, in carrying out the objects mentioned in r 3, were to be paid out of the General Fund.\footnote{NUW MFI-13, 5/11/15, p 192 (r 14.1).} No money other than the ordinary working expenses of the union was to be voted unless the matter had been recommended by the BCOM. No loan, grant or donation exceeding $1,000 was to be made unless it was in accordance with the rules, appropriate security was given if it is a loan, and the BCOM had approved it.\footnote{NUW MFI-13, 5/11/15, p 192 (r 14.2).}

317. Counsel assisting noted that despite being provided for in the State Rules, the Finance Committee apparently ceased its separate existence in about 2009. Minutes of a BCOM meeting on 17 August 2009\footnote{NUW MFI-40, 17/11/15, pp 22, 26.} recorded Frazer Hall stating that Finance Committee meetings had not been held for the previous two scheduled dates. The minutes further recorded that Derrick Belan ‘explained’ (it would appear, erroneously) that the Finance Committee was formed at the discretion of the Secretary and it was not mandatory that a meeting be held each month. No record of separate Finance Committee meetings being held after this date is in evidence. This accorded with Danielle O’Brien’s
evidence that the Finance Committee merged into the BCOM Finance Committee, although she was not sure.464

318. Marilyn Issanchon also gave evidence that the Finance Committee changed from being a single committee on its own a long time ago to one which was ‘amalgamated’ with the BCOM.465 She further stated that she did not think the Finance Committee really had a lot to do and it would look at the finances the same way as the BCOM and that’s why ‘it was put as one’.466 According to Marilyn Issanchon, the material reviewed was a ‘finance sheet’ ‘which has money in and moneys out and what we have spent and what we’ve received’.467

319. Derrick Belan submitted468 that whilst the Finance Committee ceased to operate as a separate Committee, the cessation was in name only. He contended that the Minutes showed that the officials through the BCOM met monthly rather than quarterly and in fact assumed the role of the Finance Committee.

320. In response, counsel assisting submitted that it was incorrect to say that the cessation of the Finance Committee was ‘in name only’. As explained in counsel assisting’s principal submissions,469 the State Rules set out the duties of the finance committee, which included among other things the task of advising the BCOM ‘upon all matters

468 Submissions of Derrick Belan, 30/11/15, para 42.
469 Submissions of Counsel Assisting, 18/11/15, para 243.
concerning finance’ and recommending to the BCOM the
disbursement of funds. If, as Derrick Belan’s submissions suggested, the BCOM assumed the role of the finance committee, this would result in an implausible position under which the BCOM was advising itself and making recommendations to itself. Counsel assisting contended that the Finance Committee, as contemplated under the State Rules, necessarily had to be a separate committee.

321. As to the issue of credit card usage, on 24 October 2011, the General Secretary of the National Branch requested the NSW Branch (amongst others) to consider Credit Card guidelines which had been adopted at the national level ‘with a view to the Union ensuring that it adopts a consistent national policy’. The national policy provided that a union credit card should not be used for ‘purchase of assets or items of a lasting value; payment of private expenditure [or] ‘cash advances or withdrawals’.

471 Submissions of Derrick Belan, 30/11/15, para 42.
prior approval from the National Secretary or Assistant National Secretary. The policy provided:  

All expenditure on credit cards must be evidenced by an itemised tax invoice and not just a receipt. Officials are required to complete the credit card expenditure form [an example of which was attached] within 5 working days of use.

A completed form should include the date of expenditure and not the date of completing the form. One form should be completed for each expenditure.

322. The completed forms were to be submitted with a copy of the tax invoice via email or directly to the Administrative Officer.

323. The policy also provided: ‘In the event of an emergency which might necessitate use of the credit card, the official should seek approval from the Branch Secretary prior to use’.  

324. A document was produced by the NSW Branch entitled ‘Principles of Financial Accountability for the Union’s Governing Bodies’. This document provided that ‘in performing its financial responsibilities the [B]COM shall be governed by the Unions [sic] rules and the following principles’ which included:

(a) Meetings shall receive regular financial reports so as to provide appropriate oversight;

474 NUW MFI-13, 5/11/15, p 162.
475 NUW MFI-13, 5/11/15, p 162.
(b) Policies and procedures will be properly applied, reviewed and as necessary updated. All policies and procedures will be reviewed at least once per calendar year;

(c) All expenditure shall be authorised in accordance with applicable guidelines or procedures;

(d) All transactions shall be documented and reported in accordance with procedures and accounting standards; and

(e) Credit cards and charge cards shall only be used by nominated officers in accordance with applicable policy.

325. The document also provided that Committee meetings shall contain standing agenda items detailing, amongst other thing, ‘compliance of the Secretary and Branch Secretary with the above principles’.

326. Marilyn Issanchon admitted that the NUW NSW did not in fact adopt any policy in relation to credit cards. 477 She stated: ‘I don’t think any credit card policy was ever really brought up, but, as I said, we always knew about what it was and we were always running on complete trust, which I now know was not worth it, but that’s what we’ve always done’. 478 The minutes of the BCOM did not record any item reflecting the compliance of the Branch Secretary with the principles set out in the document.

327. Danielle O’Brien stated that there were two types of credit cards used by officials and herself, MasterCard and American Express. A small group had MasterCard and American Express, and a larger group just had AMEX. As to their appropriate usage, she was never given a written document, but she was told if she needed to buy something for work, they usually just did it, or ‘if the officials needed to use it, I assume that was between them and Derrick and Wayne’.  

328. Danielle O’Brien gave evidence that John Anderson, a signatory on the NUW NSW’s general account, would attend the union office every couple of months and sign blank cheques. She said that he would sign half a book or a whole book of blank cheques at a time. She would not check the credit card bills for appropriateness, she just paid the bill. She stated that she tried to categorise the expenditure so she could put them into a particular ledger within the accounting program MYOB, but could not always work out the category from the description on the statement and would sometimes search the internet to find out. She further stated that she would provide the general ledger to the Finance Committee every month (although, as has been seen, the Finance Committee as a separate entity did not exist in recent years). She stated that MasterCard bills were paid by direct debit, but American Express bills were paid by cheque. Receipts were only

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484 Danielle O’Brien, 4/11/15, T:34.10-32.
sometimes provided.486 According to her, the American Express statements were provided to Derrick Belan with a cover sheet for his approval page.487 John Anderson would have already pre-signed a cheque and Derrick Belan would later sign it.

329. In relation to other electronic payments, Danielle O’Brien stated that tokens were provided by the bank to her and Derrick Belan, but that she had the use of both of them.488

330. Marilyn Issanchon stated that she never asked to see her credit card statements, and did not know the procedure for the payment of credit card bills.489 She stated that she did not know whether or not credit card statements were checked by anybody. They were certainly not checked by her. Marilyn Issanchon’s outline of the procedure of checking the finances, including credit card expenditure, was: ‘We had a look at the Branch Committee of Management and we had a look at all the moneys in and the moneys out and I always opened it for any discussion if anybody wanted to question things, and look, I realise now that there’s a lot of holes in the way we’ve been doing it and I can only learn’.490

331. It should be noted that Marilyn Issanchon had been part of the Finance Committee when it operated as a separate body.491 Marilyn Issanchon

is also President of Unions NSW. She became aware of policies and procedures once new laws about governance came in. She stated when they undertook their governance training she questioned what the union’s policies and procedures were but was told they were with the National Branch and that ‘we would be circulating them, but we never did’. Marilyn Issanchon agreed she should have followed that up and stated: ‘I can assure you that there will be a lot of changes after what has happened, but everything was basically put on trust there, and it’s the way we operated and we have for the last 20 years’.

332. Wayne Meaney stated that he did not know about the practice of pre-signing of the cheques. He stated that he would be changing that practice. He said “[t]here are obviously a lot of things need to be tidied up in regards to the governance, I’m not hiding from that, I accept that, and that’s what I intend to do”.

333. In the course of giving evidence about his role in relation to the finances of the union Wayne Meaney repeatedly stated how he and the union operated on notions such as trust and faith. For instance, at one point he stated:

when you are a team within the Union, you put your trust in your Secretary and you give your loyalty to your Secretary because otherwise I don’t think you can work, if you don’t. That’s what being in the Union is, you put your trust and your faith in your leader… I always had faith and trust in Derrick.

494 Wayne Meaney, 10/11/15, T:411.38-44.
334. At another point Wayne Meaney stated: 497

I put my trust in Derrick as a Secretary … I don’t think the Assistant Secretary should question the day-to-day movements of a Secretary, that’s just not how it works.

335. As Assistant Secretary Wayne Meaney stated that he: 498

…never had any day-to-day dealings with the finances: in the rules I didn’t have any power in that regard. My role was always more to - my role was as directed by the Secretary but it was always in regards to the industrial side of things … and never ever sort of got involved with the day-to-day management of the finances.

336. When asked about whether part of his role as a member of the BCOM was to oversee the finances, he stated: ‘Well, to pass the finances every month’ — ‘to have a look over them and then pass them’. When asked in what sense he looked over them, he stated ‘I’d have a look through the list of the finances and then just pass them’. He stated that he never looked at any of the MYOB records or any of the credit card statement of anything of that nature. 499

337. Wayne Meaney also stated: ‘We were Secretary and Assistant Secretary for, like 14, 15 years together and I think we were a good team for all of that time’. When questioned whether he was really vouching for all of that period, he qualified the position only slightly: ‘Well, up until the end. To be fair, up until the end, when Derrick was having problems’. 500

497 Wayne Meaney, 10/11/15, T:413.20-23. See also T:413.42-44, 414.23.
500 Wayne Meaney, 10/11/15, T:419.10-16.
338. Derrick Belan affirmed that he was involved in the approval of payments day-to-day. He stated he had the role of ‘treasurer’ and ‘was responsible for all payments at the end of the day’.\textsuperscript{501} He stated that they generally would come before the BCOM, or Danielle O’Brien would bring them to him. He said day-to-day payments such as electricity or utilities would be paid by the staff. Anything outside of that or ‘extraordinary was generally raised with myself or Wayne’, ‘informally’.\textsuperscript{502}

339. Counsel assisting contended that Derrick Belan’s evidence about his supervision of the accounts was contradictory and confused. For example, early on his evidence, he stated firmly that he approved the payment of credit card bills as they came in. He further stated:\textsuperscript{503}

The usage of credit cards within the NSW Branch in regards to organisers, they could use it for parking and/or accommodation without approval. Anything outside of that, they would have to ring myself or Wayne Meaney and get it approved. If we weren’t available, they could then make their own decision, but it would be questioned when it came in at the end of the month.

340. When asked who would question it, he stated: ‘Me or Wayne’. When asked how that would occur, he stated: ‘Generally Danielle would point it out to us, that there was something on there that shouldn’t have been on there, and then they’d be called in’. When challenged about this he confirmed that this ‘absolutely’ happened.\textsuperscript{504}

\textsuperscript{501} Derrick Belan, 10/11/15, T:448.41-47.
\textsuperscript{502} Derrick Belan, 10/11/15, T:449.1-19
\textsuperscript{503} Derrick Belan, 10/11/15, T:449.28-37.
\textsuperscript{504} Derrick Belan, 10/11/15, T:449.39-45.
341. There was then the following exchange:

Q. You checked them, did you?
A. Not of recent, no.

Q. When did you stop checking them?
A. Oh, I never really stopped checking them. I think that of recent times I really haven’t been up to scratch. I mean, a lot of people would know that the last 12 months haven’t been good for me. I’ve sort of done my best. I remember a number of times when Danielle said Wayne had checked them, or where they were available and I sort of breezed over them, looked at the end payments, that type of thing, but, yeah, myself, I accept responsibility.

342. Later in his evidence, Derrick Belan was asked about cash payment journal forms behind which credit card statements were placed. He was asked if his signature was placed next to the word ‘Approved’ on one particular page and he stated: ‘That could be. I don’t think so. It is a lot closer to mine but I don’t think so. I won’t say a definite no but I’m not sure’. When asked who, if not him, would have been approving payments he stated: ‘I don’t know. I wouldn’t like to say who. I mean, I think – I think that, you know – I mean, that is for the law to find out and sort out’. In relation to other approval forms he said he did not recognise the signature or mark. When asked who was authorised to sign in his absence he stated: ‘Nobody. Wayne Meaney… Wayne Meaney would be the only person who would be authorised to sign that in my absence’. Derrick Belan could not...

505 Derrick Belan, 10/11/15, T:450.3-14.
508 Derrick Belan, 10/11/15, T: 502.27-502.46.
509 Derrick Belan, 10/11/15, T:503.25-30.
account for how someone else authorised payments whilst he (Derrick Belan) was not absent, in August 2014.\textsuperscript{510} Derrick Belan went on to state:\textsuperscript{511}

I’m saying that the payments are made and the authorisations are cleared, or once they’re checked they’re cleared. I’m saying that I did not see or authorise those payments, and as again I will say, I regret the way I’ve been in the last few months or the last year. I understand that I haven’t taken my duties or done my duties as well as I should have and I feel embarrassed and humiliated by it, but I have never authorised anyone to steal or stolen from my organisation.

343. When Derrick Belan was asked about co-signing cheques for particular American Express bills, he stated that the cheque and the authorisation slip did not come together:\textsuperscript{512}

The cheque, the signature would have been put on my desk with the other cheques for signature. Once they are signed and things are paid then the authorisation slip comes with the definition of what was, or the summary of what was on there, so they’re not together. Well, I never saw them together for quite some time.

344. He then claimed that even if he signed the cheque, until the summary was authorised the cheque should not have been posted.\textsuperscript{513} When asked why he did not wait to see what he was signing for, Derrick Belan stated: ‘it was for American Express. It’s obvious who it was for. It doesn’t say Peter’s Pizzas, it says American Express’.\textsuperscript{514}

\textsuperscript{510} Derrick Belan, 10/11/15, T:503.47-504.5.
\textsuperscript{511} Derrick Belan, 10/11/15, T:504.24-32.
\textsuperscript{512} Derrick Belan, 10/11/15, T:506.5-13.
\textsuperscript{513} Derrick Belan, 10/11/15, T:507.1-3.
\textsuperscript{514} Derrick Belan, 10/11/15, T:507.38-40.
345. It is to be noted that Derrick Belan’s nomination of Wayne Meaney’s involvement in the day-to-day finances contradicts Wayne Meaney’s evidence, as set out above, that he had no dealings in such matters.  

346. As to the system relating to electronic payments, when Derrick Belan was initially asked about the topic, he had no problem in understanding questions about whether or not he had a token. When first asked he said he did not have one. He stated: ‘I believe Danielle had a token and I think the other token was either locked in the safe or with maybe Jenny, but I never had a token, never’. Despite these clear initial answers, Derrick Belan then went on to claim not to understand what tokens were or how they worked.

347. It should also be noted that Derrick Belan’s evidence as to the length of time over which he was experiencing personal difficulties changed, being described at different points as a few months, a year, and then a couple of years. He stated when asked about the apparent extension of time mentioned during the course of his evidence: ‘Well, I mean a person like me would not admit if they were unwell nor would they like to admit that they’re struggling’. He also stated: ‘At no stage

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515 Wayne Meaney, 6/11/15, T:380.36-46. Wayne Meaney, witness statement, 2/12/15, para 57 in which it is further clarified by Wayne Meaney that the only responsibility in relation to expenditure he had was that if an organiser rang up to seek authorisation to take delegates to lunch and use their credit card, he was allowed to authorise that expenditure.

516 Derrick Belan, 10/11/15, T:450.22-32.

517 Derrick Belan, 10/11/15, T:450.23-451.11.

518 Derrick Belan, 10/11/15, T:504.28.

519 Derrick Belan, 10/11/15, T:508:33.
348. In his written submissions in response, Derrick Belan contended that there was a system of governance for the financial management of the NUW NSW. He referred to a limit of $2000 on MasterCards. He referred to AMEX statements which included item by item descriptions of purchases. He said officials were told what credit cards could be used for and were otherwise to seek approval from Derrick Belan or Wayne Meaney. He said the bookkeeper Danielle O’Brien checked purchases on credit cards and made notations on the statements about various purchases. He said she would prepare a summary of AMEX purchases for review by Derrick Belan or Wayne Meaney for payment. He said a financial report by the bookkeeper was prepared every month for the BCOM for their review, including a printout of the general ledger of outgoing expenses. He stated that accounts were audited by external auditors and an auditor/accountant attended the NUW premises every 6 weeks to ‘oversight and assist the bookkeeper’. He said staff other than Danielle O’Brien were involved in the MYOB entries and preparation of the financial report for the BCOM. Cheques had to be countersigned by two signatories. Later, there was the use of ‘a token’ to authorise electronic funds transfers.

349. Derrick Belan contended that while the evidence of what was presented to the BCOM meetings was inconsistent, statements of financial expenditure were made available to the BCOM members for

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520 Derrick Belan, 10/11/15, T:508.9-11.
521 Submissions of Derrick Belan, 30/11/15, para 36.
their consideration and approval. He noted that the Commission did not call the witness who prepared the BCOM meetings folders nor did it seek the production of the folders.522

350. In response, counsel assisting submitted that those who were in attendance at the BCOM meetings, particularly the President (who chaired the meetings), the Secretary and the Assistant Secretary, should have been in position to give an accurate account as to what was presented to the BCOM, or at the least the general practice.523

351. Both Marilyn Issanchon and Wayne Meaney gave evidence in relation to this matter. Relevantly, Marilyn Issanchon stated that BCOM reviewed ‘a finance sheet’ prepared by Danielle O’Brien.524 Similarly Wayne Meaney stated that as a member of the BCOM he would ‘look through the list of the finances and then pass them’.525 It appears that by ‘the list of the finances’ he was referring to a general ledger printout, as later in his oral testimony he explained that the BCOM was provided with a general ledger showing the outgoings, with, for example, American Express as a one line item.526

352. Neither Marilyn Issanchon nor Wayne Meaney were able to confirm that the BCOM had been provided with the underlying/source documents.527 Marilyn Issanchon said that she, personally, had not

522 Submissions of Derrick Belan, 30/11/15, para 41.
523 Submissions of Counsel Assisting, 4/12/15, para 42.
526 Wayne Meaney, 10/11/15, T:442.1-5, T:442.23-443.3.
checked credit card statements.\textsuperscript{528} Similarly, Wayne Meaney denied ever looking at any of the MYOB records or any of the credit card statements or anything of that nature.\textsuperscript{529} In those circumstances, it can be inferred that it was unlikely that underlying or source material was provided to members of the BCOM.

353. Derrick Belan submitted\textsuperscript{530} that the State Secretary was ‘entitled to operate from the assumption that the auditors were providing oversight and cross-checking of the bookkeeper’s entries and accounts’. At the same time, however, his submissions\textsuperscript{531} conceded that he accepted that, as the State Secretary, he had to bear responsibility for many of the failures in the governance processes, and he had apologised to members for the breakdown and laxness in the processes of governance.

354. In response, counsel assisting submitted\textsuperscript{532} that the so-called ‘system of governance’ referred to was not in truth such a system at all. Further, in any event, the steps set out failed to provide the type of meaningful oversight which would have prevented the problems studied in this Chapter from arising.

\textsuperscript{528} Marilyn Issanchon, 6/11/15, T:367.21.
\textsuperscript{529} Wayne Meaney, 6/11/15, T:381.17-19.
\textsuperscript{530} Submissions of Derrick Belan, 30/11/15, para 44.
\textsuperscript{531} Submissions of Derrick Belan, 30/11/15, paras 7, 8.
\textsuperscript{532} Submissions of Counsel Assisting, 4/12/15, para 40.
355. The submissions of the NUW NSW acknowledged that the hearings have clearly identified very serious governance failures within the organisation recent years.  

356. What of Marilyn Issanchon’s responsibility for governance failures? She contended that the position of the President is an honorary one which carries limited practical authority other than that which arises from the obligation to chair meetings. She contended that she had no authority and no involvement in relation to financial matters other than chairing meetings of the BCOM. She contended that cannot form a basis for any finding that she may have contravened section 285 of the FW(RO) Act.  

357. In response to this submission, counsel assisting contended that the rules of the union tend to indicate that the State President has duties in addition to simply chairing meetings. The rules imply that the State President has, at least to some extent, a role in governance more generally. For instance, cl 19.1 of the State Rules listed the duties of the State President and included, among other things, an obligation to:

(a) give an impartial decision on all questions submitted to the State President;

(b) attend to audits of the Union’s accounts whenever it is possible to do so; and

533 Submissions of the NUW, 28/11/15, para 4.
534 Submissions of the NUW, 28/11/15, paras 41-42.
358. Marilyn Issanchon, as State President, was required to not only have a working knowledge of the rules of the union, but also to ensure that the rules were administered impartially. The rules also required her to have a familiarity with the union’s accounts, including as a member of the ‘Finance Committee’ whose role was to advise the BCOM on all matters concerned with finance.

359. Wayne Meaney contended that counsel assisting’s submission that he may have contravened s 285 of the FW (RO) Act should not be acceded to. He submitted that NUW NSW had its accounts audited each year as required by both state and federal legislation. Its accounts were lodged with the relevant industrial authorities as required. He argued that taking into account their positions in the organisation, both he and Marilyn Issanchon were entitled to expect that those auditors were doing their job properly. He noted that the rules of the organisation (both federal and state) placed a great deal of power and authority in the Secretary as to the manner in which he or she runs the organisation on a daily basis. It was further contended that the Assistant Secretary has duties which essentially amount to being an ‘adjutant’ to the Secretary with no independent authority within the rules to exercise separately any control over the functions of organisation. It was contended that Wayne Meaney clearly had no authority to deal with financial matters. It was argued that it is unclear as to why or how Wayne Meaney could be held to account by being

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537 Submissions of Counsel Assisting, 8/11/15, para 243.
538 Submissions of the NUW, 28/11/15, paras 37-40.
charged with failure to do something which the rules did not allow or authorise him to do.

360. It will have been noticed that one of Derrick Belan’s testimonial tactics was to spread the blame for what has happened as thickly and widely as possible. Thus in response to this submission on behalf of Wayne Meaney, Derrick Belan submitted that Wayne Meaney was a person from whom other officials could seek approval for financial expenditure and was a member of the BCOM where accounts were presented for the consideration of the BCOM members. The minutes showed that, from time to time, he presented the accounts to the BCOM members for approval. 539

361. Counsel assisting also responded to the submission 540 made on behalf of Wayne Meaney by contending that it failed to address the fact that Wayne Meaney was part of the BCOM which, under the rules, had a critical role in the management of the branch. 541 As Assistant Secretary, Wayne Meaney was a senior member of the branch as well as being a member of the BCOM.

362. It was further noted by counsel assisting that Wayne Meaney clarified his oral testimony that the BCOM ‘endorsed’ the terms of the deed. 542 His evidence is clarified to the extent that the actual terms of the Deed (entered into by him on behalf of the NUW NSW) were not before the BCOM, rather, it was only ‘explained’. This suggested that the Deed

539 Submissions of Derrick Belan, 3/12/15, para 11.
540 Submissions of Counsel Assisting, 4/12/15, para 9.
541 Submissions of Counsel Assisting, 18/11/15, paras 240, 242.
was not properly before the BCOM and any approval by the BCOM may not have been fully informed.

363. It should be noted that in the time available it has not been possible to examine the role of the NUW NSW auditors. It is plain that the failure to detect the credit card misuse and other conduct prior to the Commission’s inquiries bringing it to light indicates that the auditing processes may have been deficient. Their role warrants further investigation.

364. Counsel assisting contended that it is obvious that the governance of the NUW NSW has been seriously deficient in a number of respects for a number of years.

365. The submission of counsel assisting is accepted. She also submitted that Derrick Belan, Wayne Meaney and Marilyn Issanchon may have contravened s 285 of the FW(RO) Act. That submission is correct. (The same, incidentally, is true of other BCOM members, but they have not been heard, and the three named were the most senior officials.) Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against Derrick Belan for pecuniary penalty orders in relation to possible contraventions of s 285 of the Fair Work (Registered Organisations Act) 2009 (Cth) concerning the general governance of the union. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the
Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against Wayne Meaney for pecuniary penalty orders in relation to possible contraventions of s 285 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) in concerning the general governance of the union. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against Marilyn Issanchon for pecuniary penalty orders in relation to possible contraventions of s 285 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) concerning the general governance of the union.

**K – FINDINGS**

366. Counsel assisting correctly submitted that it is clear from the evidence that there has been a grave failure of governance in the NUW NSW. In turn, that allowed apparently criminal conduct to go undetected for a period of years. This failure of governance stemmed from a breakdown in the functioning of the two critical organs of the Branch which were responsible for the supervision of expenditure of the Branch funds: the Secretary and the BCOM. Counsel assisting further stated that the apparently inability of the union’s National Office to detect the problems and intervene until these problems came to light during the Commission’s investigation is also of profound concern.

367. The factors responsible for the breakdown are not entirely clear. But counsel assisting correctly contended that the following overlapping matters contributed to the problem:
(a) the unhealthy devolution of power into the Secretary’s hands, whether under the Rules or as a matter of practice, without appropriate checks and balances;

(b) the lack of clarity between and within the State and National Rules as to the roles of the Secretary and the BCOM;

(c) the abrogation of responsibility by members of the BCOM in a manner leaving the Secretary’s actions effectively unchecked;

(d) the personal problems of the Secretary exacerbated by the lack of any effective recognition of or response to them by the BCOM;

(e) the employment by the Secretary of a family member in a position for which she was not qualified;

(f) the failure effectively to apply policies and procedures governing credit card expenditure; and

(g) the failure to prevent, eliminate or regulate wrong practices including the signing of cheques in bulk in advance and the provision of electronic banking tokens to one person rather than two.

368. In relation to the misuse of union credit cards, Danielle O’Brien may have committed offences against ss 117, 156 and/or 192E of the Crimes Act 1900 (NSW). The matter has been referred to the New
South Wales Commissioner of Police and the Director of Public Prosecutions for New South Wales for further investigation.

369. In relation to the misuse of union credit cards, Nick Belan may have committed offences against ss 117, 156 and/or 192E of the *Crimes Act* 1900 (NSW) and ss 267 and 268 of the *Industrial Relations Act* 1996 (NSW), and may have contravened ss 285, 286 and 287 of the FW(RO) Act. The matter has been referred to the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales, the Executive Director of New South Wales Industrial Relations for further investigation and the General Manager of the Fair Work Commission.

370. In relation to the misuse of union credit cards, Derrick Belan may have committed offences against ss 117, 156 and/or 192E of the *Crimes Act* 1900 (NSW) ss 267 and 268 of the *Industrial Relations Act* 1996 (NSW) and ss 285, 286 and 287 of the FW(RO) Act. The matter has been referred to the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales, the Executive Director of New South Wales Industrial Relations and the General Manager of the Fair Work Commission for further investigation.

371. The issue of possible inappropriate union credit card use by Wayne Meaney has been referred to the General Manager of the Fair Work Commission, the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales and the Executive Director of New South Wales Industrial Relations for further investigation.
372. In relation to the arrangement with Paul Gibson, Derrick Belan may have contravened ss 285, 286 and 287 of the FW(RO) Act and s 268 of the *Industrial Relations Act 1996* (NSW). The matter has been referred to the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales, the Executive Director of New South Wales Industrial Relations and the General Manager of the Fair Work Commission for further investigation.

373. In relation to the negotiation of the severance terms with Derrick Belan, both Derrick Belan and Wayne Meaney (as the signatory to the Deed on behalf the NUW NSW) may have contravened ss 285, 286 and 287 of the FW(RO) Act and s 268 of the *Industrial Relations Act 1996* (NSW). The matter has been referred to the New South Wales Commissioner of Police, the Director of Public Prosecutions of New South Wales, the Executive Director of New South Wales Industrial Relations and General Manager of the Fair Work Commission.

374. Finally, the significant failures of governance within the NUW NSW in recent years lead to the conclusion that Derrick Belan, Wayne Meaney and Marilyn Issanchon may have contravened s 285 of the FW(RO) Act. The matter has been referred to the General Manager of the Fair Work Commission.
APPENDIX 1

Holiday Payments identified on Danielle O'Brien’s CBA MasterCard statements (account number 5550 XXXX XXXX 0037) for the period 1 November 2010 to 21 March 2015.

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<th>Amount</th>
<th>Royal Commission Categorisation</th>
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APPENDIX 2

iTunes transactions identified on Danielle O’Brien’s CBA MasterCard statements (account number 5550 XXXX XXXX 0037) for the period 1 November 2010 to 21 March 2015.

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APPENDIX 3

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**Total** $2271.70
APPENDIX 4

Notices to Produce issued to the National Union of Workers and Derrick Belan

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<td>1788</td>
<td>Derrick Belan Requiring: financial records and correspondence concerning the operation of any fund or account.</td>
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<td>1935</td>
<td>National Union of Workers, NSW Branch Requiring: employment and remuneration details of officers and staff of the NUW NSW; documents concerning the Ultimate training centre; documents concerning union credit card expenditure.</td>
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<td>National Union of Workers, NSW Branch Requiring: documents concerning payments to Paul Gibson.</td>
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<td>1981</td>
<td>National Union of Workers (National Office) Requiring: documents concerning employment of Officers of the NUW NSW; any guideline or policy for expenditure of funds of NUW NSW.</td>
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<td>National Union of Workers, NSW Branch Requiring: copy of agreement covering employment of officials and staff of NUW NSW – referred to in BCOM minutes on 15 July 2013.</td>
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541 NUW MFI-37, 17/11/15, pp 1, 10, 17, 26, 34, 41, 63, 73, 81, 88.
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PART 5: HEALTH SERVICES UNION

CHAPTER 5.1

THE PETER MAC SETTLEMENT

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<td><strong>A – OUTLINE</strong></td>
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<td><strong>B – RESOLUTION OF THE INDUSTRIAL DISPUTE</strong></td>
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<td>relating to underpayment</td>
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<tr>
<td>HSU and Peter Mac enter into a Memorandum of Understanding</td>
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<tr>
<td>HSU seeks ‘compensation’ from Peter Mac</td>
<td>7</td>
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<td>Peter Mac employees told about payment to HSU?</td>
<td>10</td>
</tr>
<tr>
<td>HSU and Peter Mac enter into a Deed of Release</td>
<td>12</td>
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<tr>
<td>HSU itemised statement of expenses</td>
<td>16</td>
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<tr>
<td>Peter Mac pays HSU $250,000</td>
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<td><strong>C – LEGAL ISSUES ARISING FROM THE SETTLEMENT</strong></td>
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<td>between the HSU and Peter Mac</td>
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<td>Obtaining property or a financial advantage by deception</td>
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A – OUTLINE

1. The Peter MacCallum Cancer Centre (Peter Mac), as its name suggests, is an institute which conducts research into cancer. It fell into industrial disputation with its employees (the industrial dispute). The industrial dispute arose from alleged breaches of various industrial instruments leading to a substantial underpayment of research technologists (or researchers) employed by Peter Mac (the affected employees). The claim in the dispute was described by Katherine Jackson, correctly, as having a twin character – a claim on behalf of employees for unpaid wages, and a claim on behalf of the union for penalties in respect of breaches of the industrial instruments. \(^1\) In 2003 the industrial dispute was settled.

2. Katherine Jackson was at the time of the Secretary of the HSU Victoria No 3 Branch (the Victoria No 3 Branch). She played a key role in the settlement of the industrial dispute. As part of that settlement, in a Deed of Release, she negotiated a payment to the HSU of up to $250,000 to cover legal and ‘other’ expenses the HSU had supposedly incurred in the course of resolving the dispute, and ‘future expenses’ it

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\(^1\) Submissions of Katherine Jackson, 14/11/14, paras 115, 159.
supposedly expected to incur in connection with implementing the settlement. Peter Mac agreed to pay up to that amount upon presentation of an ‘itemised statement’.

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

4. The Committee of Management of the Victoria No 3 Branch (the BCOM), of which Katherine Jackson was a member, then apparently earmarked the ‘Peter Mac money’, as some within the Branch referred to it, for expenditure principally on activities to ‘advance the interests of the union’. How those funds were dealt with is the subject of Chapter 5.2.

5. This Chapter deals with the circumstances leading to the payment of the Peter Mac money.

B – RESOLUTION OF THE INDUSTRIAL DISPUTE RELATING TO UNDERPAYMENT

HSU and Peter Mac enter into a Memorandum of Understanding

6. Counsel assisting put the following submissions about events up to the Deed of Release. On 21 March 2003, the HSU and Peter Mac entered into a Memorandum of Understanding (MoU) relating to the resolution
of the industrial dispute.\textsuperscript{2} They agreed to negotiate an enterprise agreement that would ‘provide a new and agreed classification structure and rates of pay and conditions for Peter MacCallum Cancer Centre Research Technologists’. The agreement was to be put to Peter Mac staff ‘for consideration and, if approved by vote of the staff, would become a registered Agreement’.\textsuperscript{3} The parties to the MoU also agreed ‘not to instigate any claims for retrospective payment for pay and conditions’.\textsuperscript{4}

**HSU seeks ‘compensation’ from Peter Mac**

7. Around June 2003, the HSU Victoria No 3 Branch ‘raised the matter of compensation being paid directly to the union as part of the overall settlement of the compliance issue’.\textsuperscript{5} On 8 July 2003, Dr David Hillis (Chief Executive Officer of Peter Mac), Brian Cook (a human relations consultant) and Rohan Millar (a barrister) provided an update to the Peter Mac Board on ‘initiatives to finalise the acceptance of the Single Employer Certified Agreement (SECA) relating to the payment issues of Research staff’.\textsuperscript{6} The minutes of the Board meeting note that the HSU Victoria No 3 Branch had ‘raised several key concerns the majority of which have been responded to at a senior management

\textsuperscript{2} Jackson MFI, 30/7/14, Vol 3, p 895. See also Katherine Jackson, 30/7/14, T:376.39-42.  
\textsuperscript{3} Jackson MFI, 30/7/14, Vol 3, p 895.  
\textsuperscript{4} Jackson MFI, 30/7/14, Vol 3, p 896.  
\textsuperscript{5} Brian Cook, witness statement, 27/8/14, para 12. See also statutory declaration of David Hillis, 27/8/14, attached transcript T:11.42-12.5.  
\textsuperscript{6} Jackson MFI, 30/7/14, Vol 3, p 831. See also statutory declaration of David Hillis, 27/8/14, T:12.35-14.23.
An issue which remained ‘outstanding’ was ‘the Deed of Release and a payment to the HSUA #3 in respect of their legal costs and time impost on union officials’.8

On 22 July 2003, there was a ‘special meeting’ of the Peter Mac Board.9 The meeting had been called to ‘consider a proposed Deed of Release’ between Peter Mac and the HSU Victoria No 3 Branch ‘relating to payment issues of Research staff’.10 In a memorandum to the Board, dated 22 July 2003, Dr David Hillis said: ‘HSUA #3 are now agitated over delays in the process and have indicated commencement of Federal Court action [to pursue penalties for breaches of industrial instruments] by Thursday 24 July unless the Deed issues are resolved.’11

At the 22 July meeting, the Board was ‘unanimous in its view that should there be a payment made to the HSUA #3 that there is transparency and disclosure of information and that staff are to be advised of this fact prior to a vote on the SECA.’12 The Board relevantly resolved:13

Negotiations to continue with the HSUA #3 on the option of Peter Mac paying HSUA #3 expenses up to a maximum of $250,000[.]

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7 Jackson MFI, 30/7/14, Vol 3, p 831.
8 Jackson MFI, 30/7/14, Vol 3, p 831.
9 Jackson MFI, 30/7/14, Vol 3, p 833. See also statutory declaration of David Hillis, 27/8/14, T:14.30.
10 Jackson MFI, 30/7/14, Vol 3, p 833.
11 Jackson MFI, 30/7/14, Vol 3, p 874.
12 Jackson MFI, 30/7/14, Vol 3, p 834.
13 Jackson MFI, 30/7/14, Vol 3, p 834.
In the event of a payment being made to the HSUA #3 that staff will be advised of the payment.

An itemised statement is to be provided by the HSUA #3 outlining the expenses associated with the payment of up to $250,000.

…

Any payment to the HSUA #3 is conditional on the successful voting on of the SECA by Peter Mac staff and the successful certification of the SECA in the AIRC.

…

An updated Deed of Release to be prepared incorporating confidentiality between Peter Mac and the HSUA #3 save that Peter Mac will make disclosure of the amount and purpose of the payment of up to $250,000 to its staff.

Peter Mac employees told about payment to HSU?

10. On 9 September 2003, Dr David Hillis, Dr Heather Wellington, Katherine Jackson and Erryn Creshull attended a meeting with research staff at which ‘staff were advised of initiatives to progress the SECA and the resolution of the underpayment of Research staff.’¹⁴ At the meeting, the ‘staff were advised that agreement was required to three (3) key documents in order to resolve this issue’.

1. SECA
2. Deed of Release (Peter Mac and Research Staff)
3. Deed of Release (Peter Mac and HSUA #3)


¹⁵ Jackson MFI, 30/7/14, Vol 3, p 836.
11. The fact that Peter Mac proposed to reimburse the HSU for its costs was discussed at the 4 September meeting, according to Dr David Hillis’s evidence. However, Dr Hillis could not recall whether the ‘specifics’ of the proposed payment to the union were disclosed. Dr Heather Wellington had a ‘very strong sense that there was discussion’ of the payment at the 4 September meeting. Katherine Jackson also recalled that the payment was disclosed at the meeting.

**HSU and Peter Mac enter into a Deed of Release**

12. On 9 September 2003, the Board agreed to affix the Peter Mac seal to a Deed of Release between Peter Mac and the HSU. On that day, the HSU and Peter Mac executed a Deed of Release. It relevantly recited that the HSU alleged Peter Mac had breached various industrial instruments. It recited that Peter Mac denied those allegations. And it recited that in ‘negotiating’ a proposed single employer certified agreement, the ‘HSUA has incurred, and will continue to incur, significant expenses, both internally and externally, for which the HSUA seeks payment from the Peter Mac.’

13. Within seven days of certification of the single employer certified agreement – the SECA – the HSU agreed to provide to Peter Mac an

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18 Katherine Jackson, 30/7/14, T:386.3.
19 Jackson MFI, 30/7/14, Vol 3, p 837.
20 Jackson MFI, 30/7/14, Vol 1, p 37.
‘itemised statement of its legal expenses and other expenses and expected future expenses incurred in relation to the matters referred to in the Recitals and the preparation of the Certified Agreement’. Peter Mac agreed to pay the ‘total sum disclosed in the statement’ provided the sum did not exceed $250,000.\(^{21}\) In Dr Heather Wellington’s view, the $250,000 maximum payment the Board agreed to pay the HSU was not ‘an unrealistic estimate for the sort of effort that was put into the negotiation process’ by the HSU.\(^{22}\)

14. In consideration of that payment, the HSU released and discharged Peter Mac:\(^{23}\)

from all suits, demands, losses and causes of action in relation to or arising from the alleged breaches [of the industrial instruments], including (but not limited to) any claims for alleged underpayment of wages, and any claims for alleged underpayment of wages, and any claims for breach of any award or certified agreement that allegedly occurred prior to that date of certification of the proposed certified agreement.

15. Further, the HSU agreed not to ‘encourage or assist its members to take up any cause of action in relation to or arising from the alleged breaches [of the industrial instruments]’ and agreed also not to assist ‘in any such action, if brought.’\(^{24}\)

\(^{21}\) Jackson MFI, 30/7/14, Vol 1, p 38.

\(^{22}\) Heather Wellington, witness statement, 28/8/14, para 76.

\(^{23}\) Jackson MFI, 30/7/14, Vol 1, p 38.

\(^{24}\) Jackson MFI, 30/7/14, Vol 1, p 38.
HSU itemised statement of expenses

16. On 22 October 2003, Katherine Jackson wrote to Dr David Hillis, enclosing an itemised statement of the HSU’s legal expenses, other expenses and expected future expenses. Katherine Jackson admitted that the HSU had not in fact incurred solicitors’ costs in that amount. The actual costs the HSU incurred were $1,122. Katherine Jackson admitted that she inflated the figure of $1,122 to $65,740 because she wished to claim a total in excess of $250,000. Doing that would secure the HSU’s entitlement to $250,000 under the Deed of Release.

17. The total given in Katherine Jackson’s letter for ‘expected future costs’ was $89,460. Katherine Jackson admitted that these ‘expected future costs … did not reflect a true claim for expected future costs’. She had ‘picked that figure of $89,460 to bring the total of the amount claimed to an amount in excess of … $250,000’.

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25 Jackson MFI, 30/7/14, Vol 1, pp 97-98.
26 Jackson MFI, 30/7/14, Vol 1, p 98.
27 Katherine Jackson, 28/8/14, T:786.36-787.6.
28 Toby Borgeest, witness statement 27/8/14, para 16 and Annexure C. See also Toby Borgeest, 27/8/14, T:690.36-45.
29 Katherine Jackson, 28/8/14, T:787.8-11.
30 Jackson MFI, 30/7/14, Vol 2, p 98.
31 Katherine Jackson, 28/8/14, T:788.3-6.
32 Katherine Jackson, 28/8/14, T:788.8-11.
18. Dr David Hillis did not ask Katherine Jackson to provide materials to substantiate the expenses which she represented the HSU had incurred or to provide a breakdown for expected future expenses. He gave evidence that he was ‘confident’ at the time that the HSU’s expenses were ‘real’. In particular, the figures relating to the expenses the HSU had already incurred did not appear to him to be ‘disproportionate’; they seemed ‘reasonable’. Dr Heather Wellington also gave evidence that she had considered that the $250,000 maximum amount the Peter Mac Board agreed to pay the HSU was a ‘reasonable estimate of what was likely to have been incurred’ by the HSU, particularly having regard to the length of the dispute and the costs that Peter Mac had itself incurred in its resolution.

19. Despite the recitals in the Deed of Release, the Peter Mac Board considered the payment to the HSU a ‘settlement of a valid claim that the union had against’ it for alleged breaches of various industrial instruments. But Dr Heather Wellington did not accept that the amount included a component ‘notional or otherwise’ for the union not pursuing penalties (or, as they were sometimes described, ‘fines’).

20. Katherine Jackson said that the settlement between Peter Mac and the HSU was expressed to cover legal, other and expected future expenses to render the settlement of the industrial dispute more ‘palatable’ to the

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34 Statutory declaration of David Hillis, 27/8/14, T:29.6.
35 Statutory declaration of David Hillis, 27/8/14, T:27.34-45.
36 Heather Wellington, 28/8/14, T:856.40-857.5.
37 Heather Wellington, 28/8/14, T:856.42-43, 858.5-12.
Peter Mac Board.³⁹ She said the HSU gave Peter Mac a ‘dressed-up’ letter for ‘comfort and cover’.⁴⁰ By that she meant her letter of 22 October 2003. Katherine Jackson added that Peter Mac did not ‘want to be exposed to penalties, and the union at that time did give Peter Mac cover and comfort that they weren’t going to go back to their board to say they’d stuffed it up, and that is how it all settled’.⁴¹

21. Katherine Jackson recounted a conversation with Brian Cook during which she claims he said words to the effect:⁴²

We understand that if this dispute isn’t settled we have to deal with both the employees’ claims for outstanding entitlements and the union’s claim for penalties. However, the Board does not want the reputation of Peter Mac damaged by any public acknowledgment of its breaches or acknowledgment that it would have been liable to pay fines. That is not a good look with the donors. We are happy to negotiate a settlement with the union for its claims over and above whatever is agreed with the employees, but we would like to characterise the payment as reimbursement of expenses.

If this was said, Brian Cook was making the point that the income of Peter Mac depended heavily on the generosity of donors.

22. According to Katherine Jackson, she replied to Brian Cook in the following words:⁴³

You can call it what you like. But don’t think that the members won’t understand what has happened. We have explained the situation to them

³⁹ Katherine Jackson, 30/7/14, T:397.13-14, 398.5-8.
⁴⁰ Katherine Jackson, 30/7/14, T:416.33-35.
⁴¹ Katherine Jackson, 30/7/14, T:416.9-13.
⁴² Katherine Jackson, witness statement, 28/8/14, para 144.
⁴³ Katherine Jackson, witness statement, 28/8/14, para 144.
and they realise that if the dispute isn’t settled we will be going for fines as well as their entitlements.

23. Brian Cook denied saying words to the effect attributed to him by Katherine Jackson. When asked if she replied to him in the terms just set out, he said: ‘No, I don’t recall that.”

24. Katherine Jackson also gave evidence that she recalled having ‘similar discussion with other members of Peter Mac management and the BCOM about this request’. Further, she said that near the ‘end of the negotiating period Mr Cook said words to the effect: “Could you please send us a list of expenses [so] that we can pay you the agreed settlement figure.”’ Brian Cook recalled having a conversation with Katherine Jackson about the HSU’s ‘expenses’, but said that the conversation would have been ‘back in June when Peter Mac had asked for details’ of the expenses.

25. Finally, Katherine Jackson said:

The Peter Mac Institute paid the union $250,000 as it was a fair and moderate estimate of a possible fine the court may have imposed on Peter Mac for its negligence in breaching its awards. In exchange the Union did not pursue the claim for which there was no defence. The union’s expenses were real, the Deed was a legal agreement and it contains statements of truth – but underlying the way the payment was styled was the knowledge both parties had that should the matter not be settled by negotiation, the

44 Brian Cook, 27/8/14, T:695.19-696.18.
45 Katherine Jackson, witness statement, 28/8/14, para 145.
46 Katherine Jackson, witness statement, 28/8/14, para 147.
47 Brian Cook, 27/8/14, T:697.2-5 and see earlier T:696.28-36. See also Brian Cook, witness statement, 27/8/14, para 18.
48 Katherine Jackson, witness statement, 28/8/14, para 149.
Act provided for significant potential penalties to be levied on … Peter Mac and paid to the union.

26. Katherine Jackson’s evidence was thus that those representing Peter Mac in fact knew that the amount claimed was not a genuine reimbursement of costs that the union had incurred, and reasonably expected to incur. If accepted, the evidence would negate any deception of the Peter Mac officers, because they would have known that the true position was as Katherine Jackson said, and that the Deed of Release did not correspond with the truth. However, Katherine Jackson’s evidence cannot be accepted. It is inconsistent with the available documentary evidence, Dr David Hillis’s evidence, 49 Dr Heather Wellington’s evidence, 50 and Brian Cook’s evidence. 51

27. So much for the submissions of counsel assisting on events up to the Deed of Release. 52

28. Those submissions are fortified by the following considerations. There is no reason to disbelieve Brian Cook’s evidence that he never met

49 Statutory declaration of David Hillis, 27/8/14, T:30.29-32.38.
51 Brian Cook, 27/8/14, T:695.19-696.18, 697.2-5 and see earlier T:696.28-36. See also Brian Cook, witness statement, 27/8/14, para 18.
52 A submission was received from a person who did not seek any authorisation to appear and who gave no evidence. The submission states that it draws no conclusions, but merely asks questions. In fact it does draw some conclusions as well as asking questions. Much of the submission depended on evidentiary material not before the Commission. The submission is hostile to Katherine Jackson, but also makes serious allegations against various people who were not given the opportunity to deal with them in the witness box. As the writer of the submission accepts, the submission is contrary to sworn evidence. That evidence is accepted in this Report. In these circumstances the Report will not deal with the submission.
Katherine Jackson alone. As Brian Cook’s counsel pointed out, senior counsel for Katherine Jackson did not cross-examine Brian Cook. It may be that that was not necessary as a matter of fairness, but it is harder to reject the evidence of someone on whom no damage has been inflicted in cross-examination. In contrast to the position with Brian Cook, senior counsel for Katherine Jackson did cross-examine Dr Heather Wellington. He did so with skill and firmness. But he did not achieve success.

29. Dr David Hillis gave evidence by statutory declaration because he was overseas. It was indicated that if anyone wished to cross-examine him and gave notice of that desire, an arrangement would be made for that to happen. No notice was given. It might also be pointed out that Katherine Jackson gave no date or place or context for the conversation she alleges she had with Brian Cook. She gave no date or place or context for the ‘similar discussions with other members of Peter Mac management and the BCOM’.

30. What submissions were put to the contrary of those advocated by counsel assisting?

31. Katherine Jackson contended that the ‘Commission should seek to obtain a copy of [a draft Deed of Release] with comments before any

53 Brian Cook, witness statement, 27/8/14, para 32.
54 Submissions of Brian Cook, 21/11/14, para 3.
55 Brian Cook, 27/8/14, T:697.30-32.
56 Statutory declaration of David Hillis, 27/8/14.
57 Statutory declaration of David Hillis, 27/8/14; 27/8/14, T:744.14-34.
58 Submissions of Katherine Jackson, 14/11/14, para 130.
adverse finding could fairly be made against’ her. That submission was made on 14 November 2014. Two notices to produce dated 22 July 2014 addressed respectively to the Peter MacCallum Institute and to Service Industry Advisory Group had already been served. No document answering the description in Katherine Jackson’s submission was produced.\textsuperscript{59} It does not appear to exist.

32. Katherine Jackson’s arguments against counsel assisting are lengthy. But they boil down to one proposition. The Deed of Release conferred on the HSU an entitlement of up to $250,000 for legal expenses, other expenses, and expected future expenses. But Katherine Jackson submitted that that was not the \textit{actual} agreement. The \textit{actual} agreement was that Peter Mac would pay the HSU up to $250,000 in consideration for the HSU not pursuing a claim against Peter Mac for penalties as a result of Peter Mac’s alleged breaches of industrial agreements which had led to a substantial underpayment of Peter Mac employees. According to Katherine Jackson, her version of the actual agreement is the only plausible explanation.

33. The heart of her submission was put thus:\textsuperscript{60}

\begin{itemize}
  \item \textbf{(a)} the Union’s causes of action against Peter Mac in relation to the Award Breaches – both on behalf of employees in respect of the Employee Back-Pay, and on its own behalf in respect of the Union Penalties Claim – were causes of action under s. 178 of RAO Schedule to the \textit{Workplace Relations Act 1996} (\textbf{WR Act});
  
  \item \textbf{(b)} any penalties were likely payable to the Union as a moity (cf s. 357 \textit{WR Act});
\end{itemize}

\textsuperscript{59} Submissions of Counsel Assisting, 25/11/14, paras 51-53.

\textsuperscript{60} Submissions of Katherine Jackson, 14/11/14, paras 159-161.
(c) there was no prospect that the union could recover legal costs against Peter Mac in any such proceedings because the relevant jurisdiction is effectively a “no costs” jurisdiction: see the limitation on the ordering of costs in s 347 of the WR Act;

(d) there is no cause of action known to the law pursuant to which a union can sue to recover from an employer the costs associated with time spent by Union officials in relation to an industrial dispute or the negotiation or implementation of a statutory enterprise agreement;

(e) in particular, there was no cause of action by which the Union could have recovered from Peter Mac the expenses referred [to] in clause 1 of the Deed of Release;

(f) it follows that the only legal exposure Peter Mac had to the Union in its own right was in respect of the Union Penalties Claim;

(g) the Deed of Release provided a release in respect of the Union Penalties Claim. On any view, the payment to the Union provided for in the Deed of Release was part of the consideration given by Peter Mac to the Union in return for that release; and

(h) the settlement amount paid was not more than 10% of the value of the Award Breaches – a realistic and commercial amount if the payment was in truth referrable to the Union Penalties Claim that was being settled.

(i) at all material times Peter Mac engaged professional industrial law advisors.

Neither Ms Jackson nor the Vic 3 Branch had any reason to seek or insist upon a payment characterised as a reimbursement of expenses as opposed to a simple payment of a specific amount made in consideration of granting a release to Peter Mac in respect of the Union Penalties Claim.

Crucially, there was no advantage that accrued to Ms Jackson or the Vic 3 Branch from characterising the settlement payment to the Union as referable to the Union’s expenses in the manner done in clause 1 of the Deed of Release – other than because Peter Mac, through its lead negotiator, wanted the agreed “quantum” characterised in that way and because agreeing to that request would assist in achieving the settlement.

(emphasis in original)

34. These submissions must be rejected for the following reasons.
35. The mere fact that the legal and other expenses of the HSU were not recoverable, or were very difficult to recover, at law does not negate the possibility that they were the subject of the settlement. Litigation is often settled by giving to parties advantages they could not have obtained from a court or tribunal order in the proceedings themselves.

36. The fact that Peter Mac could have reached agreement with the HSU on different terms does not refute the submissions of counsel assisting. No doubt Peter Mac and the HSU could have entered into an agreement that provided for Peter Mac to pay the HSU a specified amount not calculated by reference to legal expenses and without admission of liability in consideration for the HSU not pursuing its claim. The fact that the parties did not execute a deed in those terms does not provide any reason for doubting the proposition that the agreement that was actually reached corresponded with the terms of the Deed of Release. Peter Mac and the HSU could have settled their dispute in several ways. They chose to settle it in one particular way. The best evidence of the agreement they in fact reached is the Deed of Release itself. Solemn documents of that kind are only to be set aside or called in question by the clearest evidence. The only evidence which could be used as a basis for doing that is that of Katherine Jackson. It is not convincing evidence.

37. Contrary to what Katherine Jackson submitted, Peter Mac was not the only party that was ‘advantaged by [the] characterisation’ of the Deed of Release as a reimbursement of expenses rather than as a payment of an amount in settlement of a legal claim. The background to the agreement between Peter Mac and the HSU is that the Peter Mac employees who had been underpaid received no back pay. An ex
*gratia* payment to the HSU of a general kind not made referable to legal and other expenses may well have been likely to generate resentment amongst the underpaid employees who had received no monetary recompense in the settlement.

38. One other argument of Katherine Jackson was put thus:61

> It is odd that, approaching the settlement commercially, the upper limit of the settlement amount could have been agreed and paid before there was any provision of the supporting information to justify the amounts claimed by the Union.

39. But is this odd? A party acting commercially might well wish to be certain about its potential liability. Setting an upper limit achieved certainty. There is no reason to doubt Dr Heather Wellington’s evidence that the $250,000 maximum amount was understood by Peter Mac as a reasonable estimate of what as likely to have been incurred by the HSU. The whole point of selecting an upper limit is that it forestalled the need to supply supporting information.

40. Katherine Jackson’s submissions proceed in part by reference to seemingly close documentary analysis coupled with various dark suggestions. But the documents actually do nothing to support Katherine Jackson’s essential thesis – that the agreement as recorded in the Deed of Release was totally different from the actual agreement. There is no satisfactory basis for concluding that the Peter Mac officers knew that the actual costs and expenses could not possibly have reached $250,000.

61 Submissions of Katherine Jackson, 14/11/14, para 175.
41. Katherine Jackson submitted that the union’s actual costs and expenses could not possibly have reached $250,000. If so, the Deed of Release must be characterised as, to the union’s knowledge but not Peter Mac’s, one which involved a bogus element. It highlights the deceit Katherine Jackson perpetrated when she made the false claims for payment.

42. Katherine Jackson also submitted that the ‘dressing up’ of settlement agreements is ‘commonplace in the real world’. Even if that is so, there is no convincing evidence that the Deed of Release involved dressing up.

43. Katherine Jackson’s submissions made a brief passing reference to the evidence of Dr Heather Wellington. As indicated earlier, she, unlike Dr David Hillis and Brian Cook, was cross-examined by senior counsel for Katherine Jackson, but not successfully. Dr Heather Wellington had given evidence that neither she nor the Board would have approved an attempt to present the arrangement as something it was not, ie by the idea that the $250,000, paid for something else, should be ‘packaged up’ or ‘dressed up’ as legal expenses.\(^{62}\) The cross-examiner did not attempt any direct assault on that evidence. Instead the evidence elicited in cross-examination proceeded as follows. Dr Heather Wellington said the figure of $250,000 was seen by the Board as reflecting ‘legal costs plus staff costs from the union’s perspective, plus future, reasonable future costs in the certification and implementation of the certified employer agreement’.\(^{63}\) She adhered to

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\(^{62}\) Heather Wellington, witness statement, 28/8/14, paras 73-74.

\(^{63}\) Heather Wellington, 28/8/14, T:856.33-36.
that answer more than once. She did accept that the claims against Peter Mac involved both the employee claims for outstanding entitlements and the union claims for penalties. She said that the Board was concerned about the potential size of these two exposures, but that the settlement itself was structured by reference to costs.

We were concerned that as an organisation, we were exposed to substantial penalties. The actual settlement, from our perspective, was past costs, legal and staff, and future expenses on behalf of the union. So it was intended to be a cost settlement to the union, not directly, as I understand it now, to cover any potential future penalties which from my recollection were actually potentially very large. So I don’t think it was intended – I mean I don’t know how we could have foreseen what those were because my understanding of what we were exposed to is that there was a potential exposure for continuing breach of the agreement. (emphasis added)

44. To some extent the cross-examination of Dr Heather Wellington included the cross-examination that was not carried out of Brian Cook. Dr Heather Wellington emphatically denied any concern, of the kind which Katherine Jackson said had been expressed by Brian Cook to her, that the Board did not want to damage its reputation by admitting its breaches and acknowledging its liability to pay penalties.

65 Heather Wellington, 28/8/14, T:856.16-21.
67 Heather Wellington, 28/8/14, T:858.32-859.35.
45. The most favourable answer the witness gave from Katherine Jackson’s point of view was late in her cross-examination:

Q. And as you understood it, the board could see that $250,000, all things considered, was a fair and reasonable settlement of costs and penalty issues in respect of this aspect of the claim?

A. I thought so, and I still think so.

(emphasis added)

But her last answer clarified the matter:

Q. So the amount, as it were, or at least the maximum amount was fixed by reference to entitlements and potential union penalty claim; is that right?

A. It was fixed in relation to union staff costs, union legal costs, and potential – the costs of certification and implementation of the SECA but it was fixed in the context of an understanding that we potentially were exposed to significant penalties.

(emphasis added)

46. That is, although the overall dispute involved an exposure to penalties (and to the employees’ back entitlements) the actual fixing of a $250,000 figure was carried out by reference to actual and expected legal costs and actual and expected union staff costs.

47. Katherine Jackson cited Dr Heather Wellington’s evidence to establish the very real concern that Peter Mac had at being “exposed to

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substantial penalties”.'\textsuperscript{70} But Katherine Jackson’s submissions did not face up to the consequences of analysing all of Dr Heather Wellington’s evidence.

48. The submissions of counsel assisting are correct for the reasons they state and the other reason set out above.

**Peter Mac pays HSU $250,000**

49. On 11 November 2003, Dr David Hillis wrote to Katherine Jackson, enclosing a cheque in the amount of $250,000.\textsuperscript{71} The cheque was deposited into a Commonwealth bank account that was maintained by the HSU Victoria No 3 Branch under the control of the union’s Branch Committee of Management.\textsuperscript{72}

50. Katherine Jackson regarded the payment as a ‘windfall’ in the sense that it was not ‘general revenue received by the Vic 3 Branch which would be budgeted income’.\textsuperscript{73} Katharine Wilkinson also described the payment as a windfall.\textsuperscript{74} Katharine Wilkinson was the Vice President of the Victoria No 3 Branch and a member of the BCOM until the Victoria No 3 Branch merged with the Victoria No 1 Branch and the

\textsuperscript{70} Submissions of Katherine Jackson, 14/11/14, para 187, citing Heather Wellington, 28/8/14, T:857.

\textsuperscript{71} Jackson MFI, 30/7/14, Vol 1, p 99.

\textsuperscript{72} Katherine Jackson, 30/7/14, T:400.21-25, 401.14-15.

\textsuperscript{73} Katherine Jackson, witness statement, 28/8/14, para 9.

\textsuperscript{74} Katharine Wilkinson, witness statement, 17/6/14, para 31.
NSW Branch to form the HSU East Branch.\textsuperscript{75} She said the money was ‘above and beyond [the branch’s] normal income’.\textsuperscript{76}

\section*{C – LEGAL ISSUES ARISING FROM THE SETTLEMENT BETWEEN THE HSU AND PETER MAC}

\subsection*{Obtaining property or a financial advantage by deception}

51. It will be remembered that Katherine Jackson admitted that the statement she issued to Peter Mac on 22 October 2003 misrepresented the ‘Solicitors Costs’ the HSU had incurred and the ‘future costs’ the HSU expected to incur. Relying on that itemised statement, Peter Mac paid the HSU $250,000 in November 2003 in the form of a cheque.

52. As at October and November 2003, it was an indictable offence against s 81 and s 82 of the \textit{Crimes Act} 1958 (Vic) to obtain either property or a financial advantage by deception.\textsuperscript{77} At the relevant time, the elements of obtaining property by deception were: (1) a person by any deception; (2) dishonestly obtains property belonging to another; (3) with the intention of permanently depriving the other of it.

53. ‘Property’ includes money\textsuperscript{78} and has been held to include a cheque.\textsuperscript{79} By s 81(2) a ‘person is to be treated as obtaining property if he obtains

\begin{footnotesize}
\textsuperscript{75} Katharine Wilkinson, witness statement, 17/6/14, paras 4-5.
\textsuperscript{76} Katharine Wilkinson, 17/6/14, T:659.11-12.
\textsuperscript{77} See version 170 of the \textit{Crimes Act} 1958 (Vic). The word ‘deception’ in s 82 has the same meaning as in s 81 of the Act: see s 82(2).
\textsuperscript{78} Section 71 of the \textit{Crimes Act} 1958 (Vic).
\textsuperscript{79} \textit{Parsons v The Queen} (1999) 195 CLR 619 at [35]-[36].
\end{footnotesize}
ownership, possession or control of it, and ‘obtain’ includes obtaining for another or enabling another to obtain or to retain.’ (emphasis in original)

54. A person ‘dishonestly’ obtains property belonging to another (or a ‘financial advantage’) if he or she knows he or she had no legal right to the property or financial advantage.80

55. The elements of obtaining a financial advantage by deception generally overlap with the elements of obtaining property by deception. At the relevant time, they were: (1) a person by any deception; (2) dishonestly obtains for himself (or herself) or another; a financial advantage.

56. ‘Financial advantage’ is undefined. The words carry their ‘plain meaning’.81

Are the elements of s 81 and s 82 satisfied?

57. Was there deception? On 22 October 2003 Katherine Jackson falsely represented to Peter Mac that the HSU had incurred, or would incur, costs that she knew it had not, and would not, incur. That false representation constitutes the relevant deception. For the reasons given above, Ms Jackson’s evidence that Peter Mac in fact knew that the itemised statement of expenses she presented was not genuine is to be rejected. Had Peter Mac known that the expenses which Katherine

81 R v Walsh (1990) 52 A Crim R 80 at 81.
Jackson represented the HSU had incurred or would incur were not genuine, it would have followed that there was no deception or, put differently, that the property or financial advantage the HSU obtained was not ‘by any deception’.

58. Was property or a financial advantage obtained ‘by’ deception?
Katherine Jackson’s deception caused Peter Mac to draw a cheque in the HSU’s favour for $250,000, and send it to her. Thus, by her deception the HSU obtained property – the cheque – of Peter Mac or a financial advantage since, once the HSU received the cheque, it conferred on the HSU an entitlement to be paid the amount shown on its face.

59. Was the property or financial advantage obtained dishonestly?
Katherine Jackson made the false representation knowing that under the Deed of Release executed by the HSU and Peter Mac the only legal right the HSU had was to payment of its ‘legal expenses and other expenses and expected future expenses’ up to a maximum of $250,000. In other words, she knew that the HSU only had a right to payment of up to $250,000 for expenses that the HSU in fact had incurred or would incur. Therefore, the property or financial advantage the HSU obtained was obtained dishonestly.

60. Was Peter Mac permanently deprived of its property? Once banked, the cheque had been put to a use which left it ‘spent and deprived of

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83 See the observations of the High Court in *Parsons v The Queen* (1999) 195 CLR 619 at [29].
[the] characteristics which led or significantly contributed to [its] classification as property’. That satisfies the third element of obtaining property by deception.

61. Those were the submissions of counsel assisting. Katherine Jackson submitted that even if Brian Cook’s evidence is preferred to hers, she could not have committed an offence, because she had an honest belief that a genuine claim to penalties was what was being settled. To that factual submission there are two answers.

62. First, in the circumstances of this case study, to prefer Brian Cook’s evidence to hers is to reject hers. Rejection of hers involves radically diminishing the possibility of accepting that she honestly believed that the settlement fixed a figure referable to the claimed penalties.

63. The second answer is as follows. Even though the Deed of Release effected a settlement of a claim for penalties which the HSU could have pursued against Peter Mac, that does not negate the fact that Katherine Jackson negotiated a specific legal settlement that entitled the union to a payment limited as to possible quantum and limited also by terms constraining the circumstances in which any amount would be paid by Peter Mac to the union. Katherine Jackson submitted that she genuinely believed that the payment of the full $250,000 by Peter Mac was the quid pro quo negotiated by the HSU in return for abandonment of its claim for a penalty against Peter Mac. A bona fide claim of legal right certainly negates the existence of ‘dishonesty’ for

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84 Parsons v The Queen (1999) 195 CLR 619 at [41], the High Court rejecting an argument that the appellant did not intend permanently to deprive the drawer of various cheques because, once paid, they would be returned to the drawer.
the purpose of s 81 and s 82. But Katherine Jackson did not negotiate an unqualified legal right in the Deed of Release for payment of $250,000 to the HSU. She negotiated a much more limited entitlement. It depended on making representations of fact to Peter Mac. Her submission was that she believed that the HSU had a ‘legal right’ to whatever financial benefit accrued from the settlement of the claim for penalties. That submission entails a belief that the union was entitled to whatever benefit in fact flowed from the settlement. If her belief was that the union was entitled to something different from that which the Deed of Release provide for, it derives no support from the documentary evidence. And it is not corroborated by any other witness on the point. For reasons given earlier, her evidence of that belief cannot be accepted.

64. For the reasons given by counsel assisting, and those further reasons, it is necessary to reject the submissions of Katherine Jackson that no offence against s 81 or s 82 could be made out because she did not ‘dishonestly’ obtain the relevant property or financial advantage.

D – CONCLUSION

65. There is an ongoing investigation by the Victorian Police Taskforce of matters referred to it by the HSU. These correspond with the allegations dealt with by Tracey J in Health Services Union v Jackson (No 4).\(^{85}\) The question whether it is desirable or appropriate to make findings of possible criminal conduct in a situation in which there is an ongoing criminal investigation depends on all the circumstances of the

\(^{85}\) [2015] FCA 865.
particular case. Here, among other things, the Commission’s investigations into the Peter Mac issue were concluded, and the subject of detailed submissions, in 2014, well before the Taskforce was established and any investigation by it began. The issues relating to the Peter Mac matter are in a narrow factual compass. And many of the conclusions recorded in this Chapter derive from admissions made by Katherine Jackson in oral or other evidence. In all the circumstances of the case there is no obstacle to making appropriate findings.

Accordingly, it is found that Katherine Jackson may have committed a contravention of s 81 and s 82 of the *Crimes Act* 1958 (Vic). Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria for consideration of whether she should be prosecuted for those possible offences.
CHAPTER 5.2

THE HEALTH SERVICES UNION: MICHAEL WILLIAMSON, KATHERINE JACKSON AND CRAIG THOMSON

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A – INTRODUCTION

1. The HSU\(^1\) has undergone many difficulties and tribulations over the last few years. Their origins lie earlier in time. Many of those difficulties centre around three senior figures in the Union: Michael Williamson, Craig Thomson and Katherine Jackson.\(^2\)

2. The allegations against each of these officials have now been the subject of criminal and civil investigations and proceedings. Some are concluded. Some are ongoing. Those proceedings are described further below. There may be future criminal proceedings. The proceedings so far concern allegations of misappropriation of the funds of the Union.

3. Michael Williamson pleaded guilty to charges of defrauding the HSU and the New South Wales Union (NSW Union) by the provision of false invoices in the amount of $938,470.

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\(^1\) The legal structure of the HSU and its related entities is discussed further in Section B of these submissions.

\(^2\) For another difficulty, see Royal Commission into Trade Union and Governance and Corruption, *Interim Report*, (2014) Vol 2, ch 9, which dealt with problems in the HSU Victoria No 1 Branch in relation to the fraudulent obtaining of entry permits by means of online right of entry tests sat by persons other than those gaining the permits.
4. Craig Thomson was convicted on criminal charges concerning misuse of HSU funds for personal expenses. He was initially convicted on counts relating to expenses with a total value of $24,583.42. On appeal he was convicted on counts relating to expenses totalling $5,650. In separate civil proceedings he was found to have misused HSU funds for a number of purposes. On 15 December 2015 he was ordered to pay the HSU $378,180.58 (inclusive of interest). He was also ordered to pay penalties to the HSU in a total amount of $80,050 assuming payment is made in a timely way.

5. Katherine Jackson was ordered by the Federal Court of Australia to pay compensation to the HSU of $1,406,538.16 (the HSU Proceedings). Her activities are in part also the subject of a continuing criminal investigation.

6. Each of the above officials have been personally responsible for the misappropriation of HSU members’ money in a total amount of exceeding $2,700,000.

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

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3 In DPP v Thomson [2014] VCC (17 December 2014) at [16]-[18] Judge Douglas noted that there was an issue as to the precise amount stolen, and her Honour set out the amount of which she was satisfied, noting it is a particular only.

4 General Manager of the Fair Work Commission v Thomson (No 4) [2015] FCA 1433.

5 General Manager of the Fair Work Commission v Thomson (No 4) [2015] FCA 1433 at [39]-[40].

6 See paras 78-79.
8. This section begins by discussing briefly each of three persons responsible for the above misappropriations. It then discusses the general approach.

9. The balance of the Chapter is then arranged as follows. Section B explains the relevant rules of the HSU. Section C describes and considers the activities of Katherine Jackson. Section D describes and considers the activities of Craig Thomson. Section E deals with governance issues.

Michael Williamson

10. Michael Williamson was for some years General Secretary of the NSW Union. After the merger in 2010 he was General Secretary of HSU East Branch and the NSW Union.7

11. His career attracted many complaints.8 He isolated Mark Hardacre, Assistant State Secretary of the Health and Research Employees Association, and attempted to stop him performing his role. He manipulated the union electoral process. He threatened and instituted legal proceedings against his enemies. He engaged in sexual harassment of Union employees. He refused to refund the contributions of Janice Hardacre and Mark Hardacre to a fighting fund after they resigned as elected officials. He bullied and harassed Katrina Vernon. He bullied Mark Hardacre and attempted to bribe him into

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7 See Royal Commission into Trade Union and Governance and Corruption, Interim Report (2014), Vol 1, ch 4.5, for his role in the HSU Officers’ Election Fund.
8 Mark Hardacre, witness statement, 16/6/14.
leaving his post. He forced the resignations of those he disliked. He managed to maintain his position by engendering intense loyalty among his supporters, but to his enemies he was commonly known as ‘the dear leader’. Many taped conversations were played in public hearings demonstrating Michael Williamson’s intelligence, drive, charm, ruthlessness and amorality.

12. In about September 2011 allegations were raised in the media about the conduct of Michael Williamson. On 12 September 2011 Katherine Jackson made a formal complaint of corruption to the New South Wales Police against him. The letter alleged that he had financially benefited from the work HSU East had awarded to Communigraphix, and from the contract HSU East had with an information technology provider, United Edge, and from payments by the Union to a company named Access Focus. It also alleged that he had used Union funds to pay for the costs of constructing a holiday house. On the same day the New South Wales Police announced the formation of Strike Force Carnarvon to investigate allegations about him. On 22 September 2011 he ‘took leave’, speaking euphemistically, from the role of General Secretary by resolution of the respective Councils of HSUeast and HSU East Branch. The resolution appointed Peter Mylan to the position of Acting General Secretary. On 23 September 2011 Michael Williamson resigned as National President of the HSU. The public message thereafter put out by the Union was that he had ceased to be involved in the general running of the Union. In the same resolution which acknowledged that he was taking leave, a process was set up pursuant to which Ian Temby QC and Dennis Robertson FCA were
appointed to conduct an independent audit of HSUeast. On 4 November 2011 Ian Temby QC and Dennis Robertson FCA were nominated to conduct an inquiry into the affairs of HSUeast. The first is a very experienced barrister. The second is a very experienced accountant. Their report was published on 3 July 2012. It is a coruscating account of deficient procedures – financial, hiring, electoral – within the Union.10

13. Even after Michael Williamson went on leave, he continued to control the Union during Peter Mylan’s period as Acting General Secretary from 22 September 2011 to 21 June 2012. He was fighting for his career and his liberty. This state of affairs was contrary to the impression which might have been derived from the events described in the previous paragraph. Peter Mylan agreed that Michael Williamson ‘remained closely involved in the affairs of the union’11 and ‘was very much pulling the string [sic]’.12 Peter Mylan did not reveal Michael Williamson’s activities to his colleagues. He said he would have done if asked, which implies that he did not.13 The truth is that Michael Williamson’s union activities were furtive, clandestine but intense. Intercepted telephone calls and text messages reveal that Michael Williamson gave constant instructions about political problems within the Union.14 These calls descended to the detail of how observers hostile to Michael Williamson could be excluded from

10 Final Report on HSUeast by Ian Temby QC and Dennis Robertson FCA, 3 July 2012, Hart MFI-1, 16/6/14, tab 45.
11 Peter Mylan, 24/9/14, T:1196.8-10.
12 Peter Mylan, 24/9/14, T:1207.16-22.
13 Peter Mylan, 24/9/14, T:1208.4-15.
14 Mylan MFI-1, 24/9/14, p 2.13-16; Mylan MFI-3, 24/9/14, p 2.28-29; Mylan MFI-4, 24/9/14, pp 1-2.
meetings and what the precise wording of a necessary resolution should be. Peter Mylan said that: ‘Michael [Williamson] continued to be involved in high level consultations with people like HSU National Secretary Chris Brown.’ He said that the HSU National Executive ‘seemed to accept still dealing with Mr Williamson, and nobody suggested to me that this was wrong or inconsistent with him going on leave.’ In early February 2012 Michael Williamson directed Peter Mylan not to let the auditors come to a meeting to explain their proposals for policies concerning electronic funds transfer approvals.

14. What was the role of other officials in the Union in the period in which Michael Williamson, though on leave, continued to play a powerful part in its affairs? This question is answered, in part, below.

15. On 4 October 2012 Michael Williamson was charged with many offences relating to corrupt conduct and relating to steps he took to destroy and fabricate evidence to hinder its investigation. On 15 October 2013 he pleaded guilty to some of those charges. On 28 March 2014 the District Court of New South Wales sentenced him to seven and a half years imprisonment. The non-parole period was five years. He is currently serving that custodial sentence.

15 Mylan MFI-6, 24/9/14, p 1.26-3.13.
16 Mylan MFI-7, 24/9/14, p 2.26-29.
17 Peter Mylan, supplementary witness statement, 31/10/14, para 3.
18 Peter Mylan, supplementary witness statement, 31/10/14, para 4.
19 Mylan MFI-5, 24/9/14, p 4.8-6.37.
20 See Appendix G to this Chapter.
16. The charges to which he pleaded guilty are the subject of agreed facts signed by him.

17. The first charge related to a contravention of what was then s 176A of the *Crimes Act* 1900 (NSW). The charge was that Michael Williamson cheated or defrauded the HSU while a director by issuing 22 invoices in the amount of $15,385 to the Union from a business known as CANME. That business was associated with him and his wife. He signed cheques on behalf of the HSU NSW Branch in payment of those invoices. The invoices purportedly related to the task of archiving old records. The cheques were countersigned by the Vice President of the NSW Branch, pursuant to a practice whereby the Vice President would sign blank cheques in advance.\(^\text{21}\) The total amount paid to CANME was $338,470.\(^\text{22}\) The funds received by CANME were expended on personal expenses for the benefit of Michael Williamson and his family.\(^\text{23}\)

18. The second charge related to a contravention of s 192H of the *Crimes Act* 1900 (NSW). Michael Williamson was charged with dishonestly making a false statement while an officer of an organisation with the intention of deceiving the members or creditors of the organisation. While the Temby/Robertson inquiry was under way and after enquiries had been made as to HSU East’s dealings with CANME, Michael Williamson caused Peter Mylan to make a false statement to the inquiry that the payments to CANME had been approved by the Union Council. The relevant minutes of Union Council meetings were then

\(^{21}\) HSU Tender Bundle, 6/10/15, tab 10, p 2373 [19]-[25].

\(^{22}\) HSU Tender Bundle, 6/10/15, tab 10, p 2373 [22].

\(^{23}\) HSU Tender Bundle, 6/10/15, tab 10, p 2374 [36].
destroyed by another Union employee on Michael Williamson’s instructions. He then presented to the Chief Financial Officer of HSU East, Barry Gibson, 15 invoices for the CANME services. He procured Barry Gibson to endorse the invoices without evidence of payment. He procured Peter Mylan to sign them as if they had been approved for payment. Those invoices were then provided to the Temby/Robertson inquiry. Associated charges on this count related to instructing Bradley Bird to delete files relating to CANME from Michael Williamson’s computer after the criminal investigation had been announced.

19. The third charge concerned a contravention of what was then s 176A of the *Crimes Act* 1900 (NSW). The charge was that Michael Williamson cheated or defrauded the HSU while a director. He procured the services of Access Focus Pty Ltd to print HSU publications. He entered into an arrangement whereby Access Focus would inflate its invoices to the Union. In return he and the HSU’s NSW procurement manager, Cheryl McMillan, would receive cash payments. As a result, Michael Williamson received about $600,000 in cash.

20. The fourth charge related to a contravention of s 351A(1) of the *Crimes Act* 1900 (NSW). The charge was recruiting another to assist in carrying out a criminal activity, in that he instructed John and

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24 See Appendix F to this Chapter.
25 HSU Tender Bundle, 6/10/15, tab 10, pp 2375-2377 [37]-[55].
26 HSU Tender Bundle, 6/10/15, tab 10, pp 2378-2379 [63]-[71].
27 HSU Tender Bundle, 6/10/15, tab 10, p 2380 [72]-[77].
28 Contrary to s 351A of the *Crimes Act* 1900 (NSW).
Carron Gilleland to destroy American Express statements with the intention of hindering a police investigation. The Gillelands operated a business that produced the NSW Union’s magazine. He caused them to apply for American Express cards for the use of himself (and later Craig Thomson) with the intention of avoiding scrutiny of expenditures. When the police investigation commenced, he instructed the Gillelands to destroy the American Express statements.29

Craig Thomson

21. Craig Thomson was formerly National Secretary of the HSU from 16 August 2002 until 14 December 2007. He vacated this position when he became a member of Federal Parliament for the seat of Dobell, on the New South Wales Central Coast. He was charged on 31 January 2013 with a large number of offences relating to the misuse of his Union-issued credit card. On 18 February 2014 he was convicted by the Magistrates Court of Victoria of 71 counts of obtaining financial advantage by deception and 16 counts of theft.

22. He appealed against these convictions. The appeal was heard in December 2014 by her Honour Judge Douglas in the County Court of Victoria. The appeal was by way of rehearing. Judge Douglas convicted him of thirteen of the charges brought by the Director of Public Prosecutions. She found that he was not guilty of the remainder. This improvement in his position was not the result of Judge Douglas taking a more benign view of his conduct than the

29 HSU Tender Bundle, 6/10/15, tab 10, p 2381 [78]-[85].
23. Craig Thomson was also party to civil proceedings in the Federal Court of Australia. They were brought by the General Manager of Fair Work Australia in respect of alleged contraventions of the *Workplace Relations Act 1996* (Cth) (*WRA*). Some of those contraventions overlap with the criminal proceedings.

24. On 11 September 2015 Jessup J delivered his reasons for judgment on liability.\(^{30}\) In substance, Jessup J found that Craig Thomson had breached his statutory duties in a variety of ways. Those breaches included the inappropriate use of Union funds. The findings of Jessup J in these civil proceedings are accepted.

**Katherine Jackson**

25. Katherine Jackson became Secretary of the HSU Victoria No 3 Branch (*No 3 Branch*) in about 1996. She remained in that position (with a brief interruption following her election as National Secretary) until 24 May 2010. She was the Executive President of the HSU East Branch from 24 May 2010 until 21 June 2012. She was appointed Acting National Secretary of the HSU in December 2007. She was elected National Secretary on 23 January 2008. She held that position until 12 February 2015. She had been on sick leave from late August 2012.

26. Katherine Jackson was instrumental in revealing the conduct of Michael Williamson and Craig Thomson to the authorities. For this she is owed much praise. Even her enemies within the Union continue to acknowledge that. However, her own activities as a Union official have now also come to light. They reveal a darker side. In the HSU Proceedings\textsuperscript{31} Tracey J found that she misused her position as a Union official to further her own interests and her political ambitions in a variety of ways and over a period of years. This resulted in the misappropriation from the HSU of in excess of $1,400,000.

27. The evidence before Tracey J, though far from identical with the evidence heard by the Commission before the hearing of the civil proceedings, is generally consistent with it. Indeed in many instances it has been possible to put the findings of Tracey J in wider context by reference to evidence received by this Commission. In general Tracey J’s findings, where relevant, are accepted.

The Commission’s approach

28. The evidence about the HSU is deeply disturbing. It reveals a Union in disarray. In that Union the predominant culture among senior management was of lust for position, power and money. The duty of service to members was put aside. At the apex of the Union was a triumvirate of powerful people who were prepared to further their own personal interests and political ambitions at the expense of the members. Sic volo, sic jubeo.

\textsuperscript{31}\textit{Health Services Union v Jackson (No 4)} [2015] FCA 865.
29. The Court decisions about the activities of this triumvirate are binding on the parties. They are not binding on the Commission. But they are legitimate sources of information.32

30. The Interim Report was delivered on 15 December 2014. It noted that it was appropriate in the circumstances as they then stood to defer findings in relation to Katherine Jackson’s conduct while the HSU Proceedings – civil proceedings – were pending.33 Now circumstances have changed. The HSU Proceedings have been determined at trial. There is no risk of any findings by the Commission having an undesirable impact on the trial. There is a discrete body of factual material (much of which was ultimately uncontested) capable of assessment. Subject to an appeal, the Judgment in the proceedings has conclusively determined Katherine Jackson’s rights in respect of the subject matter.

31. Craig Thomson is in a similar position to Katherine Jackson in that subject to any appeal his rights in relation to both liability and remedies have now been determined.

32. The position is even more conclusive in the case of Michael Williamson, since he pleaded guilty to various charges. His rights of appeal on sentence have now been exhausted.

33. How and why did this conduct occur? In particular, how is it that the activities of these three senior officials could continue for so long and

32 For the contrary arguments of Katherine Jackson, see Appendix D.

so brazenly? Why did employed staff not detect them earlier? Why did no-one from the relevant Branch Committee of Management identify was what was going on? Why did no auditor detect any problems?

34. In large part, this comes down to the failure of governance and transparency to control a culture of corruption. The three individuals identified above were intelligent, determined, forceful and dominating. That characterisation is supported in relation to Katherine Jackson by her behaviour in the witness box over five days. It is also supported, so far as Michael Williamson is concerned, by many tape recordings of telephone conversations with his colleagues which were played in public hearings. Craig Thomson was not observed in either of these ways, but the short-term success of his conduct, like that of the other two, supports the characterisation. Each of the three was apparently bent upon pursuing his or her own material interests and political aspirations, come what may. It seems to have been all too easy for them to prosecute their own interests ahead of those of the members.

B – THE RULES AND GOVERNANCE OF THE HSU

35. Neither Katherine Jackson nor the HSU has criticised counsel assisting’s analysis of the structure and Rules of the HSU. The analysis is correct. It proceeded as follows.
Structure

36. The HSU is a federal trade union. That is, it is registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth). It is an old and well-established Union. It has existed in various forms since 1911.34

37. Its members are health and community services workers. It was one of the five employee associations specifically named in the Terms of Reference.

38. The HSU is a federation of various autonomous State branches. These branches collect membership fees. They operate as financially independent units. Each Branch has elected officers. Each Branch has a Branch Committee of Management (*BCOM*). A BCOM is responsible for the management of the affairs of the Branch. The BCOM comprises the Branch Officers and some rank and file members.

39. In addition to the federally registered HSU, there have existed for many years independent, but associated, State-registered Unions in Tasmania, Western Australia and New South Wales. These State-registered Unions are ‘employee associations’ within the definition of that term in the Terms of Reference.

40. The branches and the State-registered Unions have been fissiparous. A particular branch seems constantly to be growing or contracting in size,

34 The history is described in *Re Health Services Union* [2010] NSWIR Comm 107 at [5]-[14] and *Brown v Health Services Union: HSU East v New South Wales Minister for Finance and Services* (2012) 205 FCR 548 at [15]-[26].
splitting and breaking away, but then reforming in new combinations or shapes, like some dynamic amoeba. Thus the HSU and the NSW Union have undergone various well-publicised upheavals in recent years. For example, in early 2010 the Victoria No 1 Branch, the Victoria No 3 Branch and the New South Wales Branch of the HSU merged. They formed the HSU East Branch. Fair Work Australia certified the rule changes necessary to implement this merger on 24 May 2010. In July 2010 the NSW Union amended its rules to permit members of the former Victorian No 1 Branch and No 3 Branch to become members of the NSW Union. Officers of HSU East Branch automatically held the same position in the NSW Union. Below the HSU East Branch and the enlarged NSW Union will be referred to collectively as ‘HSU East’. The NSW Union changed its name to ‘HSUeast’.

41. On 21 June 2012 the merger was reversed by order of the Federal Court of Australia. HSU East Branch and the NSW Union were put into administration. The various Branches were ‘de-amalgamated’. The HSU East Branch ceased to exist. It was broken into the Victoria No 1 Branch, the Victoria No 3 Branch and the New South Wales Branch. The Victorian members ceased to be members of the NSW Union.

42. These structural changes were driven by deep internal divisions. A few examples may be given here. Quite a lot of evidence was received about them, but it is desirable to refer to them only briefly.

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35 Brown v Health Services Union; HSU East v New South Wales Minister for Finance and Services (2012) 205 FCR 548.
One example concerned what happened after a team headed by Diana Asmar won the November 2012 elections for the No 1 Branch. The problem was that the competing but defeated ticket, headed by Marco Bolano, did win some representation. Discord followed. Leonie Flynn was a Bolano supporter who took office as Assistant Secretary/Treasurer. She alleged that Diana Asmar bullied her, and she received some testimonial support. She also alleged, in effect, that the Asmar team caucused in the sense of holding separate meetings before BCOM meetings. For their part, Diana Asmar and Kimberly Kitching denied bullying Leonie Flynn. There is no doubt that nature did not confer on Diana Asmar the capacity easily to shoulder the heavy burden of ensuring that two groups of officials who disliked each other behaved courteously and cordially. She was certainly not particularly successful in that regard. The evidence, however, is not strong enough to suggest that, whatever her failings, Diana Asmar failed to an extent which forced her to fall below the relevant professional standard for a trade union official. But the episode does reveal how dysfunctional the HSU can be. Huge numbers of human institutions, the members of or officials in which experience divided opinions, face that problem. Many soldier on and solve the problem of how to achieve peaceful and cooperative existence. The No 1 Branch did not. The evidence is all one way in support of Leonie Flynn’s submission that the No 1 Branch under Diana Asmar’s leadership was ‘a highly dysfunctional workplace, home to a culture of unhappiness, bitterness and fear’.

36 Submissions of Counsel Assisting, 31/10/14, ch 11.3, paras 112-127.
37 Submissions of Leonie Flynn, 21/11/14, para 7.
Another example is the conflict between Jeff Jackson, on the one hand, and Pauline Fegan and Shaun Hudson, on the other, in the HSU No 1 Branch. The Federal Court of Australia placed the No 1 Branch into administration as a result. The struggle was investigated by Terry Nassios of Fair Work Australia. His report in 2011 made many adverse findings, including findings that there had been numerous statutory breaches. The General Manager of Fair Work Australia then applied to the Federal Court of Australia for orders concerning the statutory contraventions. Orders were made by North J imposing penalties and directing payment of compensation. At the heart of the trouble were failures to establish and maintain appropriate office procedures and systems of internal control and authorisation.

Yet another example, much more recent, is the dispute between Katherine Jackson and Christopher Brown over what role each played in investigating allegations of fraud involving Craig Thomson. There was also the dispute between the Michael Williamson/Peter Mylan faction and the Katherine Jackson/Katrina-Anne Hart faction up to the time when Flick J appointed an administrator. According to Peter Mylan, this dispute made it difficult for the Union and the Union

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38 Submissions of Counsel Assisting, 31/10/14, ch 11.2.
40 General Manager of Fair Work Australia v Health Services Union [2014] FCA 970.
41 Submissions of Counsel Assisting, 31/10/14, ch 13.1, paras 5-36.
Council to function. Finally, there is the long history of Michael Williamson’s career before he left the Union, alluded to above.

Rules

46. It is necessary to survey in some detail the registered rules of the Union (HSU Rules). The rules presently in force date from 5 June 2014. The numbering and to some extent the substance significantly differs from those in force during the period under consideration in this Report. During that relevant period, the following rules were in force:


(b) The rules in force as at 29 November 2009 (2009 Rules).

(c) The rules in force as at 24 May 2010 (2010 Rules).

47. Below reference will generally be made to the numbering adopted in the 2009 Rules. There is no material difference in the content of the rules in force over the relevant period.

48. The HSU Rules provided that the National Council was the supreme governing body of the Union. It was required to meet annually.

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42 Peter Mylan, witness statement, 27/8/14, paras 25, 30.
43 See paras 10-20.
44 Christopher Brown, witness statement, 27/8/14, para 14.
46 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 21.
Special meetings were to be held by resolution of the National Council or National Executive, or by decision of the National Secretary in conjunction with the National President.  

49. The powers of the National Council included the fixing of remuneration and terms and conditions of employment of the Officers of the Union. HSU Rule 19 provided that one of these Officers was the National Secretary – a full time paid officer. That Rule was amended on 24 May 2010 to provide that it was for the National Council to determine, from time to time, whether the office of National Secretary was to be a full time paid office.

50. Provision was made for a National Executive comprising the National Officers, including the National Secretary, and the Branch Secretaries of each Branch.

51. The National Executive had a general power, subject to certain qualifications, to conduct and manage the affairs of the Union. It could exercise the powers of the National Council between its meetings. Meetings of the National Executive were to be held (inter alia) when decided by the National Council or the National Executive or, if

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47 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 22(a).
48 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 22(b).
49 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 21(c).
50 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 19.
51 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 26.
52 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 27(a).
52. The National Secretary was the registered officer with power to sue and be sued on behalf of the Union and to control and conduct the business of the Union between meetings of the National Executive. Responsibility was conferred on the National Secretary to:

(e) keep or cause to be kept the records required to be kept by an organisation pursuant to the provisions of the Workplace Relations Act 1996 or as amended from time to time;

(f) lodge and file with and furnish to the Industrial Registrar all such documents as are required to be lodged, filed or furnished under the said Act at the prescribed times and in the prescribed manner;

(g) receive all monies on behalf of the Union and pay the same within seven days of receipt into the Union Bank account to the credit of the Union and enter into a book kept for that purpose particulars of all amounts received and paid to such bank;

(h) draw up a report and balance sheet to be submitted to the National Council at its annual Meeting and forward a copy of the same to each branch;

(i) submit his/her books, accounts and receipts annually or as often as may be required by the National Council or National Executive to the auditors and to give them such assistance as they may require in the audit;

(j) be responsible for the books, records, property and moneys of the Union and, within 48 hours of receiving a request from the National Council to do so, deliver to the National Council such books, records, property and moneys.

53 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 28(a).
54 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 32(a), (n).
55 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 32(e)-(j).
53. HSU Rule 36 dealt with the funds and property of the Union. Rule 36(b) provided that:

The funds and property of the Union shall be controlled by the National Council and the National Executive both of which shall have power to expend the funds of the Union for the purposes of carrying out the objects of the Union and all cheques drawn on the funds of the Union shall be signed by two officers of the Union and at least one Trustee. For the expenditure of the funds of the Union on the general administration of the Union and for purposes reasonably incidental to the general administration of the Union, the prior authority of the National Council or the National Executive shall not be necessary before cheques are signed or accounts paid.

54. HSU Rule 36(g) provided that the Union was not to make any loan, grant or donation of any amount exceeding $1,000 unless the National Council or the National Executive of the Union:

(i) has satisfied itself:

(a) that the making of the loan, grant or donation would be in accordance with the other rules of the Union, and,

(b) in relation to a loan, that, in the circumstances, the security proposed to be given for the repayment of the loan is adequate and the proposed arrangements for the repayment of the loan are satisfactory and,

(ii) has approved the making of the grant, loan or donation.\(^{56}\)

55. The HSU Rules provided for a national auditor to be appointed annually by the National Council or the National Executive. The national auditor had power to have access to all records of the National

\(^{56}\) Thus giving effect to the requirements of s 149(1) of the FW(RO) Act and its predecessors. However, rule 36(h) excluded from the operation of the rule payments made by way of provision or reimbursement of out of pocket expenses incurred by persons for the benefit of the Union.
Council, National Executive and each Branch. The national auditor
also had power to question officers and employees of the Union and
require information from any bank. The national auditor had power to
place before the National Executive, or the BCOM of any Branch,
suggestions as to the financial affairs of the Union or a Branch.57

56. From 12 November 2009, the HSU Rules required provision of
financial reports to members. This gave effect to the requirements of s
265(1) of the *Fair Work (Registered Organisations) Act 2009* (Cth)
(*FW(RO) Act*).58

57. The HSU Rules provided that Branches of the Union ‘shall be
completely and absolutely autonomous within the ambit of these Rules,
and shall be responsible for their own Government and
administration.’59 The HSU Rules provided that there were five
branches in Victoria, two in Tasmania, and one each in New South
Wales, South Australia, Queensland and Western Australia.60

58. The management and control of the affairs of each Branch was in the
hands of a BCOM. Each BCOM was subject to any proper direction of
the National Council or National Executive.61 Each Branch had
officers, including a Branch Secretary.62 The BCOM consisted of the

57 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 35.
58 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 35A.
59 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 44(a).
60 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 48(a).
61 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 49(a).
62 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 50(a).
officers of the Branch and not less than five, nor more than 15, ordinary members who were elected from time to time.63

59. The BCOM was empowered to transact all the business of the Branch.64 In particular it had power to fix remuneration and terms and conditions of employment of any officer or employee of the Branch.65 It had power to direct the Branch Secretary on the performance of his or her duties.66 It had power to appoint a branch Auditor.67 It had power to take any action which, in the opinion of the Committee, was in the interests of the Branch, provided it did not conflict with the policies of the Union.68

60. The Branch Secretary was to be the chief executive officer of the Branch. The Branch Secretary was to have charge of the general conduct, administration and business of the branch, subject to the HSU Rules.69 The Branch Secretary was required to:

(b) receive or cause to be received all moneys on behalf of the branch and issue receipts and pay all moneys received by him/her on behalf of the Branch into such bank…or any other financial institution as the Branch Committee may from time to time decide;

(c) have charge of the financial books and statements of his/her Branch;

63 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 51.
64 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 52(a).
65 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 52(e).
66 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 52(g).
67 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 52(k).
68 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 52(l).
69 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 56 (r 57 from 24 May 2010).
(d) prepare and present to each meeting of the Branch Committee an up-to-date financial statement and when called upon to do so by the Branch Committee, produce all relevant books;

…

(f) conduct the business and correspondence on behalf of the branch;

…

(j) hand his/her successor, on the latter’s election, all moneys and property held by him/her on behalf of the Branch;

(k) subject to any direction of the Branch Committee appoint, engage, control and dismiss such clerical and other staff as may be necessary for the conduct of the affairs of the branch;

(l) prepare returns required by the Industrial Relations Act 1988 [sic].

61. The HSU Rules provided for the appointment, by BCOM, of a branch auditor with equivalent powers and responsibilities to those of the national auditor.70 They also dealt with the funds and property of the Branch. HSU Rule 60 (amended on 24 May 2010 and renumbered 65) provided inter alia that:

(a) The funds and property of a branch shall consist of –

(i) any real or personal property of which the branch by these rules or by an established practice not inconsistent with these rules, has, or, in the absence of any limited term lease, bailment or arrangement would have, the right to custody, control or management;

…

(c) All cheques drawn on the funds of a branch shall be signed by the Branch Secretary (or in his/her absence the Branch Assistant Secretary) together with any two members of the Branch Committee.

70 Exhibit#1, HSU Rules, 17/6/14, tab 1, r 59 (r 64 from 24 May 2010).
(d) For the expenditure of the funds of a branch on the general administration of the branch, and for purposes reasonably incidental to the general administration of the branch, the prior approval of the Branch Committee shall not be necessary before such cheques are signed or accounts paid.

62. HSU Rule 60(e) was in equivalent terms to HSU Rule 36(g). 71

63. HSU Rule 68(a) (Rule 75 from 24 May 2010) provided for additional remuneration for members, as follows:

Should any member of the Union lose any part of his/her salary or wages or be required to work overtime in consequence of his/her having been engaged on the business of the Union or his/her branch under instructions from the National Executive or his/her Branch Committee, the National Executive or his/her Branch Committee, as the case may be, shall make good all such loss or shall remunerate the member at his/her rate of salary for the time occupied by him/her whilst so engaged. Reasonable out-of-pocket expenses shall be allowed [to] members engaged on Union or branch business.

64. Under HSU Rule 29 elections for national and branch offices of the Union were to take place every four years commencing in 2006.

C – ALLEGATIONS RELATING TO KATHERINE JACKSON

Background

65. Katherine Jackson became Secretary of the No 3 Branch in 1996 72 or 1997. 73  For a brief period between January 2008 and 13 May 2008 she

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71 See para 54.

72 Katherine Jackson, witness statement, 18/6/14, para 30.
did not hold the office and Brian Yeates did. Apart from that, she remained Secretary until 2010 when the No 3 Branch amalgamated with the Victoria No 1 Branch and HSU NSW Branch.

66. The brief interregnum in 2008 was caused by her appointment as National Secretary. She was appointed Acting National Secretary of HSU in December 2007. She was elected National Secretary on 23 January 2008. She was reappointed as No 3 Branch Secretary on 13 May 2008 after a rule change enabled her to hold both positions. She held both roles concurrently until the amalgamation.

67. The No 3 Branch was a Victorian based branch of the HSU. It is ‘traditionally responsible’ for the industrial representation of Allied Health Professionals in Victoria. It was known as the ‘Australian Health Professionals Association’.

68. The No 3 Branch membership covered physiotherapists, speech pathologists, occupational therapists, podiatrists, radiation therapy technologists, medical imaging technologists, nuclear medicine technologists, medical librarians, medical photographers, health information managers and social workers. In 2010 the No 3 Branch

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73 Christopher Brown, witness statement, 27/8/14, para 22.
74 Christopher Brown, witness statement, 27/8/14, para 21.
75 Katherine Jackson, witness statement, 18/6/14, para 30.
76 Katherine Jackson, witness statement, 18/6/14, para 39.
77 Christopher Brown, witness statement, 27/8/14, para 23.
78 Christopher Brown, witness statement, 27/8/14, para 24.
79 Katherine Jackson, witness statement, 18/6/14, para 22.
80 Katherine Jackson, witness statement, 18/6/14, para 33.
had approximately 4,000 members, eight full-time staff and one full-time official. That official was Katherine Jackson.81

Proceedings in the Commission

69. In their written submissions in October and November 2014, counsel assisting, the HSU and Katherine Jackson each submitted that while the HSU Proceedings remained ongoing against Katherine Jackson, no findings or recommendations should be made concerning the allegations raised in the HSU Proceedings (Allegations).82

70. For the reasons underlying those submissions, the Interim Report did not deal with the evidence which had been received up until that time in respect of the Allegations.83 In view of the fact that Katherine Jackson’s credit was important not only in relation to the Allegations but also in relation to other matters involving her falling outside the HSU Proceedings, it was decided not to deal with her at all in the Interim Report. It was decided not to deal with evidence relating to Peter Mylan because of a potential overlap with civil proceedings against him, which were only settled this year. It was therefore convenient also not to deal with any other HSU-related matters, save for the discrete issue of fraudulently conducted right of entry tests,84

81 Katherine Jackson, witness statement, 18/6/14, para 34.
82 Submissions of Counsel Assisting, 31/10/14, ch 1.1, para 81; Submissions of the HSU, 14/11/14, para 6(a); Submissions of Katherine Jackson, 14/11/14, paras 100-107.
83 Royal Commission into Trade Union and Governance and Corruption, Interim Report (2014) Vol 1, ch 1, p 28 [95]; see also Vol 2, ch 8.2, p 1067 [152].
since in general the HSU-related matters are linked by common themes.

71. On 24 April 2015 it was indicated that issues affecting Katherine Jackson should be dealt with in this Report unless good reason were shown for a contrary course. No good reason not to consider these issues has been shown. The circumstances in relation to the civil HSU Proceedings have radically changed. However, the emergence of a criminal investigation will require limits to recommendations to be made.85

Civil proceedings

72. The HSU Proceedings requested civil relief against Katherine Jackson in respect of alleged contraventions of three sections of the FW(RO) Act.86 Section 285(1) prescribes a duty of care and diligence in the exercise of a Union officer’s powers and duties. Section 286(1) requires a Union officer 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. Section 287(1) precludes an officer or employee of a Union from improperly using his or her position to gain an advantage for himself or herself or another person, or cause detriment to the organisation or another person.

85 See paras 78-79.
86 The relevant provisions of the FW(RO) Act existed, in the same form, in Schedule 1B of the WRA up to 26 March 2006, and Schedule 1 of the WRA until the repeal of that Act and the commencement of the FW(RO) Act on 1 July 2009.
On 19 August 2015 Tracey J delivered his reasons for decision in the HSU Proceedings (Judgment). Subject to any successful appeal, the HSU Proceedings are now concluded. Katherine Jackson filed a Notice of Appeal on 9 September 2015. That Notice of Appeal does not seek to challenge the factual basis for the Judgment, although an amendment to the Notice of Appeal is foreshadowed. The matter came before a Full Bench of the Federal Court of Australia on 19 November 2015. The Court reserved its decision.

As between Katherine Jackson and the HSU, the Judgment is a binding and conclusive determination of all issues.

Katherine Jackson did not take an active part in the final hearing of the Federal Court proceedings before Tracey J. But before the final hearing she had filed a defence and detailed affidavit material which contained her response to the Allegations.

One important feature of that defence was the fact that she did not, for the most part, deny that she had incurred various expenditures and committed the Union to various obligations. Rather, her assertion was that those acts were properly authorised by the BCOM and (where relevant) the Branch Secretary.

There was a second important feature of that defence. She contended that she was at a disadvantage in answering the claims because of the unavailability of documents relevant to her tenure as No 3 Branch Secretary. There seems little doubt that many of the records have
become unavailable. Nonetheless, the material which is available must be taken into account.

**Criminal investigation**

78. As explained in Chapter 1, there is a Victorian Police Taskforce operating independently and autonomously but in support of the Royal Commission. It has decided to conduct and is conducting an investigation into whether criminal conduct has occurred in relation to the Allegations. It appears likely that this investigation will not be concluded before the reporting date of this Commission.

79. In the circumstances currently arising, including the complexity of the matters under investigation and the likelihood that the investigation will be proceeding for some time, it is undesirable to pre-empt the outcome of the investigation by canvassing whether criminal conduct may have occurred in relation to the Allegations and whether recommendations to refer the matter to the prosecuting authorities should be made. Neither the HSU, nor any other person, suggested otherwise in submissions. There is no bar, however, to a consideration of whether non-criminal proceedings should be instituted against Katherine Jackson in relation to the Allegations.

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87 See Appendix F to this Chapter.
80. The HSU received a fraudulently obtained sum of $250,000 by cheque dated 11 November 2003 from the Peter MacCallum Cancer Centre.\textsuperscript{88} Both Katherine Jackson and the Branch Vice-President, Katharine Wilkinson, referred to the payment as a windfall.\textsuperscript{89} Over time money, including the Peter Mac money, was paid into a bank account called the National Health Development Account (\textbf{NHDA}). That bank account was opened by Katherine Jackson. She informed the bank that the account was held by an unincorporated association. She also said that authority to sign and operate the account had been given ‘by resolution passed at a legally constituted meeting of the Committee Members of the Association’.\textsuperscript{90} Yet her defence in the HSU Proceedings did not mention any unincorporated association and said that the NHDA was nothing more than a bank account.\textsuperscript{91}

81. The submissions of counsel assisting on NHDA were not contradicted by the HSU, though in part they were by Katherine Jackson. In substance the submissions of counsel assisting are correct.

\textsuperscript{88} See Chapter 5.1.
\textsuperscript{89} Katherine Jackson, witness statement, 28/8/14, para 9; Katharine Wilkinson, witness statement, 17/6/14, para 31.
\textsuperscript{90} \textit{Health Services Union v Jackson (No 4)} [2015] FCA 865 at [78].
\textsuperscript{91} HSU Tender Bundle, 6/10/15, tab 9, para 68.
Establishment and approval of the NHDA

82. Katherine Jackson contended that the creation of the NHDA was authorised by a BCOM resolution in about 2004 (the 2004 Resolution). In her defence in the HSU Proceedings, the resolution was described as follows:  

In early 2004 the BCOM discussed what should be done with the windfall “Peter Mac money” and resolved it should be earmarked as a discretionary fund to be spent over time to advance the industrial and political interests of the Vic 3 Branch and the Union more generally (Fund) and authorised Jackson to spend that money at her discretion for the purposes specified in the resolution, including an amount of $4,000 that she was authorised to spend on her own personal expenses …

However, in her evidence before the Commission Katherine Jackson said that the resolution was passed in late 2003.  

83. Katherine Jackson stated in her evidence before the Commission that she discussed with the BCOM a range of things the fund could be spent on, including ‘education, travel, electioneering when the vital interest of the Union was at state [sic] and political donations.’

84. In her written statement to the Commission, Katharine Wilkinson said:

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92 Health Services Union v Jackson (No 4) [2015] FCA 865 at [82]; Katherine Jackson, witness statement, 18/6/14, para 423. See also Katherine Jackson, 30/7/14, T:400.33-401.3.

93 Katherine Jackson, witness statement, 18/6/14, paras 421-423.

94 Katherine Jackson, witness statement, 18/6/14, para 422.

95 Katharine Wilkinson, witness statement, 17/6/14, para 32; Katharine Wilkinson, 17/6/14, T:659.10-660.47.
The BCOM discussed the settlement money and decided that the money should be kept to further benefit the interests of members. I recall that the BCOM passed a resolution approving the earmarking of the Peter Mac money as a fund that could be expended by Katherine Jackson on a discretionary basis for Union purposes including advancing the industrial and political interests of the Union. I also recall that Ms Jackson was also authorised to spend for her own personal purposes because she had not been receiving sitting fees (emphasis added).

85. Reuben Dixon was a member of the HSU Victoria No 3 BCOM from late 1998 to May 2010.96 He recalled that after he had a discussion with Katharine Wilkinson, the ‘No 3 Branch received a payment from Peter Mac’. He believed it was a ‘settlement payment or some kind of payment which was made following the underpaying of their staff for a long period of time’.97 But he could not ‘precisely recall what the payment was for’.98 He could not recall the quantum of the payment. But he believed it was about $160,000.99

86. Reuben Dixon believed that ‘after the money was paid to the No 3 Branch, [Katherine] Jackson put it into an education fund, however [he could not] be sure of this’. He added that he could not recall ‘the details, how it was set up, or who was signatory to the fund’.100 He said he recalled ‘discussion at a BCOM meeting that the settlement money would be invested into a fund for research purposes, as the payment represented a large part of [the branch’s] assets’.101 He did not recall a resolution authorising the transfer of money out of the

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96 Reuben Dixon, witness statement, 17/6/14, para 5; Reuben Dixon, 27/8/14, T:768.24-27.
97 Reuben Dixon, witness statement, 17/6/14, para 32.
98 Reuben Dixon, witness statement, 17/6/14, para 32.
99 Reuben Dixon, witness statement, 17/6/14, para 36.
100 Reuben Dixon, witness statement, 17/6/14, para 37.
101 Reuben Dixon, witness statement, 17/6/14, para 38.
Branch’s account into an account conducted by Katherine Jackson.\textsuperscript{102} He said that he recalled the discussion because:\textsuperscript{103}

… when I joined BCOM in 1998 we had next to no money and no staff. When I left BCOM in 2010 we only had about $900,000, and therefore, I recall the discussion about the Peter Mac settlement because it was such a large amount in the context of the No. 3 Branch’s finances.

87. Reuben Dixon’s recollection was not as clear as the recollections of Katherine Jackson and Katharine Wilkinson. Nor did the detail of his evidence precisely match theirs. His evidence was nevertheless broadly consistent with their evidence.

88. There appears to be little doubt that the BCOM subsequently acted on the basis that the NHDA fund had been established. That is because subsequent BCOM resolutions authorised funding of the NHDA from the funds of the HSU No 3 Branch.\textsuperscript{104}

89. There is some doubt about whether the resolution of which Katharine Wilkinson spoke was in fact passed. The doubt arises from the inconsistency in Katherine Jackson’s accounts of when the BCOM resolution was passed.

90. The approach of Tracey J was to assume that the 2004 Resolution was passed in the terms identified above.\textsuperscript{105} It is convenient to take the

\textsuperscript{102} Reuben Dixon, 27/8/14, T:770.11-14.
\textsuperscript{103} Reuben Dixon, witness statement, 17/6/14, para 39.
\textsuperscript{104} Health Services Union v Jackson (No 4) [2015] FCA 865 at [85]-[86]. See also Submissions of Counsel Assisting, 31/10/14, ch 12.3, paras 52-56; Katharine Wilkinson, witness statement, 17/6/14, para 33.
\textsuperscript{105} Health Services Union v Jackson (No 4) [2015] FCA 865 at [106].
same course. But a question then arises. As a matter of proper governance, could the BCOM, acting within power and for a proper purpose, have committed funds of the Union to be expended in that way?

91. That question was answered in the negative by Tracey J. He found that the 2004 Resolution did not authorise the establishment of the NHDA. More particularly, the 2004 Resolution did not authorise an account which was not subject to the reporting and auditing requirements of the FW(RO) Act and the HSU Rules.

92. Katherine Jackson gave a lengthy explanation of the purposes for which she intended to deploy the NHDA funds. Among the purposes were funding elections for control of branches of Unions and servicing alliances with ALP politicians, including funding their electoral campaigns and contributing to ALP branch membership fees to achieve branch stacking. She saw the advantage of this latter course as being that it enables a union to have an ‘ear in government’ in respect of matters of interest to the Union’s members. The passage concluded:

In short, one cannot be an ALP factional player without access to a fighting fund, and without the need to deploy funds in a manner that is kept secret and ignores disclosure obligations because the funds are being deployed in circumstances that “must” be kept secret.

106 Health Services Union v Jackson (No 4) [2015] FCA 865 at [120].
107 Health Services Union v Jackson (No 4) [2015] FCA 865 at [89].
93. Katherine Jackson gave evidence to similar effect before the Commission.¹⁰⁸

94. In his Judgment, Tracey J expressed serious doubt as to whether the commitment of funds, at the discretion of a single member of the Union, towards the funding of election campaigns for HSU branches or other Unions, or to effect branch stacking in ALP electorates, could reasonably be in the interests of the members. His Honour persuasively referred to:¹⁰⁹

...the blurring of the distinction between personal and Union interests. The strengthening of the position of the factional warrior who holds a Union office is assumed to advance the interests of the Union and its members. This mindset readily evolves into a pervasive sense of entitlement, on the part of the office holder, to utilise the Union’s resources to advance his or her personal interests.

95. The conclusion arrived at by Tracey J was that the terms of the 2004 Resolution, assuming it was passed by the BCOM, did not authorise the creation of the account that was in fact established by Katherine Jackson, or the transfer of funds to that account.¹¹⁰

96. Each of the members of the BCOM were, by operation of s 9 of the FW(RO) Act and its predecessors, officers of the No 3 Branch. They were subject to the duties conferred in Part 2 of Chapter 9 of the FW(RO) Act in respect of the financial management of the Branch. For the reasons identified by Tracey J, the 2004 Resolution would not not

¹⁰⁸ Katherine Jackson, 18/6/14, T:824.13-29.
¹⁰⁹ Health Services Union v Jackson (No 4) [2015] FCA 865 at [91].
¹¹⁰ Health Services Union v Jackson (No 4) [2015] FCA 865 at [106]-[107], [120].
be one which a person in the position of an officer of the Branch, acting with the requisite degree of care and diligence, would support.\textsuperscript{111} Nor would it be a resolution that an officer would support, acting in good faith in what he or she believes to be in the best interests of the Branch, or for a proper purpose.\textsuperscript{112} The 2004 Resolution involved the commitment of a disproportionate amount of Union funds into an account, disbursements from which were at the unfettered and unsupervised discretion of a single officer. An officer acting with care and diligence would expect controls to be applied to the fund on implementation of the resolution. None were. The stated purpose of the 2004 Resolution could not have anything but a remote relationship with the day-to-day interests of the members of the No 3 Branch.

97. Purportedly the 2004 Resolution conferred a discretion on Katherine Jackson to pay herself $4,000 per annum out of the NHDA. Again no controls were stipulated. There was no disclosure of that benefit to the members or to the Fair Work Commission or its predecessors in accordance with the HSU’s obligations under Chapter 8 of the FW(RO) Act or its predecessor. That could not have been a proper exercise of the BCOM’s powers pursuant to HSU Rule 52(e), had its members been acting conformably with the duties outlined above.

98. It is difficult to identify the precise legal basis on which Katherine Jackson was operating the NHDA. No-one on the BCOM endeavoured to address this question at the time. Nor did Katherine Jackson.

\textsuperscript{111} As to which, see FW(RO) Act, s 285(1).

\textsuperscript{112} As to which, see FW(RO) Act, s 286(1).
In evidence to the Commission, Katherine Jackson initially agreed that whatever rights and discretionary powers she had in relation to the NHDA were rights and powers exercised in her capacity as Secretary of the No 3 Branch. Later, she changed her position. She said:

...as far as I was concerned, once the NHDA was set up, the NHDA was not an account of the union, it was a separate account, and I was authorised to use that account and to disburse money from that account regardless of whether I was branch secretary or not.

Subsequently she said:

Once the money had left the Union ... I believed that it was legally held [by] me in the NHDA account but that I held that money subject to my duties as an official to deal with the money in accordance with the BCOM Approval and only spend it on purposes that I genuinely believed advanced the industrial or political interests of the Union and its members.

On the one hand Katherine Jackson stated a belief that her entitlement to disburse the funds in the NHDA was subject to her duties as an official. On the other hand she stated a belief that that entitlement continued after she ceased to be an official. It is impossible to reconcile these states of mind.

Katharine Wilkinson recalled that 'over the years' Katherine Jackson informed the BCOM of her intention to spend 'some of the Peter Mac money for a particular purpose and secured the consensus of the

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113 Katherine Jackson, 30/7/14, T:401.29-32.
114 Katherine Jackson, 30/7/14, T:408.33-42.
115 Katherine Jackson, witness statement, 28/8/14, para 10(d).
BCOM for that expenditure'. But no formal resolutions were passed authorising the expenditure ‘on the basis that the original resolution continued to operate in relation to the Peter Mac money’.

103. Katherine Jackson insisted that the funds in the NHDA were not, after transfer to the account, the property of the HSU. That insistence gave rise to significant problems in relation to the manner in which the funds were accounted for. Either the funds remained the property of the No 3 Branch or they did not. At least four possibilities then arose.

104. One possibility is that the funds in fact remained the property of the No 3 Branch. If so, they should have been accounted for as such in the annual financial reports provided to the members.

105. Another possibility is that the funds were no longer the property of the No 3 Branch but were held by Katherine Jackson ‘subject to [her] duties as an official to deal with the money in accordance with the BCOM Approval and only spend it on purposes that [she] genuinely believed advanced the industrial or political interests of the members’. If so, they should have been accounted for in the annual financial reports provided to the members, at least in respect of the disbursements to the NHDA. In addition, if she held the funds subject to an obligation to disburse them in the interests of the Union and its members, it was an obligation analogous to that of a trustee and she

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116 Katharine Wilkinson, witness statement, 17/6/14, para 34.
118 See Health Services Union v Jackson (No 4) [2015] FCA 865 at [103].
119 Health Services Union v Jackson (No 4) [2015] FCA 865 at [92].
should have accounted to the No 3 Branch for the funds accordingly.\textsuperscript{120} Katherine Jackson admitted that she held the funds subject to such an obligation in her defence in the HSU Proceedings.\textsuperscript{121}

106. A third possibility is that the funds were no longer the property of the No 3 Branch, but were dedicated by the No 3 Branch to the NHDA for a particular political or beneficial purpose. If so, they should have been approved and disclosed either as a grant or donation to the NHDA under ss 149(1) and 237 of the FW(RO) Act or its predecessor.\textsuperscript{122} To the extent that they were a grant, they should have been approved as such by BCOM in accordance with HSU Rule 60(e).\textsuperscript{123}

107. A final possibility is that the funds were no longer the property of the No 3 Branch, but were dedicated by the No 3 Branch to Katherine Jackson for her own personal use. If so, they should have been treated for accounting purposes as employee benefits paid to Katherine Jackson.

108. In fact, the payments from the No 3 Branch accounts to the NHDA were coded in the MYOB General Ledger for the branch as ‘NHDA’. They were recorded in year to date profit and loss statements prepared by Jane Holt for the purposes of BCOM meetings. The statements record only the total amount treated as expenses to the NHDA with no

\textsuperscript{120} See the authorities cited in \textit{Re Simersall; Blackwell v Bray} (1992) 35 FCR 584 at 587-590; \textit{Health Services Union v Jackson (No 4)} [2015] FCA 865 at [120].

\textsuperscript{121} HSU Tender Bundle, 6/10/15, tab 9, p 2356 [72].

\textsuperscript{122} \textit{Health Services Union v Jackson (No 4)} [2015] FCA 865 at [93].

\textsuperscript{123} \textit{Health Services Union v Jackson (No 4)} [2015] FCA 865 at [120].
They do not disclose the purposes for which funds were transferred to the NHDA on any occasion save for one occasion on which the transfer was recorded as a ‘Health Fund Contribution’. Nor do they disclose the amounts expended from the NHDA.

The only other record of the funds paid out of the NHDA was an exercise book. Katherine Jackson said she maintained it as a handwritten list. She asserted it was lost on about 7 September 2011. Thereafter she kept no written record of money paid into or out of the NHDA.

Because of the finding that the transfers to the NHDA were beyond the powers of the No 3 Branch BCOM, it is in one sense unnecessary to consider the individual transactions which had been undertaken by Katherine Jackson on the NHDA.

Counsel assisting, however, has tendered evidence in relation to a large number of the NHDA transactions. These are now considered in detail.

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124 Jane Holt, witness statement, 17/6/14, para 76; Holt MFI-1, 17/6/14, pp 3-15.
125 Holt MFI-1, 17/6/14, p 6.
127 Katherine Jackson, 28/8/14, T:800.41-47.
Transfers to the NHDA

112. There is no dispute that the total funds transferred to the NHDA from the accounts of the No 3 Branch between February 2004 and October 2010 amounted to $284,500.\(^{128}\) Jane Holt’s evidence is that those transfers were effected by her on Katherine Jackson’s instructions.\(^{129}\) The following table sets out the relevant transfers drawn from Jane Holt’s evidence before the Commission:\(^{130}\)

<table>
<thead>
<tr>
<th>Date</th>
<th>Transaction description</th>
<th>Amount</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>February 2004 ‘Payment to NHDA out of settlement’</td>
<td>$80,000</td>
<td>Holt MFI-1, 17/6/14, tab 3, p 4.</td>
</tr>
<tr>
<td>2</td>
<td>23 June 2005 National Health Development</td>
<td>$20,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 329.</td>
</tr>
<tr>
<td>3</td>
<td>6 January 2006 National Health Development Account</td>
<td>$10,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 329.</td>
</tr>
<tr>
<td>4</td>
<td>30 June 2006 National Health Development Account</td>
<td>$8,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 330.</td>
</tr>
<tr>
<td>5</td>
<td>29 June 2007 National Health Development Account</td>
<td>$5,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 330.</td>
</tr>
<tr>
<td>6</td>
<td>6 December 2007 NHDA</td>
<td>$8,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 331.</td>
</tr>
</tbody>
</table>

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\(^{128}\) *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [95]; Submissions of Counsel Assisting, 31/10/14, ch 12.3, para 57.

\(^{129}\) Jane Holt, witness statement, 17/6/14, para 75.

\(^{130}\) Jane Holt, witness statement, 17/6/14, para 78. For a collection of bank statements relating to the NHDA, see Jackson MFI-5, 28/8/14, tab 4, 1059- tab 5, 1111. Also see *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [96].
<table>
<thead>
<tr>
<th>Date</th>
<th>Transaction description</th>
<th>Amount</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 21 December 2007</td>
<td>NHDT</td>
<td>$8,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 331.</td>
</tr>
<tr>
<td>8 27 June 2008</td>
<td>National Health Development Fund</td>
<td>$7,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 332.</td>
</tr>
<tr>
<td>9 4 September 2008</td>
<td>National Health Development Account</td>
<td>$8,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 332.</td>
</tr>
<tr>
<td>10 5 December 2008</td>
<td>National Health Development Account</td>
<td>$5,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 333.</td>
</tr>
<tr>
<td>11 7 January 2009</td>
<td>National Health Development Account</td>
<td>$12,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 333.</td>
</tr>
<tr>
<td>12 23 March 2009</td>
<td>National Health Development Account</td>
<td>$50,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 334.</td>
</tr>
<tr>
<td>13 1 July 2009</td>
<td>National Health Development Account</td>
<td>$7,500</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 334.</td>
</tr>
<tr>
<td>14 3 October 2009</td>
<td>National Health Development Account</td>
<td>$8,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 335.</td>
</tr>
<tr>
<td>15 27 October 2009</td>
<td>National Health Development Account</td>
<td>$8,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 335.</td>
</tr>
<tr>
<td>16 7 April 2010</td>
<td>National Health Development Account</td>
<td>$22,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 336.</td>
</tr>
<tr>
<td>17 27 May 2010</td>
<td>National Health Development Account</td>
<td>$12,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 336.</td>
</tr>
<tr>
<td>18 13 October 2010</td>
<td>National Health Development Account</td>
<td>$6,000</td>
<td>Holt MFI-1, 17/6/14, tab 14, p 337.</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>$284,500</strong></td>
<td></td>
</tr>
</tbody>
</table>
Expenditure from the NHDA

113. Katherine Jackson’s evidence is that she alone operated the account by means of a debit card attached to the account. A schedule setting out the deposits and withdrawals on the NHDA account is Appendix A to this Chapter.

114. Relevant to the transfers from the NHDA are certain accounts held by Katherine Jackson and apparently under her control. Deposits were made to these accounts which correspond to the dates on which withdrawals were made from the NHDA account. One account was a SGE Credit Union account jointly held with Jeff Jackson, including a mortgage account (SGE Mortgage Account). Another was a Westpac transaction account held jointly with Jeff Jackson (Westpac Account). A third was a Commonwealth Bank of Australia Streamline Account held by Katherine Jackson personally (Streamline Account). A fourth was an American Express credit card.

115. The following pattern of expenditure emerges from the transactions on the NHDA Account:

(a) On 27 February 2004 $80,000 was transferred into the NHDA account from No 3 Branch Funds. Katherine Jackson’s evidence was that this transfer was in connection with a study trip to the United States. Between 5 and 22 March 2004

131 Katherine Jackson, 19/6/14, T:846.41-42, 850.23-29.
there were a number of cash withdrawals from the NHDA Account. They took place at the following locations: Las Vegas, Seattle, San Francisco, Washington DC and London Heathrow.\textsuperscript{134}

(b) On 13 April 2004 Katherine Jackson withdrew $20,000 from the NHDA account.\textsuperscript{135} On the following day she deposited the funds to the Streamline Account in her name.\textsuperscript{136} Her evidence was that she did not recall whether this withdrawal was to repay credit card debts incurred for the purposes of the United States Trip.\textsuperscript{137} The $20,000 was transferred from the Streamline Account on 19 April 2004.\textsuperscript{138}

(c) On 15 and 21 October 2004 Katherine Jackson withdrew $8,000\textsuperscript{139} and $5,000\textsuperscript{140} respectively from the NHDA account. On 25 October 2004 she withdrew cash and made retail purchases using the NHDA debit card in Hong Kong.\textsuperscript{141} She denied that the cash withdrawals were for the purposes of the Hong Kong trip. But she could not remember why they were made.\textsuperscript{142}

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{134} Jackson MFI-5, 28/8/14, Vol 5, pp 1065-1066.
\textsuperscript{135} Jackson MFI-5, 28/8/14, Vol 5, p 1066.
\textsuperscript{136} HSU Tender Bundle, 6/10/15, tab 2, p 11.
\textsuperscript{137} Katherine Jackson, 28/8/14, T:789.11-28.
\textsuperscript{138} HSU Tender Bundle, 6/10/15, tab 2, p 11.
\textsuperscript{139} Jackson MFI-5, 28/8/14, Vol 5, p 1068.
\textsuperscript{140} Jackson MFI-5, 28/8/14, Vol 5, p 1068.
\textsuperscript{141} Jackson MFI-5, 28/8/14, Vol 5, p 1068.
\textsuperscript{142} Katherine Jackson, 28/8/14, T:790.11-45.
\end{footnotesize}
\end{flushleft}
On 31 March 2005 Katherine Jackson withdrew $5,000 from the NHDA Account. On the same day she deposited $3,800 into her Streamline Account. She was on a trip to the United States between 24 March 2005 and 17 April 2005. During that time, a number of withdrawals were made from her Streamline Account, including two cash withdrawals in Los Angeles.

On 23 June 2005 Katherine Jackson caused $20,000 to be deposited to the NHDA. On 6 January 2006 she caused $10,000 to be deposited to the NHDA. The next substantial withdrawals from the NHDA were on 2 February 2006 ($6,500), 17 March 2006 ($7,500), 22 March 2006 ($4,800), and 3 April 2006 ($3,000). The last withdrawal corresponded with a deposit of $3,000 to her Streamline Account on 7 April 2006. Between 4 and 20 April 2006 Katherine Jackson was in the United States and Mexico. On 18 April 2006 she transferred $3,500 from her

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143 Jackson MFI-5, 28/8/14, Vol 5, p 1070.
144 HSU Tender Bundle, 6/10/15, tab 2, p 42.
145 *Health Services Union v Jackson (No 4) [2015] FCA 865* at [232].
146 HSU Tender Bundle, 6/10/15, tab 2, p 44.
147 Jackson MFI-5, 28/8/14, Vol 5, p 1071.
149 Jackson MFI-5, 28/8/14, Vol 5, p 1073.
150 Jackson MFI-5, 28/8/14, Vol 5, p 1074.
151 Jackson MFI-5, 28/8/14, Vol 5, p 1074.
152 Jackson MFI-5, 28/8/14, Vol 5, p 1074.
153 HSU Tender Bundle, 6/10/15, tab 2, p 77.
154 *Health Services Union v Jackson (No 4) [2015] FCA 865* at [232].
Streamline Account with the description ‘Cuba’.\textsuperscript{155} There are cash withdrawals from the Streamline Account in Mexico and Los Angeles\textsuperscript{156}, and from the NHDA in Los Angeles.\textsuperscript{157} She accepted that the 17 and 22 March 2006 withdrawals were ‘possibly’ associated with the United States trip. She also accepted that the NHDA funds were in part deployed for the purposes of her overseas trips.\textsuperscript{158}

(f) On 30 June 2006 Katherine Jackson caused $8,000 to be deposited to the NHDA.\textsuperscript{159} On 8 and 15 August 2006 she withdrew $6,000\textsuperscript{160} and $3,000\textsuperscript{161} respectively. There were deposits of $5,000 to the Westpac Account on 18 August 2006\textsuperscript{162} and $4,000 to her Streamline Account on 25 August 2006.\textsuperscript{163} On 18 August 2006 there was a withdrawal from the Westpac Account of $3,930.\textsuperscript{164} Between 25 August 2006 and 9 September 2006, she travelled to Hong Kong and Europe.\textsuperscript{165} There were withdrawals and charges from the Westpac\textsuperscript{166} and

\textsuperscript{155} HSU Tender Bundle, 6/10/15, tab 2, p 77.
\textsuperscript{156} HSU Tender Bundle, 6/10/15, tab 2, p 77.
\textsuperscript{157} Jackson MFI-5, 28/8/14, Vol 5, p 1074.
\textsuperscript{158} Katherine Jackson, 28/8/14, T:791.10-20.
\textsuperscript{159} Jackson MFI-5, 28/8/14, Vol 5, p 1075.
\textsuperscript{160} Jackson MFI-5, 28/8/14, Vol 5, p 1075.
\textsuperscript{161} Jackson MFI-5, 28/8/14, Vol 5, p 1076.
\textsuperscript{162} HSU Tender Bundle, 6/10/15, tab 3, p 902.
\textsuperscript{163} HSU Tender Bundle, 6/10/15, tab 2, p 90.
\textsuperscript{164} HSU Tender Bundle, 6/10/15, tab 3, p 902.
\textsuperscript{165} Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
\textsuperscript{166} HSU Tender Bundle, 6/10/15, tab 3, pp 904-910.
Streamline\textsuperscript{167} Accounts from Hong Kong and Europe during this period.

\textbf{(g)} On 30 November 2006 there was a withdrawal of $5,500 from the NHDA.\textsuperscript{168} There was a corresponding deposit of $2,000 to her Streamline Account.\textsuperscript{169} Between 30 November 2006 and 14 December 2006 she travelled to Hong Kong.\textsuperscript{170} There were a number of cash withdrawals and transactions from her Streamline Account from Hong Kong during this period.\textsuperscript{171}

\textbf{(h)} On 29 June 2007, Katherine Jackson caused $5,000 to be deposited to the NHDA.\textsuperscript{172} On 26 July 2007 she withdrew $2,500 from the NHDA.\textsuperscript{173} On 9 August 2007 she deposited $2,000 cash to her Streamline Account.\textsuperscript{174} In August 2007 she travelled to Falls Creek.\textsuperscript{175} There are transactions from various retail outlets in Falls Creek on the Streamline Account over the period 10 to 13 August 2007.\textsuperscript{176}

\textsuperscript{167} HSU Tender Bundle, 6/10/15, tab 2, pp 91, 93.
\textsuperscript{168} Jackson MFI-5, 28/8/14, Vol 5, p 1077.
\textsuperscript{169} HSU Tender Bundle, 6/10/15, tab 2, p 128.
\textsuperscript{170} Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
\textsuperscript{171} HSU Tender Bundle, 6/10/15, tab 2, p 101.
\textsuperscript{172} HSU Tender Bundle, 6/10/15, tab 1, p 1.
\textsuperscript{173} HSU Tender Bundle, 6/10/15, tab 1, p 1.
\textsuperscript{174} HSU Tender Bundle, 6/10/15, tab 2, p 128.
\textsuperscript{175} Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
\textsuperscript{176} HSU Tender Bundle, 6/10/15, tab 2, p 128.
(i) On 6 and 21 December 2007 Katherine Jackson caused two sums of $8,000177 to be deposited to the NHDA. A sum of $6,000 was withdrawn on 6 March 2008178. She said that she cannot recall the reason for this withdrawal.179 On 8 March 2008 she travelled to Sydney and stayed at a hotel in Darlinghurst.180

(j) On 14 May 2008 Katherine Jackson withdrew $4,000 from the NHDA Account.181 Her evidence was that this was for ‘political purposes’.182

(k) On 29 May 2008, Katherine Jackson withdrew $4,000 from the NHDA Account.183 Also on 29 May 2008 she deposited $4,700 to the SGE Mortgage Account.184 She admitted in her defence to the HSU Proceedings that the source or a significant part of the source of the funds for this deposit was a cheque drawn on the Union’s funds on 19 May 2008 in the amount of $4,500.185

177 Jackson MFI-4, 19/6/14, p 9.
178 Jackson MFI-4, 19/6/14, p 10.
179 Katherine Jackson, 19/6/14, T:849.8-11.
180 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
181 Jackson MFI-4, 19/6/14, p 12.
182 Katherine Jackson, 19/6/14, T:851.3-14.
183 Jackson MFI-4, 19/6/14, p 12.
184 HSU Tender Bundle, 6/10/15, tab 8, p 2338.
185 HSU Tender Bundle, 6/10/15, tab 9, p 2358 [98]. (Defence para 98, answering statement of claim para 120(b)).
On 27 June 2008, Katherine Jackson caused a deposit of $7,000 to be made to the NHDA. On 23 July 2008, she withdrew $3,000 from the NHDA. On the same day she deposited $3,000 cash to her SGE Mortgage Account. On 23 July 2008 she also cashed a cheque in the amount of $8,500 on the Union’s funds.

On 4 September 2008, Katherine Jackson caused $8,000 to be deposited to the NHDA. On 23 September 2008 she withdrew $3,000 from the NHDA. Her evidence was that she could not recall the purpose for the withdrawal. On 26 November 2008, she withdrew $7,000 from the NHDA. Her evidence was that the withdrawal would have been for industrial or political purposes. On 26 November 2008 she deposited $3,000 to her SGE Mortgage Account.

On 5 December 2008 Katherine Jackson caused $5,000 to be deposited to the NHDA. On 24 December 2008 she caused $8,000 to be deposited to the NHDA. Her evidence was that she could not recall the purpose for the withdrawal.

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186 Jackson MFI-4, 19/6/14, p 12.
187 Jackson MFI-4, 19/6/14, p 12.
188 HSU Tender Bundle, 6/10/15, tab 8, p 2338.
189 McGregor MFI-1, 17/6/14, p 174.
190 Jackson MFI-4, 19/6/14, p 14.
191 Jackson MFI-4, 19/6/14, p 14.
192 Katherine Jackson, 19/6/14, T:851.16-19.
193 Jackson MFI-4, 19/6/14, p 15.
194 Katherine Jackson, 19/6/14, T:851.21-30.
195 HSU Tender Bundle, 6/10/15, tab 8, p 2339.
196 Jackson MFI-4, 19/6/14, p 15.
deposited $5,000 into her SGE Mortgage Account.\textsuperscript{197} On the same date, she cashed a cheque on the Union’s funds.\textsuperscript{198} She admitted that this cheque was the source, or a significant part of the source, of this transfer into her SGE Mortgage Account.\textsuperscript{199}

\textbf{(o)} On 7 January 2009 Katherine Jackson caused a further $12,000 to be deposited.\textsuperscript{200} She gave evidence that most of the cash withdrawals from the NHDA from late 2008 were ‘devoted’ to costs associated with resisting Pauline Fegan’s attempt to gain control of the Victoria No 1 Branch.\textsuperscript{201} Pauline Fegan was the president of the Victoria No 1 Branch.\textsuperscript{202} However, a withdrawal of $7,500 from the NHDA account on 4 March 2009\textsuperscript{203} predated Katherine Jackson’s departure to Hong Kong on 6 March 2009.\textsuperscript{204}

\textbf{(p)} On 23 March 2009 Katherine Jackson caused Jane Holt to deposit $50,000 to the NHDA.\textsuperscript{205} On the same day she purchased a bank cheque made out to Jeff Jackson and $50,000 was deposited to the Westpac Account which was in

\begin{flushleft}
\textsuperscript{197} HSU Tender Bundle, 6/10/15, tab 8, p 2339. \\
\textsuperscript{198} McGregor MFI-1, 17/6/14, p 195. \\
\textsuperscript{199} HSU Tender Bundle, 6/10/15, tab 9, p 2358 [98]. \\
\textsuperscript{200} Jackson MFI-4, 19/6/14, p 15. \\
\textsuperscript{201} Katherine Jackson, witness statement, 28/8/14, para 97. \\
\textsuperscript{202} Katherine Jackson, witness statement, 28/8/14, para 13. \\
\textsuperscript{203} Jackson MFI-4, 19/6/14, p 16. \\
\textsuperscript{204} Health Services Union v Jackson (No 4) [2015] FCA 865 at [232]. \\
\textsuperscript{205} Jackson MFI-4, 19/6/14, p 16. \\
\end{flushleft}
their joint names. The evidence relating to this transaction is set out in greater detail below.

(q) On 1 July 2009 Katherine Jackson caused $7,500 to be deposited to the NHDA. Withdrawals of $1,500 were made on 18 August 2009 and $4,800 on 29 September 2009. On 29 September 2009 the sum of $3,000 was deposited in cash to her Streamline Account. On 29 September 2009 she cashed a cheque for $6,000 on the Union’s funds. She admitted that the funds drawn on this cheque were the source, or significant part of the source, of this transfer into the SGE Mortgage Account.

(r) On 5 October 2009 Katherine Jackson caused an amount of $8,000 to be transferred to the NHDA. Withdrawals of $5,000 on 16 October 2009 and $3,500 on 22 October 2009 could not be explained by her.

206 HSU Tender Bundle, 6/10/15, tab 3, p 636.
207 See para 126-138.
208 Jackson MFI-4, 19/6/14, p 17.
209 Jackson MFI-4, 19/6/14, p 18.
210 Jackson MFI-4, 19/6/14, p 18.
211 HSU Tender Bundle, 6/10/15, tab 2, p 188.
212 McGregor MFI-1, 17/6/14, p 166.
213 HSU Tender Bundle, 6/10/15, tab 9, p 2358 [98].
214 Jackson MFI-4, 19/6/14, p 18.
215 Jackson MFI-4, 19/6/14, p 18.
216 Jackson MFI-4, 19/6/14, p 18.
On 27 October 2009 Katherine Jackson caused $8,000 to be deposited to the NHDA. 218 There were then withdrawals of $2,000 on 29 October 2009 219 and $3,000 on 2 December 2009. 220 She said that, depending on the timeframe, these withdrawals might have been used for election purposes, but she could not be positive. 221 The three withdrawals in October 2009 preceded her departure for Hong Kong on 29 October 2009. 222

On 7 April 2010, 223 27 May 2010 224 and 13 October 2010 225 Katherine Jackson caused deposits of $22,000, $12,000 and $6,000 respectively to be made to the NHDA. The pattern of expenditure changed from this point, in that there were a number of large withdrawals that did not, with one exception, coincide with an overseas journey. The one exception was a withdrawal of $2,100 on 21 July 2011, 226 which preceded her departure for Los Angeles on 22 July 2011. 227 The other withdrawals were explained by her as being for election purposes. That included an amount of $9,000 on 6 September 2012 that she said was provided to Marco Bolano, Fleur

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218 Jackson MFI-4, 19/6/14, p 18.
219 Jackson MFI-4, 19/6/14, p 18.
220 Jackson MFI-4, 19/6/14, p 19.
221 Katherine Jackson, 19/6/14, T:852.21-853.2.
222 *Health Services Union v Jackson (No 4) [2015] FCA 865* at [232].
223 Jackson MFI-4, 19/6/14, p 20.
224 Jackson MFI-4, 19/6/14, p 21.
225 Jackson MFI-4, 19/6/14, p 22.
226 Jackson MFI-4, 19/6/14, p 25.
227 *Health Services Union v Jackson (No 4) [2015] FCA 865* at [232].
Behrens and Katrina-Anne Hart for their election campaigns.\textsuperscript{228} There were also a number of smaller withdrawals from automatic teller machines in South Melbourne. Katherine Jackson explained these as being for staff entertainment or the purchase of envelopes or stamps.\textsuperscript{229}

(u) The deposits and payments made after 24 May 2010 were made after she ceased to be secretary of the No 3 Branch. They were made without the authority of the HSU East Branch. After 21 June 2012, payments were made from the NHDA despite the fact that she was no longer the Secretary. This is discussed further below.\textsuperscript{230}

(v) Throughout the period during which the NHDA was in use, there were withdrawals of smaller amounts from automatic teller machines in Melbourne, and charges for retail expenditure. Katherine Jackson justified the latter expenditures as falling within the $4,000 per annum allowance authorised by the BCOM.\textsuperscript{231} She also accepted that the smaller automatic teller machine withdrawals were for personal purposes.\textsuperscript{232}

(w) The account was closed, with a balance of $1,423.83, on 26 November 2013. Katherine Jackson said that she retained the

\textsuperscript{228} Katherine Jackson, witness statement, 28/8/14, para 32; Katherine Jackson, 28/8/14, T:801.2-10.

\textsuperscript{229} Katherine Jackson, witness statement, 28/8/14, para 97.

\textsuperscript{230} See paras 139-142.

\textsuperscript{231} Katherine Jackson, 19/6/14, T:847.14-47.

\textsuperscript{232} Katherine Jackson, 19/6/14, T:850.44-851.1.
balance to compensate for debts she had incurred. One concerned her engagement of a private investigator in relation to Michael Williamson.  

The pattern of expenditure for the NHDA: two preliminary observations

116. Two preliminary observations may be made about this pattern of expenditure.

117. The first preliminary observation is that a number of the transactions are unexplained. Others only receive the barest of explanations that necessarily depend, unfortunately, solely on what Katherine Jackson claimed her recollections were years after the event. There has been no assistance from proper records that might shed better light on the fate of the funds in the NHDA account.

118. Katherine Jackson submitted that the absence of records should not be used to damage her position. She submitted that it is she who has been prejudiced by the destruction of documents which her enemies have effected. Assuming that the documents were destroyed (not simply lost), that this was done by her enemies (not simply other officials for purposes of their own) and that she was prejudiced, the submission is reasonable. The absence of documents should not be used to damage her position. But that does not permit the absence of documents to be used to improve her position. The absence of documents simply makes

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233 Katherine Jackson, 28/8/14, T:801.12-28; Katherine Jackson, witness statement, 28/8/14, para 97.
it hard to assess one way or the other what actually happened and whether the documents would have helped her or not.

119. However, as part of a much more pejorative argument, Katherine Jackson put the following express submission – that there should be ‘a finding that the destroyed documents would have assisted [her] and would not have assisted those in the HSU who made allegations against her.’ The submission cannot be accepted. It is true that where a party to litigation deliberately prevents evidence from coming before the trier of fact, an inference can be drawn that the reason for that conduct was motivated by a fear that the evidence would be adverse to that party’s interests. *Omnia praesumuntur contra spoliatorem.* This is a type of ‘consciousness of guilt’ reasoning. One example is concealing evidence. Another is destroying evidence. Another is attempting to procure the destruction of evidence. Another is deliberately holding evidence while testifying. It is also true that even though a Royal Commission does not involve litigation and there are no ‘parties’ appearing before it, similar reasoning can be available.

234 Submissions of Katherine Jackson, 16/10/15, para 146.
238 *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [64]-[65].
120. Katherine Jackson’s submission relates to a series of incidents about which the following findings are made elsewhere. Peter Mylan in concert with Michael Williamson ordered an unnecessarily large clean-up of the documents in the No 3 Branch after it was flooded at a time when Katherine Jackson was on pre-approved leave. They caused the records to be moved from Melbourne to Sydney to enable Peter Mylan and Michael Williamson to search for material with a view to finding ‘dirt’ on Katherine Jackson and using it to make a complaint to the Victorian Police against her. Unfortunately, these findings are insufficient to sustain her consciousness of guilt argument.

121. It is not clear what documents Peter Mylan and Michael Williamson were looking for. But it is unlikely that the Victorian Police would then have been interested in such arcane material as documents revealing that particular resolutions had not been passed at BCOM meetings, or that the resolutions which had been passed did not justify certain types of expenditure.

122. The essential problem is that to establish a basis for the consciousness of guilt reasoning just summarised in relation to suppressing evidence it is necessary to establish that documents were suppressed for a particular purpose. Quite a large number of documents certainly appear to be missing. But to allege that other officials destroyed documents in order to injure Katherine Jackson is a serious allegation. A conclusion to that effect should not be reached unless the evidence is strong. It is not possible to infer from the events which took place in relation to the clean-up and transport of the documents, and the

239 See Appendix F to this Chapter.
apparent disappearance of a lot of them, that that disappearance was
the result of destruction *with a view to damaging Katherine Jackson’s
interests*. The searchers were interested in documents which could be
shown to the Victorian Police. They were interested in document
preservation for a particular purpose. There is no evidence that they
were interested in document destruction for another purpose.

123. In short, if Katherine Jackson’s version of events conflicted with a
version propounded by enemies who had destroyed documents which
would have rendered their version non-credible, and those enemies did
this for the purpose of preventing that outcome, the destruction of the
documents would itself render their version less credible and hers more
credible. But Katherine Jackson’s version of events before the
Commission does not necessarily conflict with a version propounded
some years ago by those responsible for the loss of the documents.
And since the documents are missing it cannot be said whether or not
they support her. Nor can it be said that those responsible for the loss
of the documents have *deliberately destroyed* documents. And even if
they had a version of events conflicting with hers, and had destroyed
documents, it cannot be said on the evidence that they did so in order
to prevent those documents being used to damage their version and
support hers.

124. The *second preliminary observation* is that the surrounding
circumstances strongly suggest that the funds were deployed, in the
main, for purposes other than those outlined by Katherine Jackson in
her evidence – the advancement of the political objects of the Union.
Instead they have been deployed to a significant extent for the purpose
of remunerating herself in relation to various journeys that she claims
to be work related. She suggested in her evidence to the Commission that one of the purposes of the NHDA was to fund travel. But the evidence of the BCOM members as to what they were told about the nature of the expenditures from the NHDA does not include payments to Katherine Jackson for overseas trips. In any event, the nature of the expenditures could not be described as do with travel for purposes related to the business of the Union.

If Katherine Jackson’s explanation is to be accepted, there would be no reason for her to be recompensed for overseas journeys from NHDA, a fund separate from the ordinary accounts of the No 3 Branch. Indeed, it would be inappropriate for that to occur. Assuming for the sake of argument that it may be acceptable conduct to establish a secret ‘fighting fund’ to further the political objects of the No 3 Branch and the Union while avoiding statutory disclosure obligations, that explanation does not apply to payments that are obviously unrelated to that purpose. There was no reason to cause payments to be made from the NHDA to fund various overseas trips taken by Katherine Jackson unless the purpose was to conceal the expenditure from the financial oversight procedures contained in the HSU Rules.

Payments benefiting Jeff Jackson

Katherine Jackson agreed that at ‘various times’ she provided sums withdrawn from the NHDA to Jeff Jackson, her former husband. Some withdrawals from the NHDA were used to meet requests for

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241 Katherine Jackson, 28/8/14, T:793.15.
money for political purposes from persons other than Jeff Jackson. But Katherine Jackson’s evidence was that the ‘bulk of the withdrawals’ in the relevant time period were provided to Jeff Jackson for him to use in his ‘battle against Pauline Fegan’.242

127. The largest sum was $50,000. On 23 March 2009, Jane Holt transferred $50,000 from the No 3 Branch account to the NHDA.243 The next day, 24 March 2009, Katherine Jackson authorised the withdrawal of $50,000 from the NHDA.244 A cheque for that amount was drawn in favour of Jeff Jackson. Katherine Jackson and Jeff Jackson had separated permanently in March 2008.245 Jeff Jackson was at that time an officer of the Victoria No 1 Branch.246

128. Jeff Jackson deposited that money into an account which was jointly in his and Katherine Jackson’s names.247 However, it is not in dispute that she left the ‘conduct and maintenance’ of the account to Jeff Jackson. He controlled the account.248

129. On 30 July 2014, Katherine Jackson stated that she believed at the time of making the payment was that it was ‘to do with a fight that was

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242 Katherine Jackson, 28/8/14, T:793.17-31; Katherine Jackson, witness statement, 28/8/14, para 97.
243 Jane Holt, witness statement, 17/6/14, para 78; Holt MFI-1, 17/6/14, p 334; see para 112.
244 Jackson MFI-1, 30/7/14, Vol 1, p 190.
245 Katherine Jackson, witness statement, 28/8/14, para 12; Katherine Jackson, 28/8/14, T:795.26; Katherine Jackson, 30/7/14, T:410.22.
246 Jackson MFI-1, 30/7/14, Vol 1, p 191; Katherine Jackson, 30/7/14, T:410.12-27; Katherine Jackson, witness statement, 28/8/14, para 13.
going on in the No 1 Branch’ which involved Pauline Fegan. Following that explanation, Katherine Jackson contended in a supplementary statement that the $50,000 was paid to Jeff Jackson ‘to help pay a range of costs incurred in relation to the attempts by [him] and his supporters to resist what may be described as a “hostile takeover” of the [Victoria No 1] Branch launched by Pauline Fegan in late 2008’.250

130. Katherine Jackson was asked whether she had disclosed to the BCOM that she proposed to ‘pay over $50,000 to Jeff Jackson’. Her initial response was: ‘I may have raised it with certain people on BCOM …’251 She then added: ‘Just from memory, probably, yes’.252

131. Katherine Jackson did not disclose the payment in the accounts of No 3 Branch as a ‘related party transaction’. She said that was because, in her view, the payment was not a ‘related party transaction because the NHDA was not an account of the HSU’.253 She accepted that the payment would have constituted an ‘impermissible use of Union money’ had the money been paid directly from the Victoria No 3 Branch account to Jeff Jackson.254

249 Katherine Jackson, 30/7/14, T:411.21-27, 412.9-11.
250 Katherine Jackson, witness statement, 28/8/14, para 97; Katherine Jackson, 28/8/14, T:791.41-45.
251 Katherine Jackson, 30/7/14, T:412.45-47.
252 Katherine Jackson, 30/7/14, T:413.12.
253 Katherine Jackson, 30/7/14, T:413.25-26.
254 Katherine Jackson, 30/7/14, T:413.37-43.
132. However, Katherine Jackson’s evidence was that the payment did not bear that character because the money was paid through the NHDA. That followed, on her contention, because once funds were transferred from the No 3 Branch account into the NHDA, the funds ceased to be ‘Union funds’. It is a construction which is very difficult to accept in law. She also denied the proposition that the payment from the No 3 Branch account to the NHDA ought to have been disclosed as a related party transaction if, as appeared to follow from her evidence, the money was being transferred to her to deal with ‘in effect’ as she saw fit.

133. Katherine Jackson admitted that from late 2008 she provided funds from the NHDA to Jeff Jackson. This included the amount of $50,000 paid in March 2009.

134. Jeff Jackson gave evidence that the sum of $50,000 he received in March 2009 was ‘in relation to a property settlement’. However, there are unfortunately real difficulties about the reliability of his evidence. His memory, by his own admission, was unreliable. He suffered ‘memory dysfunctions’ as a result of a four to five month coma he fell into in his late 30s. He explained that, particularly in the ‘last few years’, the fault in his memory had come to the fore and

255 Katherine Jackson, 30/7/14, T:413.45-414.1.
256 Katherine Jackson, 30/7/14, T:415.12-15.
257 Katherine Jackson, 30/7/14, T:414.3-8, 415.17-23.
258 Katherine Jackson, 28/8/14, T:793.15.
259 Jackson MFI-1, 30/7/14, Vol 1, p 191; Katherine Jackson, 30/7/14, T:410.12-27.
that ‘parts of [his] memory just completely dissipate’. Further, medication he took to treat diabetes also adversely affected his memory.

135. Under cross-examination by senior counsel for Katherine Jackson, Jeff Jackson accepted that he probably did need money in the first part of 2009 for ‘political electioneering purposes’ relating to the Victoria No 1 Branch. He also accepted that it was probable that he had asked Katherine Jackson for funding for those purposes. He could not deny that the payment of $50,000 he received in March 2009 from her was ‘in relation to political electioneering purposes for the No 1 Branch’.

136. He recalled an ‘allocation of moneys for [his] property settlement’. But he could not be certain whether he received ‘hard money’ for the property settlement or a ‘notional allocation [of] moneys’. The figure of $102,000 was notional in the sense that it reflected payments already made by Katherine Jackson relating, for example, to the care of their children.

137. Ultimately, Jeff Jackson accepted that what he ‘reconstructed’ or what he had ‘come to recall’ was the product, at least in part, of what he had

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263 Jeffrey Jackson, 27/8/14, T:721.46-722.3.
264 Jeffrey Jackson, 27/8/14, T:726.21-29.
265 Jeffrey Jackson, 27/8/14, T:727.6-16.
266 Jeffrey Jackson, 27/8/14, T:731.32-34.
267 Jeffrey Jackson, 27/8/14, T:731.36-40.
read in *The Australian* newspaper.\(^{269}\) Further, during an interview on 20 August 2014 with Commission staff, Jeff Jackson was asked whether he remembered why Katherine Jackson drew a cheque in his favour in March 2009 for $50,000. He responded: ‘I have been thinking I’d run up bills in terms of my involvement in [a] campaign, et cetera, whether it was legal expenses and other things’.\(^{270}\) This earlier answer is inconsistent with his later evidence to the Commission that the payment he received was in connection with the property settlement between him and Katherine Jackson. It further reinforces the unreliability of his memory.

138. The uncertainties in Jeffrey Jackson’s recollection give unusual significance to contemporary documents. There is documentary evidence to suggest Jeff Jackson spent the $50,000 Katherine Jackson paid to him on personal, as opposed to campaign, expenses.\(^{271}\) The deposit of $50,000 into the Westpac account took place on 25 March. Within approximately one month, it had been disbursed on cash withdrawals, and what appears for the most part to be personal or household expenditure. It is possible that while Katherine Jackson paid the sum of $50,000 to Jeff Jackson expecting or intending that he would use it for his campaign against Pauline Fegan, unknown to her, he did not deploy it for that purpose. However, even if that assumption is made, the fact is that money was taken from the NHDA and expended in a way which was not consistent with the BCOM resolution. Hence Katherine Jackson was liable to compensate the HSU for the taking of that money.

\(^{269}\) Jeffrey Jackson, 27/8/14, T:731.42-732.3.


\(^{271}\) Jackson MFI-5, 28/8/14, pp 1141-1157.
Payments to the NHDA after the HSU branch amalgamation

139. On 24 May 2010, the Victoria No 3 Branch merged with the Victoria No 1 Branch and the NSW Branch of the HSU to form the HSU East Branch.272 Until then, Katherine Jackson was Secretary of the No 3 Branch.273 Upon the merger of the branches, she became Executive President of the HSU East Branch.274 Michael Williamson became the General Secretary of the HSU East Branch. He took leave from that position in September 2011.275 Relevantly, the ‘assets, funds and property of, and the debts and liabilities incurred by’, the No 3 Branch became the ‘assets, fund and property of, and the debts and liabilities of, the HSU East Branch.’276

140. In consequence of those events the office of Secretary in the No 3 Branch no longer existed. Hence Katherine Jackson had ceased to hold the office of Secretary. But she continued to cause money to be transferred to the NHDA. One item was an amount of $12,000 on 27 May 2010.277 Katherine Jackson said that in making these transfers she continued to rely on the authorisation she had been given by the BCOM in 2003 even though the existence of the BCOM had

272 Katherine Jackson, witness statement, 18/6/14, para 67.
273 Christopher Brown, witness statement, 27/8/14, para 22.
274 Christopher Brown, witness statement, 27/8/14, para 24; Exhibit #1, 17/6/14, tab 2, p 63; Katherine Jackson, 28/8/14, T:837.3.
275 Christopher Brown, witness statement, 27/8/14, para 27; Katherine Jackson, 28/8/14, T:836.44-46.
276 Exhibit #1, 17/6/14, tab 2, p 64; Katherine Jackson, 28/8/14, T:838.12.
277 Katherine Jackson, 28/8/14, T:798.8; Jackson MFI-5, 28/8/14, p 1093.
terminated with that of the No 3 Branch itself.\textsuperscript{278} Although the No 3 Branch no longer existed, Katherine Jackson said the ‘accounts of the organisation hadn’t properly been merged’ by 24 May 2010.\textsuperscript{279} She said she advised Michael Williamson that she was going to transfer the $12,000 amount to the NHDA.\textsuperscript{280}

141. On 13 October 2010, nearly 5 months after the merger of the HSU branches, Katherine Jackson caused a further $6,000 to be transferred from the Victoria No 3 account to the NHDA.\textsuperscript{281} At this stage she was Executive President of the HSU East Branch. To withdraw money from any account of the Union, Katherine Jackson needed the authority of that branch.\textsuperscript{282} She did not obtain that authority.\textsuperscript{283} Nevertheless, she did not agree that there was ‘no legal basis on which [she] could cause funds to be withdrawn from [the No 3 Branch account] on 13 October 2010’.\textsuperscript{284} She said in evidence to the Commission:\textsuperscript{285}

\begin{quote}
I would say that at that time, while we were still consolidating our affairs, the understanding between the parties was that it was business as usual in relation to off-line accounts, slush funds, whatever you’d like to call them.
\end{quote}

\textsuperscript{278} Katherine Jackson, 28/8/14, T:797.44; Katherine Jackson, witness statement, 28/8/14, para 155.
\textsuperscript{279} Katherine Jackson, 28/8/14, T:798.27-39.
\textsuperscript{280} Katherine Jackson, 28/8/14, T:798.27-799.16.
\textsuperscript{281} Katherine Jackson, 28/8/14, T:799.18-22; Jackson MFI-5, 28/8/14, p 1094.
\textsuperscript{282} Katherine Jackson, 28/8/14, T:799.24-27, 35.
\textsuperscript{283} Katherine Jackson, 28/8/14, T:799.39.
\textsuperscript{284} Katherine Jackson, 28/8/14, T:799.41-44.
\textsuperscript{285} Katherine Jackson, 28/8/14, T:799.44-800.1.
142. However, she added that payments into or out of the NHDA still needed to be consistent with the ‘original reason for setting up the account’.\(^{286}\)

**Disclosure to and approval by the BCOM of NHDA expenditures**

143. A key finding of Tracey J was that Katherine Jackson provided only minimal details to BCOM about the NHDA and the expenditure made from it. His Honour held as a consequence that the BCOM did not give informed consent to the transfer of funds into the NHDA.\(^{287}\)

144. There is evidence that the BCOM was provided with some information concerning transfers into the NHDA. Katharine Wilkinson gave evidence that BCOM would, aside from the annual auditor’s financial report, ‘get financial statements throughout the year at BCOM meetings’ which would show how much money BCOM had. She described these ‘loosely’ as ‘profit and loss statements’.\(^{288}\) In her evidence, Jane Holt said:\(^{289}\)

> In relation to the financial material which went to BCOM, I provided a year to date Profit and Loss report with a comparison to the same period for the previous financial year. I provided a brief cash flow statement, and sometimes a short document highlighting financial matters to be considered, for example, comments on unusual transactions, such as, trading in old for new vehicles.

\(^{286}\) Katherine Jackson, 28/8/14, T:800.12-13.

\(^{287}\) *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [108]-[110].


\(^{289}\) Jane Holt, witness statement, 17/6/14, para 45.
145. Jane Holt provided to the Commission examples of that material for the period 2004 to 2010.290 Relevantly, they showed payments to the NHDA.291 Having been shown some of the reports Jane Holt prepared, Katharine Wilkinson agreed with several propositions. They were the ‘sorts of reports that Jane Holt would prepare’. Katherine Jackson would bring reports of that kind with her to BCOM meetings. They would be discussed at meetings. And BCOM would approve the reports.292 That was the position throughout Katharine Wilkinson’s time on the BCOM.293

146. The minutes of the 3 July 2008 BCOM meeting show that BCOM agreed that the ‘HSU Vic 3 Branch fund the NHDA up to $90,000 per annum, for the next 3 financial years.’294 At a meeting held on 25 February 2010, the BCOM resolved: ‘That the Vic No. 3 Branch fund the NHDA up to $90,000 for the next financial year.’295

147. Reuben Dixon recalled discussion of some contributions to campaign expenses (such as EBA campaigns), donations to ALP election candidates and payment of some debts of the Victoria No 1 Branch.296 He had little to no recollection of the NHDA, save that he believed that the BCOM approved investment into a fund for research purposes, and

290 Holt MFI-1, 17/6/14, pp 3-15.
291 Holt MFI-1, 17/6/14, pp 4, 6, 7, 8, 9, 11, 14.
293 Katharine Wilkinson, 17/6/14, T:657.31.
294 Jackson MFI, 30/7/14, p 106.
295 Agostinelli MFI-3, 17/6/14, tab E.2.32, p 742.
296 Reuben Dixon, witness statement, 17/6/14, paras 26-29.
he believed that this resolution would have been minuted. 297 He said: 298 ‘I do not know what happened to the Peter Mac settlement money since it was discussed. I imagine it has been sitting in an account collecting interest for our use.’

148. Katharine Wilkinson gave evidence as to the disclosures made to the BCOM about expenditures from the NHDA. She said [Katherine] Jackson would state her intention to expend funds and seek consensus for that expenditure, but that no formal resolutions were passed. She described the process as ‘more a case of Katherine Jackson keeping the BCOM informed.’ 299 Katharine Wilkinson said that the BCOM minutes recorded a summary of the discussion of various expenditure proposals. 300

149. Set out below is a table recording significant transactions on the NHDA that are contemporaneous with those of the BCOM Minutes as are available. Any discussion of NHDA expenditure, or any specific non-employment related expenditure, is noted.

<table>
<thead>
<tr>
<th>Expenditure</th>
<th>Minute</th>
<th>Ref</th>
</tr>
</thead>
<tbody>
<tr>
<td>27 June 2008 Deposit of $7000 to NHDA.</td>
<td>3 July 2008</td>
<td>Jackson MFI 30/7/2014, tab 2, p 105</td>
</tr>
<tr>
<td>23 July 2008 $3000 withdrawn from NHDA.</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>There was discussion about our continuing support to National Health Development Association. Moved: That HSU Vic 3 Branch fund the NHDA up to $90 000 per annum.</td>
<td></td>
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297 Reuben Dixon, witness statement, 17/6/14, paras 30-41.
298 Reuben Dixon, witness statement, 17/6/14, para 42.
299 Katharine Wilkinson, witness statement, 17/6/14, para 34.
300 Katharine Wilkinson, witness statement, 17/6/14, para 46.
<table>
<thead>
<tr>
<th>Expenditure</th>
<th>Minute</th>
<th>Ref</th>
</tr>
</thead>
<tbody>
<tr>
<td>for the next 3 financial years.</td>
<td>19 August 2008</td>
<td>Agostinelli MFI-1, 17/6/14, D.1, p 172</td>
</tr>
<tr>
<td>4 September 2008 $8000 deposited to NHDA.</td>
<td>25 September 2008</td>
<td>Agostinelli MFI-1, 17/6/14, D.2, p 176</td>
</tr>
<tr>
<td>23 September 2008 $3000 withdrawn from NHDA.</td>
<td>11 December 2008</td>
<td>Agostinelli MFI-1, 17/6/14, D.4, p 182</td>
</tr>
<tr>
<td>26 November 2008 $7000 withdrawn from NHDA.</td>
<td>11 December 2008</td>
<td>Agostinelli MFI-1, 17/6/14, D.4, p 182</td>
</tr>
<tr>
<td>5 December 2008 $5000 deposited to NHDA.</td>
<td>27 March 2009</td>
<td>Agostinelli MFI-1, 17/6/14, D.6, p 189</td>
</tr>
<tr>
<td>7 January 2009 $12,000 deposited to NHDA.</td>
<td>12 May 2009</td>
<td>Agostinelli MFI-1, 17/6/14, D.7, p 192</td>
</tr>
<tr>
<td>4 March 2009 $7500 withdrawn from NHDA.</td>
<td>12 May 2009</td>
<td>Agostinelli MFI-1, 17/6/14, D.7, p 192</td>
</tr>
<tr>
<td>23 March 2009 $50,000 deposited to the NHDA.</td>
<td>12 May 2009</td>
<td>Agostinelli MFI-3, 17/6/14, E.2.32, p 742</td>
</tr>
<tr>
<td>24 March 2009 $50,000 withdrawn from NHDA.</td>
<td>29 September 2009</td>
<td>Agostinelli MFI-3, 17/6/14, E.2.32, p 742</td>
</tr>
<tr>
<td>18 August 2009 $1500 withdrawn from NHDA</td>
<td>21 December 2009</td>
<td>Agostinelli MFI-3, 17/6/14, E.2.32, p 743</td>
</tr>
<tr>
<td>29 September 2009 $4800 withdrawn from NHDA.</td>
<td>24 June 2009</td>
<td>Agostinelli MFI-1, 17/6/14, D.8, p 196</td>
</tr>
<tr>
<td>5 October 2009 $8000 deposited to NHDA.</td>
<td>9 February 2010</td>
<td>Agostinelli MFI-3,</td>
</tr>
<tr>
<td>Expenditure</td>
<td>Minute</td>
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<tr>
<td>25 February 2010</td>
<td>Agostinelli MFI-3, 17/6/14, p 742</td>
<td></td>
</tr>
<tr>
<td>23 March 2010</td>
<td>McGregor MFI-2, 17/6/14, p 10</td>
<td></td>
</tr>
<tr>
<td>7 April 2010 $22,000 deposited to NHDA.</td>
<td>9 April 2010 Agostinelli MFI-3, 17/6/14, p 741</td>
<td></td>
</tr>
<tr>
<td>27 May 2010 $12,000 deposited to NHDA.</td>
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</table>

150. None of the BCOM Minutes obtained by the Commission record a discussion of the disbursement of moneys from the NHDA. It seems that no questions were asked. No-one from the BCOM saw fit to interrogate Katherine Jackson on how significant sums of money committed to the NHDA were being spent. The complete absence of any such proper discussion or debate by the BCOM is considered further below in section E.\(^{301}\)

### Cashed cheques from No 3 Branch account

151. Between July 2007 and May 2010 at least 38 cheques were drawn on the No 3 Branch account authorising payment in cash. The total of the amounts drawn, using these cheques, was $239,837. A further $19,900 was drawn from the HSU East Branch account using two cash cheques

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\(^{301}\) Paragraphs 354-390.
drawn between 24 May 2010 and 30 June 2010. Each of the cheques was signed by Katherine Jackson.

152. None of the 40 cheques drawn bore the necessary number of authorised signatories under the HSU’s rules, according to a finding of Tracey J. His Honour also found that, between 23 January 2008 and 19 May 2008 and between 24 May 2010 and 30 June 2010, Katherine Jackson herself had no authority, under the Rules, to sign the cheques used to draw cash from the Union’s account. That was because she was not the Branch Secretary during these periods.

153. The evidence before the Commission also reveals that Jane Holt was a signatory of the No 3 Branch cheque accounts (contrary to HSU Rule 60(c)). She kept pre-signed cheques in a locked drawer in her office. She was comfortable adopting that practice because of the trust she placed in Katherine Jackson.

154. Twenty of the cheques drawn were presented on the eve of BCOM meetings. At each of the meetings, members of the BCOM were given $100 in cash, and Katherine Jackson retained the balance of the cash drawn herself. The members of the BCOM received sittings fees or honoraria. Katharine Wilkinson gave evidence that the members

302 Health Services Union v Jackson (No 4) [2015] FCA 865 at [126].
303 Health Services Union v Jackson (No 4) [2015] FCA 865 at [140]; Katherine Jackson, 28/8/14, T:873.26-35, 874.46-875.1.
304 Health Services Union v Jackson (No 4) [2015] FCA 865 at [140].
305 Jane Holt, witness statement, 17/6/14, para 21; see Submissions of Counsel Assisting, 31/10/14, ch 12.4, para 56.
306 Health Services Union v Jackson (No 4) [2015] FCA 865 at [129].
‘received modest sitting fees to defray the costs associated with attending meetings’. The amount was usually $100 in cash per meeting. Katherine Jackson said it was to ‘cover parking and petrol’.  

155. Katharine Wilkinson recalled that the BCOM had resolved that higher sitting fees would be paid. She recalled that members had agreed to contribute the difference between what they were paid, and the amount that had been authorised for payment, ‘towards expenses associated with protecting and advancing the interests of the union.’ She said that it was discussed at a BCOM meeting. She could not recall a resolution to this effect. But she accepted that there may have been a resolution. Katherine Jackson retained the balance. The balance was placed in a kitty. Katharine Wilkinson did not know what precise amount was retained on any one occasion.  

156. Jane Holt’s evidence to the Commission was that the ‘sitting fees were usually around $8,000 per meeting and would be paid in cash’.  

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308 Katharine Wilkinson, witness statement, 17/6/14, para 50; Katharine Wilkinson, 17/6/14, T:653.21-23.  
310 Katherine Jackson, 18/6/14, T:825.26.  
313 Katharine Wilkinson, witness statement, 17/6/14, para 52.  
316 Jane Holt, witness statement, 17/6/14, para 18; Jane Holt, 17/6/14, T:677.21-25.
These payments would partly be recorded in the accounts of the No 3 Branch as ‘honorarium’, partly as ‘conference/seminar’ and partly as ‘professional fees’. Jane Holt said one of the committee members, whom she later identified as Brian Yeates, would advise her ‘as to the break-up of the payment’.

Katherine Jackson explained that, usually on the day the BCOM was scheduled to meet, she and/or Brian Yeates would withdraw money from the Commonwealth Bank, and return to the Branch office. Then, she or Brian Yeates ‘would hand out $100 to each committee member for their attendance’. Since the money was ‘their honorarium’, the members of the BCOM members could have elected to take more, ‘but they decided that the rest of the money would sit in a kitty’, a ‘little steel box’ that sat in a cupboard.

On 3 July 2008 and 24 February 2010 the BCOM passed resolutions providing that amounts (of $9,500 and $9,800, respectively) would be paid to the BCOM at meetings. Katherine Jackson contended in her defence that a resolution was passed prior to 2008 to the same effect,

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320 Katherine Jackson, 18/6/14, T:823.16-26.
321 Katherine Jackson, 18/6/14, T:823.27-28.
322 Katherine Jackson, 18/6/14, T:823.31-33.
323 Health Services Union v Jackson (No 4) [2015] FCA 865 at [131].
but there was no supporting evidence of this.\textsuperscript{324} The 3 July 2008 resolution was in the following terms: \textsuperscript{325}

That the honorarium and training/conference allowances to be paid up to $9500 per meeting to the [Branch Committee of Management], this would be paid in cash at every meeting that was attended.

159. Katherine Jackson retained the ‘kitty’ funds to be disbursed on matters at her discretion ‘to advance the industrial and political interests of the Branch and the Union’.\textsuperscript{326} In her evidence before the Commission, Katherine Jackson referred to some of the expenditures she would make from the ‘kitty’. These included funding of ALP candidates in local elections, donations to political candidates and donations to other Unions.\textsuperscript{327} Members ‘in need’ could apply for money out of the kitty. The funds would also be used, inter alia, to pay for conferences and to reimburse members for expenses, such as taxi fares.\textsuperscript{328} At other times, Katherine Jackson explained, the money was used to purchase overnight mailbags, which she said were ‘quite expensive’; the money was used to build a ‘stockpile of overnight bags and paper ... to be used in political and industrial campaigns.’\textsuperscript{329} Katherine Jackson also recalled that Diana Asmar was given money out of the kitty to fund

\textsuperscript{324} Health Services Union v Jackson (No 4) [2015] FCA 865 at [134]-[135].
\textsuperscript{325} Jackson MFI, 30/7/14, Vol 1, p 106.
\textsuperscript{326} Health Services Union v Jackson (No 4) [2015] FCA 865 at [134].
\textsuperscript{327} Katherine Jackson, 18/6/14, T:824.17-29.
\textsuperscript{328} Katherine Jackson, 18/6/14, T:823.35;824.6, 824.31-825.2.
\textsuperscript{329} Katherine Jackson, 18/6/14, T:826.29-33.
expenses relating to her campaign for election to a local council, presumably Darebin Local Council.

160. Katherine Jackson frankly admitted that the purpose of the fund was to avoid the HSU’s disclosure obligations under the predecessor to the FW(RO) Act. When asked whether the funds were declared, Katherine Jackson responded to counsel for the HSU: ‘Of course not.’ She added frankly: ‘That’s why you have those funds, Mr Irving.’

161. Katharine Wilkinson did not know how the funds in the kitty were expended. The expenditure of the funds was not reported in the Branch’s financial returns. It was not audited by the Branch auditor. No expenditures from the kitty were the subject of any declarations under s 237 of the FW(RO) Act or its predecessors. So far as they were used to fund an election campaign for Union positions, even if in relation to another branch or another Union, there may have been an offence against s 190 of the FW(RO) Act and its predecessors.

162. Katherine Jackson’s position appeared to be that accounting for the funds in the manner outlined above would defeat the purpose of the fund. That was a deeply irresponsible position for the senior executive official of the Union to have taken. It could not have been in the interests of the No 3 Branch or its members to expose the Branch to

330 Katherine Jackson, 18/6/14, T:826.35-827.2.
331 Katherine Jackson, 28/8/14, T:863.17-22.
332 Katherine Jackson, 28/8/14, T:863.22-25.
333 Katharine Wilkinson, 27/8/14, T:758.28-34.
334 Health Services Union v Jackson (No 4) [2015] FCA 865 at [129].
335 Katherine Jackson, 28/8/14, T:863.17-22.
penalties for a failure properly to manage its financial affairs and comply with its statutory disclosure obligations. Nor could it have been in the interests of members deliberately to avoid disclosure obligations and therefore scrutiny.

163. There was a finding by Tracey J that, apart from the amounts paid to BCOM, each of the cash withdrawals was unauthorised.336

164. There was also a finding by Tracey J that the BCOM did not have power under Rule 68 of the HSU Rules to authorise paying BCOM members in such a way that a portion of the payments would then be donated back to the Union or Secretary to be disbursed at the discretion of the Branch Secretary. His Honour said that, to the extent that any of the pre-2008, 2008 or 2010 resolutions purported to authorise these additional payments, they were beyond the powers conferred by the HSU Rules.337

165. In the period up to 24 May 2010, the rules relevantly provided for the ‘government, management and … control of the affairs of each branch’ to be vested in a BCOM.338 The BCOM had enumerated powers. Among other things, the BCOM could, subject to the rules and the control of branch members, ‘transact all the business of the branch’ and ‘take any action which in its opinion’ was in the ‘interests of the branch, provided that such action does not conflict with the policies of the Union’.339 Relevantly, rule 68 also specifically entitled members

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336 Health Services Union v Jackson (No 4) [2015] FCA 865 at [142].
337 Health Services Union v Jackson (No 4) [2015] FCA 865 at [138].
338 Exhibit #1, 17/6/14, tab 1 (see rule 49).
339 Exhibit #1, 17/6/14, tab 1 (see rule 52).
‘engaged on Union or branch business’ to be paid reasonable out of pocket expenses. It entitled them to be reimbursed – at their rate of salary – for any loss of salary or wages as a consequence of being engaged on branch business under the instructions of the BCOM.  

166. The BCOM of the No 3 Branch had at least two broadly expressed heads of power that could arguably have supported the payment of honorariums to its members of up to $9,500 (or $9,800) per meeting. The countervailing argument propounds a narrow construction. It is that the specific provision in the Rules for members engaged, relevantly, on branch business to be paid reasonable out of pocket expenses prevails over (or cuts down) the general, and more broadly expressed, heads of powers conferred on the BCOM. That construction is reinforced by the consideration that the enumerated powers of the BCOM were expressed to be ‘subject to’ the rules.

167. On the other hand, the specific provision in the rules dealing with out of pocket expenses, properly construed, may simply establish a minimum entitlement. On that construction, the rule constitutes a floor and not a ceiling. This would have the consequence that, although members were at least entitled to be reimbursed their reasonable out of pocket expenses, the BCOM could authorise the payment of an honorarium in a greater amount.

168. In any event, two things are clear. First, as Tracey J found, regardless of the form of the authorisation, what happened was not a payment or donation from the BCOM members to the Union after receipt of a large

340 Exhibit #1, 17/6/14, tab 1(see rule 68).
honorarium. Rather, Katherine Jackson drew the cash, paid $100 to each member, and kept the remainder of the cash to disburse as she pleased.\textsuperscript{341} That is not what was contemplated by the resolutions in evidence. Secondly, 20 of the cash cheques did not coincide with BCOM meetings and therefore were wholly outside the authority conferred by the resolutions.\textsuperscript{342}

169. Katherine Jackson admitted in her defence that she had used some funds from the ‘kitty’ for personal purposes. These purposes included deposits to a mortgage account and her personal account.\textsuperscript{343} It was Tracey J’s conclusion that some, at least, of the other cash withdrawals were undertaken by Katherine Jackson with the intention of using the funds for personal purposes. His Honour drew this inference from the temporal proximity of the withdrawals from Branch accounts and deposits into personal accounts of Katherine Jackson’s.\textsuperscript{344}

170. In consequence, Tracey J found that Katherine Jackson used her positions, as Branch Secretary of the No 3 Branch and as Executive President of the HSU East Branch, improperly to gain an advantage for herself (and in some instances her husband) and thereby contravened s 287 of the FW(RO) Act.\textsuperscript{345} Tracey J ordered Katherine Jackson to pay compensation to the Union in the amount of $238,937.\textsuperscript{346}

\textsuperscript{341} Health Services Union v Jackson (No 4) [2015] FCA 865 at [139].
\textsuperscript{342} Health Services Union v Jackson (No 4) [2015] FCA 865 at [141].
\textsuperscript{343} Health Services Union v Jackson (No 4) [2015] FCA 865 at [130].
\textsuperscript{344} Health Services Union v Jackson (No 4) [2015] FCA 865 at [144].
\textsuperscript{345} Health Services Union v Jackson (No 4) [2015] FCA 865 at [145].
\textsuperscript{346} Health Services Union v Jackson (No 4) [2015] FCA 865 at [148].
Appendix B to this Chapter sets out Tracey J’s findings as to the individual cheque withdrawals and the evidence available as to likely personal expenditure of the cash retained from the cash cheques. In some cases, the evidence of contemporaneous deposits to Katherine Jackson’s personal accounts also aligns with a contemporaneous withdrawal from the NHDA. It is impossible to identify from which source the funds in Katherine Jackson’s accounts were drawn. But the overwhelming inference is that those deposits came from one or other of the NHDA funds or the funds retained by Katherine Jackson from the proceeds of the cash cheques.

The reasoning of Tracey J on these issues appear to be entirely correct.

There are larger questions. How did this arrangement come to be implemented in the first place? How and why did it continue for so long without objection including from anyone in the BCOM or the auditor?

The arrangement was not transparent. The way in which it was recorded in the records of the branch gave the appearance that the BCOM members were being paid an honorarium up to $9,500 or $9,800. But the reality was different. The amount each BCOM member in fact received, $100 per meeting, as distinct from what they were purportedly entitled to receive, was relatively modest.

Moreover, nowhere is it explained why the BCOM members required remuneration in amounts far exceeding the $100 that they were accustomed to receive. Katherine Jackson’s evidence was that the

\[\text{Health Services Union v Jackson (No 4) [2015] FCA 865 at [147].}\]
$100 was to cover expenses such as petrol and parking. There is no explanation as to why the BCOM members would have determined that they were so out of pocket for attending a monthly meeting that an entitlement of up to 8 times that amount was warranted. This is particularly so as, on Katherine Jackson’s version, the BCOM members simply dedicated the funds back to the No 3 Branch.

176. By the arrangement adopted, thousands of dollars that stood to the credit of the Branch’s bank account were withdrawn, ostensibly to cover the payment of an honorarium to the Branch Committee of Management members. They ended up in the kitty for use in the ‘interests of’ the Union – a very loose expression. Expenditure from the kitty was not accounted for in the books and records maintained by the Branch.

177. The arrangement, by Katherine Jackson’s own admission, was designed to avoid the requirements of what is now the FW(RO) Act, including the requirement in s 237 to disclose donations.

178. Where an officer receives funds to be used for the benefit of the Union, those funds ought be receipted, and accounted for, as branch funds. The use of a cash ‘kitty’ defeats transparency and accountability. It also generates suspicion and accusation. The facts surrounding the No 3 Branch ‘kitty’, and the arrangements adopted by Katherine Jackson and the BCOM to fund that kitty, in effect, from branch funds, evidence the undesirable nature of the existence and operation of this kind of relevant entity.
Credit card expenditure

Introduction

179. During her tenure as No 3 Branch Secretary, Katherine Jackson held three separate credit cards in her name: a Diners Club Card, a CBA MasterCard and a Citibank MasterCard.  

180. She made regular use of these cards. In her evidence to the Commission, she said that she had three Union credit cards, the monthly account statements for which were sent to the Union. She said that two of the cards were issued in her name because the relevant issuing financial institution required that the card be issued in the name of an individual. Katherine Jackson said in evidence:

They were Union credit cards issued in my name. There were no reimbursements. They were never personal credit cards, as has been splashed across the newspapers. They were always Union credit cards.

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348 Health Services Union v Jackson (No 4) [2015] FCA 865 at [225]-[228].
349 Katherine Jackson, witness statement, 18/6/14, para 374; Katherine Jackson, 18/6/14, T:813.47-814.12; Jane Holt, 17/6/14, T:680.8-10.
351 Katherine Jackson, 18/6/14, T:814.27-28.
352 Katherine Jackson, 18/6/14, T:817.31-34.
181. She said she was not the only person within the HSU who incurred charges on the card. Other staff members also incurred charges for Union-related purposes, including, for example, accommodation.  

182. She added, in her evidence before the Commission:  

…there was a large annual expenditure on [her] union credit cards.  

I say that the total amounts charged to credit cards each year for the whole of the No 3 Branch expenditure by credit card, which was well under 10% of total expenditure of the No 3 Branch, is unremarkable.  

183. However the HSU contended that some of the credit card expenditure incurred by Katherine Jackson was for non-work related purposes. It contended that it was incurred for the benefit of her family, not the HSU.  

184. In the HSU Proceedings Tracey J agreed. He held that Katherine Jackson should pay the HSU compensation in a total amount of $305,828.30 in relation to misuse of credit cards.  

185. His Honour identified a number of different categories of impugned credit card transaction. His Honour’s nomenclature is adopted. A chronological summary of the relevant credit card expenditure in connection with travel expenses is set out in the next table.  

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353 Katherine Jackson, 18/6/14, T:814.30-37; Jane Holt, witness statement, 17/6/14, para 29.  
354 Katherine Jackson, witness statement, 18/6/14, paras 375-376.  
355 Health Services Union v Jackson (No 4) [2015] FCA 865 at [276].  
356 See para 187.
credit card expenditure other than in connection with travel is set out in Appendix C to this Chapter.

**Travel expenses**

186. Travel expenses comprised the largest category of expense. Between July 2003 and August 2011 Katherine Jackson undertook 24 overseas trips and 10 domestic trips. On some of these trips, she was accompanied by a family member. The HSU contended that she used her Union credit cards during many of these trips for personal purposes.

187. The following table sets out the travel related credit card expenditure on the credit cards issued to Katherine Jackson. It is based on the credit card statements that are in evidence and on Tracey J’s findings as to her travel history.

<table>
<thead>
<tr>
<th>Trip</th>
<th>Date</th>
<th>Card</th>
<th>Expense</th>
<th>Amount</th>
<th>Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Zealand Trip</td>
<td>2 Jul 2003</td>
<td>Diners</td>
<td>Qantas Holidays International</td>
<td>$3,122.84</td>
<td>HSU Tender Bundle, 6/10/15, tab 5, p 1607</td>
</tr>
<tr>
<td>(9 July to 14 July 2003)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Jul 2003</td>
<td></td>
<td>Diners</td>
<td>Qantas Holidays International</td>
<td>$1,272.88</td>
<td>HSU Tender Bundle, 6/10/15, tab 5, p 1607</td>
</tr>
<tr>
<td>14 Jul 2003</td>
<td></td>
<td>Diners</td>
<td>Hertz Rent a Car Head Office</td>
<td>$115.60</td>
<td>HSU Tender Bundle, 6/10/15, tab 5, p 1610</td>
</tr>
<tr>
<td>Gold Coast Trip</td>
<td>12 Sep 2003</td>
<td>Diners</td>
<td>Hyatt Regency</td>
<td>$89.20</td>
<td>HSU Tender Bundle,</td>
</tr>
</tbody>
</table>

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357 Health Services Union v Jackson (No 4) [2015] FCA 865 at [231].
358 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
<table>
<thead>
<tr>
<th>Trip</th>
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<th>Card</th>
<th>Expense</th>
<th>Amount</th>
<th>Evidence</th>
</tr>
</thead>
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<tr>
<td>(September 2003)</td>
<td></td>
<td></td>
<td>Sanctuary Cove</td>
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<td>6/10/15, tab 5, p 1615</td>
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<td>12 Sep 2003</td>
<td>Diners</td>
<td>Noosa Village B-Shop 45665</td>
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<td>21 Sep 2003</td>
<td>Diners</td>
<td>Avis Rent A Car Mascot, pick up and drop off in Maroochydore APO</td>
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<td>$1,548.59</td>
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</tr>
<tr>
<td>Hong Kong and United States Trip (5 December 2003 to 22 March 2004)</td>
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<td></td>
<td></td>
<td></td>
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<tr>
<td>22 Nov 2003</td>
<td>Diners</td>
<td>Ted’s Camera Stores</td>
<td></td>
<td>$1,429.90</td>
<td>HSU Tender Bundle, 6/10/15, tab 5, p 1622</td>
</tr>
<tr>
<td>5 Dec 2003</td>
<td>Diners</td>
<td>Flight Centres NSW P/N:Jackson/Jeffrey Mr TKT: 9141608338 R/N: Not Supplied CX:L MEL/HKG – CX:L HKG/JFK, Date Travel 26/12/03</td>
<td></td>
<td>$3,807.14</td>
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<td>29 Dec 2003</td>
<td>Citibank</td>
<td>Body Map Tullamarine</td>
<td></td>
<td>$193.75</td>
<td>HSU Tender Bundle, 6/10/15, tab 7, p 2237</td>
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<tr>
<td>30 Dec 2003</td>
<td>Citibank</td>
<td>The Excelsior Hotel Hong Kong HK</td>
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<td>$1,586.47</td>
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<tr>
<td>8 Jan 2004</td>
<td>Diners</td>
<td>Paramount Hotel New Yo, New York</td>
<td>$2,993.72 $13.65 $5.03</td>
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<td>8 Jan 2004</td>
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<td>Star Market #121 S8g Brighton Us</td>
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<td>$81.91</td>
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<td>11 Jan 2004</td>
<td>Diners</td>
<td>Westin Hotel-Copley Place, Bosto</td>
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<td>$834.57</td>
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<tr>
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<td>Trip</td>
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<td>Card</td>
<td>Expense</td>
<td>Amount</td>
<td>Evidence</td>
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<td></td>
<td></td>
<td></td>
<td>Cambridge Ma</td>
<td></td>
<td>6/10/15, tab7, p 2233</td>
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<tr>
<td>13 Jan 2004</td>
<td>Citibank</td>
<td>Dana Hill Liquors Cambridge Us</td>
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</tr>
<tr>
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<td>Trattoria II Panino Restaurant, Boston, Us</td>
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</tr>
<tr>
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<td>HSU Tender Bundle, 6/10/15, tab 7, p 2233</td>
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</tr>
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<td>16 Jan 2004</td>
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<td>1336 Massachusetts Cambridge Ma US</td>
<td>$926.79</td>
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</tr>
<tr>
<td>17 Jan 2004</td>
<td>Citibank</td>
<td>Radio Shack 00113811 Cambridge, US</td>
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<td>HSU Tender Bundle, 6/10/15, tab 7, p 2233</td>
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<tr>
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<td>Grafton Street Cambridge</td>
<td>$293.78</td>
<td>HSU Tender Bundle, 6/10/15, tab 7, p 2233</td>
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<tr>
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<td>HSU Tender Bundle, 6/10/15, tab 7, p 2233</td>
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<td>21 Jan 2004</td>
<td>Citibank</td>
<td>The Wine Shop Brighton Us</td>
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<tr>
<td>23 Jan 2004</td>
<td>Citibank</td>
<td>Gap #2233/The Boston Us</td>
<td>$83.22</td>
<td>HSU Tender Bundle, 6/10/15, tab 7, p 2233</td>
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<td>1336 Massachusetts Cambridge Ma US</td>
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<td>Trip</td>
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<td>Card</td>
<td>Expense</td>
<td>Amount</td>
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<td>6/10/15, tab 7, p 2234</td>
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<tr>
<td>6 Feb 2004</td>
<td>Citibank</td>
<td>Amtrak Boston</td>
<td>South Us</td>
<td>$74.47</td>
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<td>Westin Hotels,</td>
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<td>Citibank</td>
<td>Harvard Coop</td>
<td>Square #3 Cambridge Us</td>
<td>$845.88</td>
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<td>14 Feb 2004</td>
<td>Citibank</td>
<td>Expedia*Travel</td>
<td>800-367-3476 Us</td>
<td>$1172.40</td>
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<td>16 Feb 2004</td>
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<td>Dana Hill Liquors</td>
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<td>1336 Massachusetts</td>
<td>Cambridge Ma US</td>
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<td>Cambridge Us</td>
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<td>19 Feb 2004</td>
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<td>Amount</td>
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<td>20 Feb 2004</td>
<td>Citibank</td>
<td>J.Crew #542 Boston Us</td>
<td>$1742.75</td>
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<tr>
<td>21 Feb 2004</td>
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<td>The Ups Store #0681 Cambridge Us</td>
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<td>$1,105.16</td>
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<td>Ups (800) 811-1648 San Franciscous</td>
<td>$410.18</td>
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<td>12 Mar 2004</td>
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<td>$167.37</td>
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</tr>
<tr>
<td>Various</td>
<td>Citibank</td>
<td>Phone services, recorded on the accounts statements as Resort Direct Dial or Vacation phone services (10/1/2004), (23/1/2004), (26/1/2004), (1/2/2004), (2/2/2004), (10/2/2004), (11/2/2004) and</td>
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<td>Tender Bundle, 2/10/2015, tab 7, pp 2227, 2229, 2230, 2231, 2234</td>
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<td>Amount</td>
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<td>Hong Kong Trip (21 October to 25 October 2004)</td>
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<td>US Trip (24 March to 17 April 2005)</td>
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<td>Diners</td>
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Gold Coast Trip (15 September to 17 September 2009)
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<td>HSU Tender Bundle, 6/10/15, tab 4, p 1478</td>
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188. As noted above, Katherine Jackson did not appear for the most part to deny incurring the travel related credit card expenses of the kind summarised in the above table. Indeed any denial would be difficult to sustain. The evidence in the credit card statements noted above appears incontrovertible, particularly when taken with Tracey J’s findings as to her international movements over the relevant period.359

189. Rather, in substance the position taken by Katherine Jackson is that each of the travel expenses incurred by her on Union credit cards was expressly or implicitly authorised by the BCOM.

190. How does Katherine Jackson’s trip to the United States in late 2003 and early 2004 match that position?

191. Her defence to the HSU Proceedings stated:360

In … 2004 [Katherine] Jackson won a US state Department/NSW Trades & Labour Council sponsorship to attend the Harvard Train [sic, scil Trade] Union Training Program, the premiere professional development course for Union officials in the world. The BCOM approved her attendance at that program and associated expenses not covered by the sponsorship. Time on the Program was properly treated as work time not leave. Ms Jackson says that she was also entitled to spend money in accordance with

359 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
360 HSU Tender Bundle, 6/10/15, tab 9, Amended Defence, para 128(a).
the BCOM HESTA Fees Approval the Contractual Travel Entitlement in relation to that travel. [Katherine] Jackson graduated from the Harvard course, delivering the graduation speech on behalf of the class.

192. Katherine Jackson’s oral evidence in the Commission was consistent with this allegation. For example, when asked about expenses incurred from the NHDA in relation with a trip to the United States in early 2004, she said that this was associated with a trip for a scholarship she had received to ‘the Harvard Program’. She also testified that her then husband accompanied her for at least part of that trip.  

193. It is possible to make several points concerning this trip which are favourable to Katherine Jackson’s position. It is not unreasonable for a Union to assist a senior official to obtain a further qualification, particularly if a third party is providing some ‘sponsorship’ in relation to that qualification, provided at least that the qualification will enable the official more effectively to perform his or her duties on behalf of the members. Also, it must have been obvious to the BCOM and others at the No 3 Branch that she was at Harvard for a period of time obtaining this qualification. She seems to have been away for a number of months. The fact of her obtaining the qualification appears to have been no secret. To this extent, the trip to the US in late 2003 and early 2004 seems prima facie less problematic than some of the other trips noted above, which even she seemed to concede were holidays.

361 Katherine Jackson, 28/8/14, T:788.47-789.5.
362 Katherine Jackson, 28/8/14, T:789.36-37.
194. Despite these points, the expenses incurred on her US trip in late 2003 and 2004 are impossible to justify. The expenses impugned in the above table in relation to this trip do not include, for example, any cost of tuition. This may have been covered by the sponsorship referred to in the defence. Nor do they include expenses which would necessarily have been incurred by her for the purposes of this course, such as her own airfare or the purchase of course materials. Rather, the expenses in the above table in relation to this trip are expenses that could not reasonably or necessarily have been incurred for the purposes of her attendance at the Harvard Trade Union Training Program. Let it be assumed for the sake of argument that the BCOM was prepared to, and did, authorise her to attend that Program. Even making this assumption it is unclear why the BCOM would, or legally could, have authorised another member of her family to travel with her at Union expense. If she wished to be accompanied by a family member that was a matter for the Jackson family to fund. She rejected counsel assisting’s submission recorded in this paragraph, and contended that the ‘Harvard Program trip and associated expenses were work related and were approved by BCOM.’\textsuperscript{363} These remarks are so vague and so unsubstantiated that they cannot invalidate the reasoning of counsel assisting.

195. Likewise, it is unclear why the BCOM would, or legally could, have authorised further trips which appear to have been taken during the course of this travel. These included trips to Las Vegas, Seattle and Hong Kong. These trips appear to have nothing to do with the Harvard Trade Union Training Program. Nor could expenses incurred at

\textsuperscript{363} Submissions of Katherine Jackson, 16/10/15, para 162.
clothing shops such as the Gap have been expenses necessarily incurred for the Harvard Trade Union Training Program.

196. In other words, even if it is assumed in Katherine Jackson’s favour that BCOM authorised in advance, or ratified subsequently, her trip to the United States in 2003 and 2004 for the purposes of completing the Harvard Trade Union Training Program, the expenses set out above go well beyond what could reasonably have been authorised by BCOM for that purpose. They also go beyond what Katherine Jackson could reasonably have understood to have been authorised. Rather, the expenses summarised in the above table in relation to this trip to the United States are explicable only by reference to two factors. One is a blind sense of entitlement on her part. She abandoned her obligations to members (including her obligation to incur expenses only where necessary for the purposes of advancing their interests). She regarded herself as at liberty to deploy Union credit cards for her own purposes and as she saw fit. The other is an absence of any, or any meaningful, supervision, review or checking by the BCOM. This latter aspect is addressed further below.364

197. Katherine Jackson in her defence justifies other trips and expenses in various ways. At a general level she asserted that a number of the other trips were work trips for which the credit card expenditure was authorised. His Honour rejected that contention in respect of several trips for want of objective evidence.365 At a more specific level, Katherine Jackson argued that the trips were undertaken on one of

364 See paras 266-302, 350-353, 355-370.
365 Health Services Union v Jackson (No 4) [2015] FCA 865 at [237]-[238].
three bases. The first was an approval by BCOM, allegedly given in 1999, that she was entitled to an allowance equivalent to the board fees payable to her as a directors of the HESTA Superannuation fund, but contingent on remission of her HESTA Board fees to the No 3 Branch.\footnote{HSU Tender Bundle, 6/10/15, tab 9, pp 2360-2361 [116]; \textit{Health Services Union v Jackson (No 4)} [2015] FCA 865 at [240].} The second rested on a decision by BCOM, allegedly made in 2002, to confer on Katherine Jackson an entitlement to spend up to $28,000 per annum on travel for conference and sabbatical purposes. The travel was to count as time at work for leave entitlement purposes. This included authority to expend monies on the costs of travel for accompanying family members.\footnote{HSU Tender Bundle, 6/10/15, tab 9, p 2361 [119]; \textit{Health Services Union v Jackson (No 4)} [2015] FCA 865 at [241].} The third relied on ‘approved annual leave with expenditure during the trip authorised by the BCOM HESTA Board Fees or the Annual Travel Entitlement.’\footnote{\textit{Health Services Union v Jackson (No 4)} [2015] FCA 865 at [239].}

198. In rejecting the contention by Katherine Jackson that she had such allowances or entitlements, Tracey J made a number of points. One was that the granting and payment of such allowances were not reported in the Union’s accounts between 2000 and 2010 as forming part of her remuneration. Another was that the available minutes of the BCOM do not mention any such allowances. Thirdly, in 2010 her salary was reviewed by an external consultant, who was provided with details of her remuneration. These details did not disclose the receipt by her of any such allowances. Fourthly, she did not disclose the
receipt of any such alleged allowances or entitlements as income in her taxation returns for the financial years between 2003 and 2011.369

199. The first three of these points are powerful. They resolve this issue adversely to Katherine Jackson. The fourth is not powerful. It may be explicable as proceeding only from a self-interested desire to minimise her apparent income and therefore her tax on it.

200. However, the points made by Tracey J can be supplemented by a number of further conclusions from the evidence before the Commission.

201. First, the proposition that Katherine Jackson had the benefit of travel allowances or entitlements of the kind now claimed by her is not revealed in the audit records prepared by John Agostinelli. Nor is there any reference to those allowances or entitlements in the audit reports of Iaan Dick – a point which may not be decisive in view of the ineffectiveness of his audits. The exit audit of May 2010 undertaken by John Agostinelli verified the payment of unpaid leave entitlements to her following the conclusion of her employment as Branch Secretary in January 2008. The supporting papers disclose calculations of her entitlements to annual leave, long service leave and accumulated days off, but not to any other entitlement.370

202. Secondly, even if she did have travel allowances or entitlements of the kind for which she contends, it was not legitimate to use those allowances or entitlements for anything but expenses unequivocally

369 Health Services Union v Jackson (No 4) [2015] FCA 865 at [244].
370 Agostinelli MFI-2, 17/6/14, tab D.76.
and necessarily associated with Union work. At least a large number of the expenses incurred by her do not answer that description. In other words, even if she had had such a travel allowance it could not legitimately have been spent on purposes extraneous to her own Union related travel, such as buying clothing or personal goods.

203. *Thirdly*, it seems highly unlikely that the BCOM knowingly would, or legally could, have conferred such lavish allowances and entitlements. There is no evidence of these allowances or entitlements being given to any other Union official. Indeed the sheer number of the trips taken by Katherine Jackson is striking. For example, as appears from the above table, in 2006 she went on holidays to the US in April, to North Queensland in June, to Europe in August and to Hong Kong in December. It is unlikely that a BCOM acting reasonably would, or could, have regarded travel of this kind as necessary for, or consistent with, advancing the interests of the members of the Union. Moreover, the BCOM could not legally have approved or ratified the credit card expenditure so as to permit discretionary spending on retail and entertainment matters entirely unrelated to the business of the Union and the interests of its members, but closely related to the enjoyment of a holiday.

204. *Fourthly*, even if it be assumed for present purposes that some travel allowance or other entitlement had been given to Katherine Jackson in her capacity as Branch Secretary of the No 3 Branch, that arrangement cannot have persisted during the period between her assumption of the role of National Secretary on 22 January 2008 and her resumption of the role of No 3 Branch Secretary on 13 May 2008. To the extent that the arrangement conferred some entitlement to take holidays without
claiming her annual leave entitlements, this could only apply during the period of her employment by the Branch, which concluded on 22 January 2008. And the arrangement must have ended when the merger took place on 24 May 2010.

205. As noted above, on or by 24 May 2010, Fair Work Australia had certified the rule changes necessary to implement the merger of the No 3 Branch with the Victoria No 1 Branch and the New South Wales Branch of the HSU, forming the HSU East Branch. As and from that time the No 3 Branch had ceased to exist and Katherine Jackson had ceased to be its Secretary.

206. However, the above table reveals expenditures when Katherine Jackson was not Branch Secretary. In March 2008 she took a trip to Sydney. After 24 May 2010 she travelled on a European holiday in August 2010 and United States holidays in December 2010 and July 2011. Even if any travel entitlement had been given while she was Branch Secretary of No 3 Branch it had plainly ceased by the time of those trips.

207. The fact that those trips cannot on any view be justified undermines the general position taken by Katherine Jackson on these issues.

208. Lastly, it is worth noting that a number of BCOM members gave evidence concerning Katherine Jackson’s allowances and in particular the suggestion that she had a $4,000 per year personal allowance from funds maintained in the NHDA. Those BCOM members did not suggest that, in addition, and separately, she was also entitled to a further allowance or entitlement, including a travel allowance of
$28,000 a year. Moreover, she did not raise these entitlements in her evidence before the Commission. The claim to them has an air of afterthought.

209. The conclusion of Tracey J was that the expenses were incurred by Katherine Jackson on holidays or to facilitate travel for personal purposes.\(^{371}\) For the reasons his Honour gives, and for the additional reasons outlined above, it is necessary to make findings to that effect.

**Retail Expenses**

210. Katherine Jackson incurred retail expenses at large department stores such as Myer and David Jones. She incurred them at electrical, computer, camera, clothing, shoes, accessories and children’s wear stores. She incurred them at home wares and furniture outlets. She also incurred expenditure at a party warehouse and car dealerships.\(^{372}\)

211. Katherine Jackson pleaded in her defence to the HSU Proceedings that each of the retail expenses was ‘work related, properly incurred and properly approved’. She denied that any of the purchases for personal purposes had been paid for with Union funds.\(^{373}\) This contention was rejected by Tracey J. His Honour held that the purchases were not approved by BCOM. This finding is adopted. In any event, he said that it was difficult to conceive why purchases in the nature of department store goods, electrical items and babywear would be

\(^{371}\) *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [246].

\(^{372}\) *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [248].

\(^{373}\) *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [254].
necessary for Union business. Moreover, assuming that the expenses were for staff gifts, there would be questions about the propriety of purchasing gifts to that value with members’ funds.374

Food and alcohol purchases

212. Between 2004 and 2008 Katherine Jackson used credit cards for two categories of purchase. In relation to the first, on at least 15 occasions she made purchases from supermarkets and liquor stores near her home. In relation to the second category, she spent large amounts at various liquor and grocery outlets between 2003 and 2010.375

213. Katherine Jackson contended, in her defence to the HSU proceedings, that each of the food and alcohol purchases was ‘work related, properly incurred and properly approved’.376

214. The purchases in the first category were made at premises close to Katherine Jackson’s residence. In Tracey J’s opinion it was more likely than not that Katherine Jackson made purchases in the first category for domestic purposes. As to the second category, his Honour found that the number and the monetary amount of liquor purchases and the absence of evidence to suggest that consumption occurred at Union functions made it difficult to conclude that any of the second group of purchases was for Union purposes. His Honour found that the food and liquor purchases were non-Union related, but allowed a

374 Health Services Union v Jackson (No 4) [2015] FCA 865 at [255].
375 Health Services Union v Jackson (No 4) [2015] FCA 865 at [256].
376 Health Services Union v Jackson (No 4) [2015] FCA 865 at [259].
discount of $5,000 to account for the possibility that some of the food and liquor was purchased for Union-related purposes. Subject to that possibility, the finding is that none of the food and alcohol purchases were Union-related.

**Health and fitness expenses**

215. Between 2004 and 2008 Katherine Jackson used the credit cards to pay for services and equipment from gymnasia and health facilities.

216. In her defence to the HSU Proceedings, she said that all of these expenses had been ‘work related, properly incurred and properly approved...’. She further argued that these expenses ‘related to other staff and were expenses incurred pursuant to express BCOM approval in relation to a staff health and well-being programme’. She also asserted that the treadmills had been purchased for the Branch office for health purposes and that the expenditure had been approved by the BCOM. But Tracey J noted there was no evidence to support these claims. It is appropriate to make a finding rejecting them.

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377 *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [260].
378 *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [261].
379 HSU Tender Bundle, 6/10/15, tab 9, paras 135-136.
380 *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [263].
Entertainment expenses

217. Katherine Jackson spent large sums at restaurants and bars in and around Melbourne.\(^{381}\)

218. She defended the claims on the ground that each of the purchases was ‘work related, properly incurred and properly approved’. She expressly denied that the purchases had been made for her personal use or had improperly been paid for from Union funds.\(^ {382}\) These denials must be for the most part rejected.

219. She did not provide particulars to demonstrate that the restaurant bills arose from work-related entertainment. Nor was there evidence to support a claim that restaurant entertainment for Union purposes had been authorised by the relevant BCOM either generally or in respect of particular occasions.\(^ {383}\)

220. During the period in which the expenses were incurred Katherine Jackson was the holder of either or both the offices of National Secretary and Secretary of the No 3 Branch. Hence it was decided by Tracey J that a discount of 30 percent should be applied to the claim in respect of entertainment expenses on the basis that some of the expenses might be justified under Rules 36(b) and 60(d) as being

\(^{381}\) *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [264].

\(^{382}\) *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [269].

\(^{383}\) *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [270].
Compensation

221. Hence Tracey J found that Katherine Jackson used the credit cards substantially for her own purposes. He found contraventions of s 187 of the FW(RO) Act. He found that Katherine Jackson incurred the following expenses on the Union credit cards for her own personal purposes:385

(a) Travel related expenses - $175,154.
(b) Retail expenses - $101,792.10.
(c) Food and alcohol expenses - $14,639.
(d) Health and fitness expenses - $5,237.
(e) Entertainment expenses - $20,864.20.

222. Katherine Jackson’s submissions, apart from expressing the fact of but not the reasons for disagreement with the key findings of Tracey J, made two points about counsel assisting’s submissions on credit card expenditure.386 The first was that she had been ‘severely prejudiced by the destruction of primary credit card receipts and relevant BCOM

384 Health Services Union v Jackson (No 4) [2015] FCA 865 at [271].
385 Health Services Union v Jackson (No 4) [2015] FCA 865 at [229].
386 Submissions of Katherine Jackson, 16/10/15, paras 159-161.
minutes’. The second was that the ‘travel expenses incurred on her Union credit cards were expressly or implicitly authorised by BCOM’. The first point may be a fair point. But it is somewhat exaggerated. There is no reason to suppose that any missing documents would totally negate the general lines of reasoning employed by Tracey J and by counsel assisting. The second point is so vaguely formulated that it is impossible to deal with.

223. The employment by Tracey J of discounts to take account of some expenditures which may have been for Union purposes is necessarily an imprecise technique, turning on matters of judgment and degree. Minds can reasonably differ on the selection of the discount figure. Subject to that consideration, the evidence considered by Tracey J, his reasoning, the evidence in the Commission and the reasoning of counsel assisting make it just to arrive at findings substantially to the same effect as those which counsel assisting submitted to be right in the manner just outlined.

$s63,000$ honorarium

224. On 23 March 2010, prior to the amalgamation on 24 May 2010 to form the HSU East Branch, the No 3 BCOM passed a resolution in the following terms:

The BCOM also reminded the Secretary that she had not claimed the $21 000 honorarium that she has been entitled to for the past 3 years, and she should arrange payment. The BCOM also noted that the Secretary should be paid the full $21 000 honorarium in total, for this financial year, not pro rata, regardless of the date of amalgamation as a sign of thanks and appreciation for her service to health professionals.
The resolution took effect on 24 May 2010.

225. Jane Holt explained that the BCOM had agreed to pay Katherine Jackson an honorarium for her ‘time in managing’ the Branch when she was the National Secretary of the HSU, and not a paid official of the No 3 Branch.387

226. A finding was made by Tracey J that Katherine Jackson wrote a cheque for $63,000 on an account operated by HSU East Branch. The cheque was signed by Katherine Jackson. It was countersigned by one but not two members of the HSU East BCOM.388 There was a breach of rule 65(c). She did not inform the National Executive of the payment to her.389 She did not know whether she made any remittance to the Commissioner of Taxation in respect of the payment.390

227. Counsel assisting pointed out that Tracey J made a finding that the BCOM did not have power under the Rules to pass this resolution. The BCOM had broad powers to manage and control the affairs of the Branch and to take action which was in the interests of the Branch (Rules 49(a), 52(e) and 52(1)). But it had no express powers to grant honoraria to Branch or National Officers. During the period to which the payment related, Katherine Jackson was an officer, but not an employee, of the Branch. In the absence of any express provision in the Rules for the making of payments to honorary office holders,

388 Health Services Union v Jackson (No 4) [2015] FCA 865 at [151].
389 Katherine Jackson, 28/8/14, T:842.18.
Katherine Jackson had no entitlement to additional remuneration.\footnote{Health Services Union v Jackson (No 4) [2015] FCA 865 at [153], citing Guinness plc v Saunders [1990] 2 AC 663 at 690.} His Honour rejected two contentions of Katherine Jackson. The first was that there was an established practice of paying honoraria to unpaid office holders. His Honour’s reasons for rejecting it were that there was no evidence to support it and in any event that could not be a legitimate source of authority.\footnote{Health Services Union v Jackson (No 4) [2015] FCA 865 at [154].} The second was that it was appropriate for her to pay the honorarium to herself from HSU East funds after the amalgamation. She based that on an alleged direction from Michael Williamson, following the amalgamation, to continue conducting the financial affairs of the No 3 Branch on a ‘business-as-usual’ basis until the various branch accounts were merged.\footnote{Health Services Union v Jackson (No 4) [2015] FCA 865 at [157], see also Katherine Jackson, 28/8/14, T:840.15-45, 841.1-8.}

228. His Honour held that Katherine Jackson improperly used her positions as Branch Secretary and Executive President to gain an advantage for herself.\footnote{Health Services Union v Jackson (No 4) [2015] FCA 865 at [158].} He ordered that Katherine Jackson pay the Union the amount of $63,000.\footnote{Health Services Union v Jackson (No 4) [2015] FCA 865 at [160].}

229. Counsel assisting urged that Tracey J’s findings be adopted. They submitted that to pay the honorarium at that time was self-evidently dubious. One question was: could Katherine Jackson be entitled to a payment of $21,000 over three years for her services to the Branch? That question is particularly pointed when regard is had to the numerous other entitlements that she claimed and claims. Apart from
that, it was improper for Katherine Jackson to give effect to an agreement to use the funds of the HSU East Branch, without any formal approval of that Branch and in respect of a transaction that was entirely for her benefit.

230. Katherine Jackson’s submissions in answer to those of counsel assisting on the $63,000 honorarium question in general did no more than deny the validity of Tracey J’s reasoning. They raise only one fresh point: ‘[E]ven if the honorarium had been paid in breach of the rules, the HSU did not suffer any loss because even if Rule 65(c) had been complied with, the payment would still have been properly made.’\textsuperscript{396} This repeats an allegation made in her defence to the HSU Proceedings.\textsuperscript{397} The phrasing of the submission is not entirely easy to follow. But it seems to assert that a breach of rules can be overlooked if the outcome would have been the same had they been complied with. If that approach were valid, it would make it unnecessary to have any rules at all. It is reminiscent of some unsatisfactory arguments by the ETU NSW.\textsuperscript{398} But if an attempt to comply with rule 65(c) had been made, questions might have been raised preventing the payment of the $63,000. At least it has not been shown that they would not have been. The whole point of rule 65(c) was to create a safeguard – the need for two signatories from members of the HSU East BCOM, not just one. Had a second person been asked to sign, that person, acting reasonably, might well have prevented the transaction from going ahead. As the High Court said in another context:\textsuperscript{399} ‘It is no easy task for a court of

\textsuperscript{396} Submissions of Katherine Jackson, 16/10/15, para 166(c).

\textsuperscript{397} HSU Tender Bundle, 6/10/15, tab 9, para 150(d).

\textsuperscript{398} Chapter 3.1, paras 227-243.

\textsuperscript{399} Stead v State Government Insurance Commission (1986) 161 CLR 141 at 145-146.
appeal to satisfy itself that what appears on its face to have been a
denial of natural justice could have had no bearing on the outcome of
the trial of an issue of fact.’

231. In any event, as Tracey J pointed out, even if Katherine Jackson’s
argument were correct, her conduct would still have been improper,
because the BCOM resolution which purportedly justified the payment
was beyond its powers.400

232. As counsel assisting submitted, it is appropriate to make findings along
the lines of those made by Tracey J.

Elliott Memorandum

233. Pursuant to a Memorandum of Agreement between Robert Elliott and
the HSU of 25 February 2010, he was employed by the HSU to
provide certain advice. The date of the agreement is the date on which
the NSW BCOM and the No 3 BCOM endorsed the merger of the
respective branches.401

234. Those of the submissions of counsel assisting which are accepted
proceeded as follows.

235. The Memorandum of Agreement was signed by Katherine Jackson.
Her evidence was that she thought, at the time, that she was signing

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400 Health Services Union v Jackson (No 4) [2015] FCA 865 at [158].
401 Health Services Union v Jackson (No 4) [2015] FCA 865 at [162].
only as a witness. In purported performance of the Memorandum of Agreement the following results flowed.

(a) Robert Elliott was paid $150,000 per year (subject to CPI increase) at a rate of $2000 per day for up to 75 days per year as a consultant at HSU East. That was a substantial increase on the $442.24 per day he was then earning as a consultant for the No 3 Branch.

(b) Robert Elliott was granted an entitlement to be paid accrued long service and annual leave from his employment at Nos 1 and 3 Branches at his new rate of pay.

(c) Robert Elliott was assured of nomination by HSU to the HESTA Superannuation Fund Board. He was entitled to retain all entitlements to director’s fees and other payments relating to that role, notwithstanding that that was a matter for the approval of the National Council or the National Executive of the Union.

(d) The performance of the agreement would have committed the HSU to providing Robert Elliott with benefits in excess of $1,000,000 over the four year life of the contract.

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402 Health Services Union v Jackson (No 4) [2015] FCA 865 at [164].
403 Health Services Union v Jackson (No 4) [2015] FCA 865 at [167].
404 Health Services Union v Jackson (No 4) [2015] FCA 865 at [168].
405 Health Services Union v Jackson (No 4) [2015] FCA 865 at [180].
(e) Following the formation of HSU East Katherine Jackson kept no records of the days and times that Robert Elliott worked.406

(f) Robert Elliott was paid a total of $88,038.59 (inclusive of superannuation) in the period between 25 May 2010 and 3 December 2010.407

(g) The NSW Union paid the balance of the money due to Robert Elliott up to on 31 August 2012 ($262,499.58 plus superannuation of $7,528.92).

(h) Following the demerger the Victoria No 3 Branch paid Robert Elliott the sum of $34,585 (inclusive of superannuation) between 1 September 2012 and 16 November 2012.408

236. No issue was raised in respect of this arrangement until questions were asked by the administrator of the HSU East Branch following his appointment. Robert Elliott then sued for his alleged entitlement. The proceedings were settled with a payment to him of $40,073.409

237. The HSU alleged that Katherine Jackson misused her position to gain an advantage for Robert Elliott or to cause detriment to the Union. It was found by Tracey J that she exceeded her authority as Secretary of the No 3 Branch (or as Executive President nominate of HSU East) by purporting to fix the terms and conditions of employment of the HSU

406 Health Services Union v Jackson (No 4) [2015] FCA 865 at [181].
407 Health Services Union v Jackson (No 4) [2015] FCA 865 at [185].
408 Health Services Union v Jackson (No 4) [2015] FCA 865 at [185], [191]-[192].
409 Health Services Union v Jackson (No 4) [2015] FCA 865 at [170].
East Branch, a matter within the power of the HSU East BCOM.\footnote{Health Services Union v Jackson (No 4) [2015] FCA 865 at [174]-[175].} She did not report the execution of the Memorandum of Agreement to the National Council or National Executive. There was no evidence to support her claim that HSU East had ratified her conduct.\footnote{Health Services Union v Jackson (No 4) [2015] FCA 865 at [176]-[177].}

238. Moreover, there was no need for the Memorandum of Agreement to be executed at the time that it was. It was not an ordinary operating expense of the Union. There was no suggestion that it was budgeted or that it was disclosed to or approved by the Finance Committee. There was no urgency requiring the execution of the Memorandum of Agreement at that time. Robert Elliott remained an employee of the No 3 Branch until the new branch was formed.\footnote{Health Services Union v Jackson (No 4) [2015] FCA 865 at [178]-[179].}

239. Counsel assisting submitted that the reasoning of Tracey J on this issue should be accepted.

240. Katherine Jackson submitted that Tracey J’s findings should be rejected. But her submissions offered no reasons why that should be done. Apart from the submission on damages, which is not a submission counsel assisting invite acceptance of, her submissions consist only of some brief and bald denials of the general case counsel assisting put against her. Her submissions did not set out any particular evidence or reasoning to justify those denials.\footnote{Submissions of Katherine Jackson, 16/10/15, paras 167-169.} Nor could they, because there was no evidence either in the Commission or before Tracey J to support them. For example, what evidence was
there to support her submissions that she ‘executed the [Memorandum of Agreement] in good faith, genuinely believing that it was appropriate and in the interests of the Victoria No 3 Branch and HSU East’? 414 According to her evidence before Tracey J, she executed only as a witness. 415 What evidence was there that ‘the HSU Branch ratified her actions in relation to this matter?’ The defence of ratification was rejected by Tracey J on the basis that there was no evidence to support it. 416 Further, the minutes of HSU East meetings in evidence do not contain any resolutions ratifying the Memorandum of Agreement. 417 That is not conclusive, because not all the minutes are in evidence. But it is suggestive.

241. Robert Elliott filed submissions opposing counsel assisting’s submissions for different reasons. 418

242. First, in relation to the genesis of the Memorandum of Agreement he disputed ‘many of the allegations’ which the HSU made and which Tracey J accepted. He submitted that he, Robert Elliott, ‘knows [them] to be false’. 419 He gave only one instance of these allegations. He did not offer any submissions explaining why it was false. He had been a party to the HSU Proceedings, but as between him and the HSU they were settled before trial. He submitted that he had never had an

414 Submissions of Katherine Jackson, 16/10/15, para 169(d).
415 Health Services Union v Jackson (No 4) [2015] FCA 865 at [164].
416 Health Services Union v Jackson (No 4) [2015] FCA 865 at [177].
417 See minutes of 25 February 2010, 16 September 2011 (Jackson MFI-1, 18/6/14, pp 283, 383, 7 February 2012 and 8 February 2011 (Wilkinson MFI-1, 17/6/14, pp 9, 13) and 13 February 2012 (Jackson MFI-3, 19/6/14).
418 Submission of Robert Elliott, 15/10/15, paras 3-6.
419 Submission of Robert Elliott, 15/10/15, para 5.1.
opportunity to contest the HSU’s evidence or allegations in the HSU Proceedings.

243. *Secondly*, he submitted that since Katherine Jackson did not appear at the trial, the HSU witnesses were not subject to cross-examination. He also pointed out that he had not been called by either of the other parties at the trial. Hence Tracey J’s finding was based on the HSU’s unchallenged evidence.

244. *Thirdly*, he pointed out that in view of Michael Williamson’s convictions, circumspection was called for so far as the findings were based on his evidence or on the evidence of HSU officers relying on accounts by him. Robert Elliott’s submissions did not identify what that evidence was.

245. *Fourthly*, he pointed out that though he was called to give evidence before the Commission on another matter, no allegations about the Memorandum of Agreement were raised with him on that occasion.

246. *Fifthly*, he suggested that certain paragraphs relating to him in the statement of Chris Brown which had not been admitted on 2 October 2014 should not be relied on in relation to the Memorandum of Agreement issue.

247. Counsel assisting made three central points in reply.\(^{420}\)

\(^{420}\) Submissions of Counsel Assisting, 2/11/15, paras 27-28.
248. The first is that if Robert Elliott is aggrieved by Tracey J’s findings, he is at liberty to seek to appeal against them. He has not attempted to do so.

249. The second is that counsel assisting did not recommend any findings against Robert Elliott. They recommended findings only against Katherine Jackson.

250. Thirdly, pursuant to Practice Direction 10, paragraph 4, Robert Elliott was at liberty to seek to have further evidence tendered in the Commission. He did not seek to do so.

251. The most significant point made by Robert Elliott, if it were valid, is that to adopt Tracey J’s findings is to injure his interests impermissibly. That point would be met if none of Tracey J’s findings adverse to him were adopted, only those adverse to Katherine Jackson. The essence of counsel assisting’s approach was to adopt only those adverse to Katherine Jackson.

252. If one omits findings of Tracey J which were adverse to Robert Elliott, his Honour’s reasoning supporting his acceptance of the HSU’s case against Katherine Jackson was as follows. The HSU contended that she had executed the Memorandum of Agreement without authority, that she had done so in breach of the relevant financial governance procedures and that she had purported to bind the Union to make excessively generous payments to Robert Elliott.\footnote{Health Services Union v Jackson (No 4) [2015] FCA 865 at [171].} She denied these allegations.\footnote{Health Services Union v Jackson (No 4) [2015] FCA 865 at [172].} In the course of those denials she abandoned the
contention that she signed only as a witness. She did not deny that she lacked authority to enter the contract, on behalf of the HSU, in her capacity as National Secretary. She relied on four propositions:

- In executing the memorandum she was acting for and on behalf of the Victoria No 3 Branch and Mr Williamson was acting for and on behalf of the New South Wales Branch.
- “The execution of the Elliott Memorandum … was the business of the Victoria No 3 Branch and the NSW Branch as branches that were in the process of amalgamating.”
- “… she occupied the office of Secretary of the Victoria No 3 Branch and, after amalgamation, was to occupy Executive President of HSU East Branch …”
- She “genuinely believed that she had power and authority, as Branch Secretary of the Victoria No 3 Branch, one of the three amalgamating branches, to execute the Elliott Memorandum.”

253. The defences were rejected. His Honour said:

They fail because Ms Jackson had no authority, in her capacity as Secretary of the Victoria No 3 Branch, to fix the terms and conditions of employment of Mr Elliott as an employee of the, yet to be created, HSU East Branch. This power rested exclusively with the Committee of Management of the new Branch which had yet to be formed: see Rule 52(e).

254. Then Tracey J said: ‘For the same reasons Ms Jackson did not have power to execute the memorandum as Executive President nominate of the HSU East Branch.’

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423 Health Services Union v Jackson (No 4) [2015] FCA 865 at [176].
424 Health Services Union v Jackson (No 4) [2015] FCA 865 at [173].
425 Health Services Union v Jackson (No 4) [2015] FCA 865 at [174].
255. Katherine Jackson also contended that the HSU East Branch or the State registered Union known as HSU East had later ratified her conduct. But Tracey J rejected this:427

There is no evidence to support her claim of ratification by the HSU East Branch once it was formed. The State registered Union was an entity separate from the HSU and could not, even if it had wished to do so, ratified Ms Jackson’s conduct as an officer of the HSU. In any event, there was no evidence that it had done so.

256. Then the financial governance procedures were dealt with by Tracey J.428

[T]he National Secretary was authorised to make and/or commit to expenditures within the context of normal operations. The National Secretary was also authorised to make expenditure up to $10,000 provided it was within the annual budget and reported to the Finance Committee as soon as practicable. If not within the annual budget, prior approval by the Finance Committee was required. The procedures required that expenditure over $50,000 must be approved by the National Executive prior to the expenditure being incurred, or, in urgent and unforeseen circumstances, jointly by the National Secretary and the National President, provided that such payments shall be immediately reported to the members of National Executive by email and to the next meeting of the National Executive following the expenditure.

The … [Memorandum of Agreement] did not deal with a normal operating expense of the Union. The appointment of Mr Elliott was not part of the systematic, repetitive and continuous business of the Union. Further, there was no evidence that the financial commitments, made to Mr Elliott, had been provided for in the Union’s budget. The terms of the memorandum were not reported by Ms Jackson to the Finance Committee. It was not approved by the Finance Committee. The circumstances in which the memorandum came into existence were neither urgent nor foreseen. Mr Elliott remained employed in the Victoria No 3 Branch and his future employment by the new Branch could have been considered once it had been formed.

426 Health Services Union v Jackson (No 4) [2015] FCA 865 at [175].
427 Health Services Union v Jackson (No 4) [2015] FCA 865 at [177].
428 Health Services Union v Jackson (No 4) [2015] FCA 865 at [178]-[179].
Finally, Tracey J said:  

The terms and conditions of employment of Mr Elliott provided for in the [Memorandum of Agreement] were significantly more beneficial to him than those which had previously obtained when he was working for the Victoria No 3 Branch.

But Tracey J said that whether those terms and conditions were ‘excessive’ need not be determined.

That reasoning of Tracey J involves no findings adverse to Robert Elliott. It does involve findings adverse to Katherine Jackson. So far as it does, that reasoning is accepted.

The findings of Tracey J against Katherine Jackson are sound. They are adopted. The findings of Tracey J quoted by counsel assisting concerning the genesis of the Memorandum of Understanding are neither adopted nor rejected. They are simply immaterial in relation to the case of the HSU against Katherine Jackson which Tracey J accepted.

**Engagement of solicitors**

Fair Work Australia undertook an investigation into various matters relating to the HSU. The delegate of the General Manager of Fair Work Australia...
Work Australia then sent three letters, dated 14 December 2011. The first of these notified Katherine Jackson in her capacity of National Secretary of the HSU of various allegations that the Union had contravened provisions of the FW(RO) Act. The other two letters were addressed to Katherine Jackson and Michael Williamson, notifying each of them of allegations that they had personally contravened the FW(RO) Act.

261. The National Executive on 19 December 2011 resolved that lawyers be retained to respond to the letter concerning the Union. Katherine Jackson disclosed to the National Executive that she had received a letter in respect of allegations against her. But she did not advise the National Executive that she would require separate representation or secure a resolution to that effect. On 18 January 2012 Katherine Jackson retained solicitors to act for her personally, at the Union’s expense. Between that time and 7 February 2012, those solicitors prepared a response to the letter from Fair Work Australia and rendered two invoices totalling $40,882.16. On 29 March 2012 the National Executive, having been advised of the invoices, refused to ratify the expense. It resolved that the retainer was unauthorised and would not be paid by the HSU. The invoices remained unpaid until November 2012 at which time the solicitors issued a letter of demand. The HSU accepted that it had no good defence to the claim. It settled the claim by payment of $34,725.43.432

262. In substance counsel assisting put the following submission about those facts. The HSU claimed before Tracey J that Katherine Jackson

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432 Health Services Union v Jackson (No 4) [2015] FCA 865 at [195]-[211].
misused her ostensible authority to commit the Union to pay the solicitors’ fees in her interest. For her part, she contended that she raised her view that she should get legal advice separate from that of the Union at a meeting of national officers on 11 January 2012 and received no objection. His Honour did not accept that. He held that authority should have come from the National Executive, which was to meet the following day. She did not endeavour to get it. He held that the evidence relating to the meeting of national officers went no further than supporting the proposition that after the meeting she had an informal discussion with one national officer whom she told that she had received a letter containing allegations against her, but to whom she said nothing about engaging lawyers. 433 His Honour also rejected her contentions that she was authorised by Union Rule 32(n) to retain the solicitors as part of the business of the Union, 434 or authorised by various delegations in the Financial Management Policy and Procedures authorising the National Secretary to make ordinary or extraordinary expenditures. The expenditure was for her personal benefit. It was therefore not part of the ordinary business of the Union. In particular, there was no evidence that the expenditure was reported to the Finance Committee before or after it was incurred as required by those delegations. 435 His Honour observed: 436

Ms Jackson had many opportunities to seek formal approval of the retainer or prompt ratification of her actions from the National Executive. The fact that she chose not to do so until late in March 2012 strongly suggests that she considered that, had she sought approval from either the Finance

433 Health Services Union v Jackson (No 4) [2015] FCA 865 at [214]-[215].
434 Health Services Union v Jackson (No 4) [2015] FCA 865 at [216].
435 Health Services Union v Jackson (No 4) [2015] FCA 865 at [217]-[222].
436 Health Services Union v Jackson (No 4) [2015] FCA 865 at [223].
Committee or the National Executive at any earlier stage, that approval would not have been forthcoming.

263. Counsel assisting submitted that the reasoning of Tracey J on the issue should be accepted.

264. Katherine Jackson opposed adoption of Tracey J’s findings. Her submissions, however, amounted to no more than bare denials of various steps in Tracey J’s reasoning. They did not endeavour to explain why any of those denials were correct.437

265. Accordingly, Tracey J’s findings are accepted.

Questions about how the conduct occurred

266. How was Katherine Jackson able to conduct herself in the manner in which she did? What system of financial approvals and oversight existed within the No 3 Branch? Counsel assisting advanced the following submissions. They are accepted.

267. Staff, the auditors, and the BCOM reposed complete practical control over the financial affairs of the Branch in Katherine Jackson. No one person exercised an independent voice so as to identify potential improprieties in her handling of the funds of the No 3 Branch.

268. Katherine Jackson handled branch funds with a view to avoiding basic financial scrutiny and with a view to taking total control over large

437 Submissions of Katherine Jackson, 16/10/15, paras 170-172.
portions of the Union’s funds. It may be that she genuinely believed that this was the correct and efficient way to achieve the Union’s aims. It may be that she acted as she believed her contemporaries in the Union behaved. It may be she believed that this was how one survived in what was patently a cut-throat and fractious Union. Indeed, in her written submissions she averred that ‘at all times she genuinely believed that she dealt with Union funds in a manner which was within entitlements as approved by BCOM and designed to advance the interests of the Union as she believed them to be.’\footnote{438} Taken as a whole, the evidence gives strong grounds for scepticism about the truth of that claim. But whatever its truth, she certainly placed herself in a position in which she was able to prefer her own interests to those of the Union members.

269. This conduct occurred in relation to a Branch that did not have a strong asset base. Set out below is a table indicating the balance sheet position of the No 3 Branch for the financial years 2004 to 2010.\footnote{439}

<table>
<thead>
<tr>
<th>Year</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assets</td>
<td>1,071,275</td>
<td>1,097,191</td>
<td>920,478</td>
<td>889,752</td>
<td>1,009,708</td>
<td>1,265,314</td>
<td>1,313,077</td>
</tr>
<tr>
<td>Liabilities</td>
<td>189,074</td>
<td>273,785</td>
<td>317,031</td>
<td>372,679</td>
<td>369,568</td>
<td>379,208</td>
<td>343,070</td>
</tr>
<tr>
<td>Net position</td>
<td>882,201</td>
<td>823,405</td>
<td>603,446</td>
<td>517,074</td>
<td>640,140</td>
<td>886,106</td>
<td>970,007</td>
</tr>
</tbody>
</table>

\footnote{438} Submissions of Katherine Jackson, 16/10/15, para 174.
\footnote{439} Dick MFI-1, 19/6/14, tab 1 (financial year ending 2004), tab 5 (financial year ending 30 June 2005), tab 6 (financial year ending 30 June 2006), tab 7 (financial year ending 30 June 2007), tab 10 (year ending 30 June 2008); Agostinelli MFI-1, 17/6/14, tab 1 (financial year ended June 2009); Agostinelli MFI-1, 17/6/14, tab 2 (exit audit for period ending 24 May 2010).
270. Counsel assisting submitted that the amounts by which Katherine Jackson benefitted, both personally and by aggregating branch funds to her control, represented a significant proportion of the total funds available for the proper business of the No 3 Branch. In her written submissions she denied this. But she gave no reason for why that denial might be correct. Counsel assisting’s submission is sound.

The financial management practices of the Branch and BCOM

271. Jane Holt was the bookkeeper of the No 3 Branch from 1988 to December 2010. Jane Holt reported directly to Katherine Jackson. She was partially assisted in her role by Frances Lindsay. She was Katherine Jackson’s assistant and No 3 Branch administrator. Jane Holt had sole authority to make payments on the No 3 Branch’s electronic banking facilities. She did so on the instructions of Katherine Jackson. However, expenses such as credit card bills were paid by direct debit. Cheques were raised on written requisitions. Almost every one of them was signed by Katherine Jackson.

272. Katherine Jackson collected records, such as invoices and receipts, which supported her credit card expenditure during her tenure as No 3

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440 Submissions of Katherine Jackson, 16/10/15, para 175.
441 Jane Holt, witness statement, 17/6/14, para 6.
442 Jane Holt, witness statement, 17/6/14, para 12.
443 Jane Holt, witness statement, 17/6/14, para 14.
444 Jane Holt, witness statement, 17/6/14, paras 24, 27, 29.
445 Jane Holt, witness statement, 17/6/14, para 28.
446 Katherine Jackson, witness statement, 18/6/14, para 367.
Branch Secretary. Jane Holt retained them. She said that the expenditure was duly recorded in MYOB and allocated to an appropriate expense account.\textsuperscript{447} Similarly, she prepared remittance advices with supporting documentation for each other expenditure. Those transactions would also be coded within MYOB.\textsuperscript{448} It was not Jane Holt’s practice to verify whether a particular expenditure was approved by BCOM.\textsuperscript{449} She did not record approvals made, or financial information received, by BCOM.\textsuperscript{450} She was not aware of the process for BCOM approvals of expenditure.\textsuperscript{451}

273. Jane Holt was a meticulous record keeper.\textsuperscript{452} However, she did not exercise any oversight of the financial practices of the No 3 Branch. She did not concern herself with whether Branch expenditure was properly approved. Nor did she turn her mind independently to the question of whether any of the expenditure she documented was appropriate.

274. The BCOM discharged its governance role at regular meetings. According to Katharine Wilkinson, the No 3 Branch BCOM was

\textsuperscript{447} Jane Holt, 17/6/14, T:681.22-32, 682.1-14; Katherine Jackson, 18/6/14, T:815.13-39; Katherine Jackson, witness statement, 18/6/14, para 378.
\textsuperscript{448} Katherine Jackson, witness statement, 18/6/14, para 371.
\textsuperscript{449} Jane Holt, witness statement, 17/6/14, para 30.
\textsuperscript{450} Jane Holt, witness statement, 17/6/14, para 38.
\textsuperscript{451} Jane Holt, witness statement, 17/6/14, para 48.
\textsuperscript{452} Katherine Jackson, witness statement, 18/6/14, para 362; John Agostinelli, witness statement 17/6/14, para 30.
harmonious, and there was no discord or dissatisfaction amongst the members.453

275. Katherine Jackson said that the BCOM was provided with monthly financial reports including a year-to-date profit and loss summary, and a schedule of expenses.454 She made a similar claim in her defence in the HSU Proceedings. But there she went further. She claimed that the BCOM was presented with and approved the credit card statements and supporting materials.455 She also said that she was ‘scrupulous’ to secure BCOM approval for Branch expenditure and to ensure that the approval was properly minuted.456 Therefore, she said, all expenditure was both approved and minuted.457

276. Counsel assisting submitted that that cannot possibly be correct. It is contradicted by the minutes. It is also contradicted by the very existence of funds such as the NHDA and the ‘kitty’.

277. In her written submissions, Katherine Jackson said that she ‘stands by’ her evidence and rejects counsel assisting’s submission. She relied on the absence of relevant BCOM minutes.458 Even if every allowance arising from the missing records is made, counsel assisting’s

454 Katherine Jackson, witness statement, 18/6/14, paras 379-380.
455 For example, HSU Tender Bundle, 6/10/15, tab 9, paras 133-135, 137. See also Health Services Union v Jackson (No 4) [2015] FCA 865 at [272]; Katherine Jackson, witness statement, 18/6/14, paras 377-378.
456 Katherine Jackson, witness statement, 18/6/14, para 383.
457 Katherine Jackson, witness statement, 18/6/14, para 385.
458 Submissions of Katherine Jackson, 16/10/15, paras 176-177.
submission has great force. And there is other evidence that supports it.

278. No other BCOM member mentioned any schedule of expenses which the BCOM reviewed and approved.

279. Jane Holt made no mention of preparing one.

280. Katharine Wilkinson said that she received ‘some outline of the financial statements’ at BCOM meetings. She said that the BCOM members would receive the audited annual reports, as well as financial statements that she would ‘loosely describe’ as profit and loss statements. Jane Holt, who prepared the reports, described them as ‘a brief cash flow statement’\(^{459}\). The BCOM would examine the statements and get advice on what they saw.\(^{460}\) Katharine Wilkinson remembered that Reuben Dixon was particularly ‘forensic’. He would seek advice as to all of the accounts on the financial statements.\(^{461}\) Katherine Jackson was the person available to answer questions of BCOM members as to the financial statements.\(^{462}\)

281. Reuben Dixon was trustee of the No 3 Branch from the mid to later part of his time on the BCOM.\(^{463}\) As trustee he did not have any ‘visibility on the investment account’ held by the Branch. His role was

\(^{459}\) Jane Holt, witness statement, 17/6/14, para 45.

\(^{460}\) Katharine Wilkinson, witness statement, 17/6/14, paras 12, 15-16.


\(^{462}\) Katharine Wilkinson, witness statement, 17/6/14, para 23.

\(^{463}\) Reuben Dixon, witness statement, 17/6/14, para 6.
limited to providing guidance as to where the money was to be invested.\textsuperscript{464} Reuben Dixon said:\textsuperscript{465}

On some occasions I recall not being happy that we did not receive a financial statement to look at during the BCOM meetings.

We might only get a statement at every second meeting and often did not get them in advance.

I believe I raised this issue initially, but it became normal.

There were various excuses as to why a financial statement was not provided. We would be told that Jane Holt was sick or that by reason of an illness it was not available.

In hindsight it would have been better and certainly more helpful to have had more information at the time.

\textbf{282.} Reuben Dixon said that the BCOM would review the financial statements provided to the meeting and query items that were out of the ordinary.\textsuperscript{466} Katherine Jackson would direct the BCOM to any expenditure.\textsuperscript{467} He relied on the accounts provided by Jane Holt. He did not recall seeing any bank statements detailing any accounts or where they were held.\textsuperscript{468} He expected that any extraordinary expenditure greater than $5000 would be itemised and raised at a BCOM meeting.\textsuperscript{469}

\begin{footnotesize}
\begin{enumerate}
\item Reuben Dixon, witness statement, 17/6/14, para 44.
\item Reuben Dixon, witness statement, 17/6/14, paras 60-64.
\item Rueben Dixon, witness statement, 17/6/14, para 21.
\item Reuben Dixon, witness statement, 17/6/14, para 22.
\item Reuben Dixon, witness statement, 17/6/14, para 43.
\item Reuben Dixon, witness statement, 17/6/14, para 46.
\end{enumerate}
\end{footnotesize}
283. The available minutes of BCOM meetings invariably record a motion ‘that the financial report be accepted’ or ‘that the financial report be received and noted’. No minute is made of an approval of the expenditure in the financial report. No mention is made about the receipt of any expenses schedule. It is necessary to find that no approval was given by BCOM to Katherine Jackson’s credit card expenditure, or to any other expenditure detailed above. That accords with Tracey J’s conclusions.

**Reporting and auditing responsibilities**

284. The No 3 Branch was required to prepare a ‘general purpose financial report’ in accordance with the Australian Accounting Standards as soon as practicable after the end of each financial year. The Branch’s auditor was required to audit the financial report of the Branch for each financial year. He was also required to ‘make a report in relation to the year to the reporting unit’ stating whether ‘in the auditor’s opinion the general purpose financial report [was] presented fairly in accordance with’ specified requirements (to the extent they applied), including the Australian Accounting Standards. The form and content of the report needed to be ‘in accordance with the

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470 McGregor MFI-2, 17/6/14; Agostinelli MFI-1, 17/6/14, pp 172-199; Agostinelli MFI-3, 17/6/14, pp 741-743; Jackson MFI 30/7/14, p 106.

471 Section 253(1) of the ‘Registration and Accountability of Organisations’ schedule (the **RAO schedule**) of the *Workplace Relations Act* 1996 (later, s 253(1) of the *Fair Work (Registered Organisations) Act* 2009: see Schedule 22 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 which came into force on 1 July 2009 (s 2)). See also the definition of ‘reporting unit’ in s 242.

472 Section 257(1), (5) of the RAO schedule of the *Workplace Relations Act* 1996 (Cth) (see later s 257(1), (5) of the *Fair Work (Registered Organisations) Act* 2009 (Cth)).
Australian Auditing Standards’. The Standards were defined 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.’

285. Until February 2006, CPA Australia and The Institute of Chartered Accountants Australia developed professional standards that applied to members of those professional bodies. Then the Accounting Professional and Ethical Standards Board took over that function. Standards developed by the Accounting Professional and Ethical Standards Board are mandatory for accounting professionals who are members of CPA Australia, The Institute of Chartered Accountants Australia or the Institute of Public Accountants.

286. For the financial years ending 30 June 2004, 30 June 2005, 30 June 2006, 30 June 2007, 30 June 2008 and 30 June 2009 there were in force a number of auditing standards. The same is true of the financial year up to 24 May 2010 (on which date the No 3 Branch merged with the Victoria No 1 Branch and the NSW Branch). The auditing standards were issued by the Auditing and Assurance Standards Board.

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473 Section 257(8) of RAO schedule of the Workplace Relations Act 1996 (Cth) (later s 257(8) of the Fair Work (Registered Organisations) Act 2009 (Cth)).

474 See the definition of ‘Australian Auditing Standards’ in s 6 of the RAO schedule of the Workplace Relations Act 1996 (Cth) (see later s 6 of the Fair Work (Registered Organisations) Act 2009 (Cth)).


of the Australian Accounting Research Foundation and later the Auditing and Assurance Standards Board.

287. A relevant standard dealt with ‘Audit Evidence’. That standard relevantly concerned the requirement to ‘obtain sufficient appropriate audit evidence’ to enable an auditor to ‘draw reasonable conclusions’ on which to base an audit opinion. For most of these relevant financial years, the relevant standard provided that ‘[e]nquiry alone ordinarily does not provide sufficient audit evidence to detect a material misstatement at the assertion level’. In short, the word ‘assertions’ refers to the representations made in a financial report by those responsible for the governance of an entity. And, for most of the relevant financial years, the relevant standard provided that an auditor needed to ‘test the operating effectiveness of controls in preventing, or detecting and correcting, material misstatements at the assertion level’ if their risk assessment included an expectation of the

478 For the financial years ending 30 June 2007, 30 June 2008, 30 June 2009 and 24 May 2010, see para 5 of Auditing Standing ASA 500 (‘Audit Evidence’) issued April 2006 (see para 3 for operative date). For the financial year ending 30 June 2006, see para 2 of AUS 502 (‘Audit Evidence’) issued February 2004 (see para 39 for operative date). For financial years ending 30 June 2004 and 30 June 2005, see para 2 of AUS 502 (‘Audit Evidence’) issued October 1995 (see para 26 for the operative date).


480 See para 19 of Auditing Standing ASA 500 (‘Audit Evidence’) issued April 2006; para 15 of AUS 502 (‘Audit Evidence’) issued February 2004; and para 13 of AUS 502 (‘Audit Evidence’) issued October 1995.
effectiveness of an entity’s controls.\textsuperscript{481} This is known as ‘test of controls’.

288. The No 3 Branch Auditors during the period under consideration were Iaan Dick and John Agostinelli. Their approaches were divergent. Counsel assisting correctly submitted that the former’s approach was deficient in a number of respects, and made certain additional points about the latter.

289. Iaan Dick was the auditor of the No 3 Branch between 2002 and 2008.\textsuperscript{482} His evidence was frank. He described the audits he conducted in that period as ‘quite low-level’.\textsuperscript{483} He explained:\textsuperscript{484}

I would normally obtain a copy of the MYOB database from Jane Holt and I would take it off-site and review it for about three to four hours. I would also print out the transaction log (general ledger) for the year and go through the transactions. I undertook this task primarily to look for and identify any misallocations.

290. That was his practice throughout the period he was the auditor of the No 3 Branch.\textsuperscript{485} In his statement to the Commission Iaan Dick explained:\textsuperscript{486}

\textsuperscript{481} See paras 24(b), 26 of Auditing Standing ASA 500 (‘Audit Evidence’) issued April 2006; paras 19(b), 21 of AUS 502 (‘Audit Evidence’) issued February 2004. See also para 11 of AUS 502 (‘Audit Evidence’) issued October 1995.

\textsuperscript{482} Iaan Dick, witness statement, 19/6/14, para 17.

\textsuperscript{483} Iaan Dick, witness statement, 19/6/14, para 21.

\textsuperscript{484} Iaan Dick, witness statement, 19/6/14, para 24; Iaan Dick, 19/6/14, T:873.3-12.

\textsuperscript{485} Iaan Dick, 19/6/14, T:873.11-12.

\textsuperscript{486} Iaan Dick, witness statement, 19/6/14, para 30.
It was not a high-level transaction audit, for example, I didn’t go into much paper to check transactions. I would only do this if some particular expense account looked a bit odd and I would then go and look at it more thoroughly. Most of the time, however, I was not digging very deeply.

291. He went on to say later: ‘most of the expenditure transactions in the No.3 Branch were not major items, so I only queried a small percentage of the transactions.’ His understanding, he explained, was that BCOM ‘approved the accounts and the expenditure at various stages during the year.’ He said: ‘If the BCOM had approved an item of expenditure, I would not dig much further to check those transactions.’ He believed that, generally, he would not have asked for an invoice from Jane Holt or Katherine Jackson if they had given him an explanation for expenditure.

292. Iaan Dick identified the following payments. The sum of $80,000 had been paid to the NHDA during the financial year ending on 30 June 2004 (2004 financial year). The sum of $20,000 was paid during the financial year ending 30 June 2005 (2005 financial year). The sum of $18,000 was paid during the financial year ending 30 June 2006 (2006 financial year). And the sum of $5,000 was paid during the financial year ending 30 June 2007 (2007 financial year). There were also transfers totalling $23,000 into the NHDA from the Victoria No. 3

487 Iaan Dick, witness statement, 19/6/14, para 37.
488 Iaan Dick, witness statement, 19/6/14, para 45.
489 Iaan Dick, witness statement, 19/6/14, para 46.
490 Iaan Dick, witness statement, 19/6/14, para 60.
491 Iaan Dick, witness statement, 19/6/14, para 57.
account in the financial year ending 30 June 2008 (2008 financial year).492

293. But Iaan Dick recorded payments to the NHDA in the financial reports of the HSU Victoria No 3 Branch inconsistently. The report for the 2004 financial year included the $80,000 paid to the NHDA in ‘Other expenses from ordinary activities’.493 The report for the 2005 financial year expressly identified the amount paid to the NHDA in that year – $20,000 – and in the previous financial year – $80,000.494

294. For the 2006 financial year, Iaan Dick took the approach of ‘netting off’ – or offsetting – the payment to the NHDA against the ‘other’ or ‘sundry’ income of the branch.495 He did the same for the 2007 financial year.496 He explained that it was his ‘normal practice to net off all minor items of sundry income and expenditure in the financial statements in order to reduce the volume of accounts that the BCOM had to absorb.’497 The No 3 Branch was required to comply with Australian Accounting Standard 101 in the preparation of its general purpose financial report.498 It provided that income and expenses

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492 Jane Holt, witness statement, 17/6/14, para 78.
493 Dick, MFI-1, 19/6/14, p 3; Iaan Dick, 19/6/14, T:875.2-4.
495 Iaan Dick, 19/6/14, T:876.33-46; Iaan Dick, witness statement, 19/6/14, para 63.
496 Iaan Dick, witness statement, 19/6/14, para 63.
497 Iaan Dick, witness statement, 19/6/14, para 65.
498 Section 253 of the RAO schedule of the Workplace Relations Act 1996 (Cth) (see later s 253 of the Fair Work (Registered Organisations) Act 2009 (Cth)).
‘shall not be offset unless required or permitted by an Australian Accounting Standard’. It relevantly stated:

It is important that assets and liabilities, and income and expenses, are reported separately. Offsetting in the income statement or the balance sheet, except when offsetting reflects the substance of the transaction or other event, detracts from the ability of users both to understand the transactions, other events and conditions that have occurred and to assess the entity’s future cash flows.

295. Iaan Dick’s rationale for ‘netting off’ in the 2006 and 2007 financial year cannot be reconciled with this statement in the Australian Accounting Standard. He said: ‘As an auditor, you are trying to make the accounts appear meaningful. By having many little categories, the accounts become less meaningful.’ But offsetting would, except in the circumstances contemplated by the Accounting Standard, in fact appear to make an entity’s accounts less meaningful. It ensured that transfers to the NHDA were not mentioned in the audited accounts.

296. Iaan Dick was not aware that the NHDA was an account operated by Katherine Jackson. His audit approach was deficient in a number of respects. He relied too heavily on BCOM approval of expenditure. In other words, his audits depended on the effectiveness of the BCOM as a ‘control’ mechanism. It is legitimate to rely on controls as a source of evidence to draw reasonable conclusions on which to base an audit.

499 See para 32 of Australian Accounting Standard 101 (as in force in the 2006 and 2007 financial years).
500 See para 33 of Australian Accounting Standard 101 (as in force in the 2006 and 2007 financial year).
501 Iaan Dick, witness statement, 19/6/14, para 70.
opinion. But the ‘operating effectiveness of controls in preventing, or
detecting and correcting, material misstatements at the assertion level’
cannot – and ought not to – be assumed. However, by Iaan Dick’s own
admission, if ‘the BCOM had approved an item of expenditure, [he]
would not dig much further to check those transactions’. Finally, if
Iaan Dick queried an item of expenditure and either Jane Holt or
Katherine Jackson gave him an explanation, he generally would not
ask for an invoice. The deficiency in that approach is obvious. It is the
reason the relevant standard provides that, ordinarily, ‘enquiry alone …
does not provide sufficient audit evidence to detect a material
misstatement at the assertion level’.

297. By contrast, the approach of John Agostinelli was more robust. His
audit documentation shows, for example, that he conducted
expenditure testing. For the financial year ending 30 June 2009, he
randomly selected 30 items, above a ‘certain material amount’, to
test. If John Agostinelli made inquiries in relation to particular items
of expenditure, he required supporting documents to resolve the
inquiry. Generally, he required an invoice.

298. In relation to payments to the NHDA for the period ending 24 May
2010, John Agostinelli noted:

Amounts are paid at the discretion of Kathy, no invoice or supporting
documentation to support amount being paid.

503 Iaan Dick, witness statement, 19/6/14, para 46.
504 John Agostinelli, 17/6/14, T:702.4-702.16.
505 John Agostinelli, witness statement, 17/6/14, paras 28-29; John Agostinelli, 17/6/14,
T:708.26-708.28.
506 Agostinelli MFI-3, 17/6/14, p 903; John Agostinelli, 17/6/14, T:710.16-46.
NHDA is the National Health Development Account. All branches contribute to this account for research/campaign purposes. Payments are made at the discretion of the Branch Secretary whereby they determine the amount and timing of the payment. As per minutes they can only contribute up to a $90K limit. The payments are made at the discretion of the Branch Secretary or when the National office requests it.

Last year the NHDA expense was $75K due to more contributions being made for the election campaign. This year no such campaign was run and therefore contribution decreased.

299. John Agostinelli later noted Katherine Jackson: ‘… confirmed that the amount of $45,500 was authorised by her [for payment in to the NHDA]’. 507 The amount of $45,500 is the amount transferred to the NHDA in the period from 1 July 2009 to 24 May 2010. 508

300. Like Iaan Dick, John Agostinelli was not aware – because he was not informed – that the NHDA was an account held in Katherine Jackson’s name. 509

301. John Agostinelli’s approach was relatively thorough. But during the audit there was a lack of proper oversight into the workings of, in particular, the NHDA, and the practices in relation to cash cheques and Katherine Jackson’s credit card expenditure. For this there were two reasons. First, John Agostinelli applied a sample materiality threshold of $10,000. 510 Most individual transactions incurred in respect of the 2009 and 2010 audits were below this amount. Secondly, John Agostinelli relied primarily on Jane Holt for provision of information.

508 Agostinelli MFI-3, 17/6/14, pp 903-904.
509 John Agostinelli, 27/8/14, T:749.31-33.
510 John Agostinelli, witness statement, 17/6/14, paras 25-27.
He did not have access to Katherine Jackson with a view to her explaining the matters over which she exerted direct control.\textsuperscript{511} However, Jane Holt did not review or question the auditors’ account allocations or attend the BCOM at which the audited accounts were discussed and approved.\textsuperscript{512} This is not intended as a criticism of John Agostinelli.\textsuperscript{513} It does, however, indicate the dangers of concentrating control over Branch finances in the hands of one person. There was no person with oversight of Katherine Jackson’s expenditure who might thereby have been in a position to communicate practices of concern to the auditors. Systemic misuses of Union funds are less readily detected when this occurs.

302. Reuben Dixon said that the audited accounts of the No 3 Branch were approved by the BCOM with ‘next to no discussion’.\textsuperscript{514} A summary of the accounts was sent to members. But it did not disclose specific expenditure. It was described by Reuben Dixon as ‘not really meaningful’.\textsuperscript{515}

\textsuperscript{511} John Agostinelli, witness statement, 17/6/14, paras 25-30.
\textsuperscript{512} Jane Holt, witness statement, 17/6/14, paras 59-60.
\textsuperscript{513} John Agostinelli’s audit work papers for the 2009 and exit audit make plain that he queried honorarium fees and credit card use policies: Agostinelli MFI-2, 17/6/14, tab E.1.1 and E.2.1.
\textsuperscript{514} Reuben Dixon, witness statement, 17/6/14, para 50.
\textsuperscript{515} Reuben Dixon, witness statement, 17/6/14, para 52.
Recommendations concerning Katherine Jackson

303. The Union submitted that it ‘is now clear Ms Jackson has lied repeatedly to the Commission’. If that allegation was made out it could be appropriate to refer that matter to the authorities for consideration or further investigation of whether she should be prosecuted for contravention of s 6H of the *Royal Commissions Act* 1902 (Cth).

304. The HSU did not ask for that recommendation in so many words. But their submission does pose the question. Counsel assisting agreed that it was difficult to reconcile some of Katherine Jackson’s testimony with the facts as they have now emerged.

305. It is worth considering this last point in more detail. One example will suffice. In her oral evidence to the Commission on 18 June 2014 Katherine Jackson was asked about how the proceeds of cash cheques were deployed. In particular when asked whether she had used the proceeds of cash cheques for personal matters or expenditure she replied, ‘I did not.’ But the facts which have now emerged suggest that Katherine Jackson did use some of the proceeds of cash cheques for personal expenditure. Among other things, the amended statement of claim in the HSU Proceedings makes this claim expressly at paragraph 120, and Katherine Jackson has admitted in her defence that in some cases at least cheques were cashed then used to reduce her

516 Submissions of the HSU, 19/10/15, para 36.
517 Submissions of Counsel Assisting, 2/11/15, para 24.
518 Katherine Jackson, 16/6/14, T:825.6.
mortgage (see para 98). In these circumstances it is appropriate that the Commission refer this issue for further investigation. Accordingly this Report and all relevant materials have been referred to the Director of Public Prosecutions in Victoria and the Victorian Commissioner of Police for consideration of whether Katherine Jackson may have given false or misleading evidence in contravention of 6H of the Royal Commission Act 1902 (Cth) in connection with the matter just identified or otherwise.

306. In his Judgment in the HSU Proceedings Tracey J found that Katherine Jackson had committed a number of contraventions of s 287 of the FW(RO) Act. Section 287 is a civil penalty provision: s 305(2)(zj). Pecuniary penalty orders may be made on application by the General Manager of the Fair Work Commission or someone authorised in writing by the General Manager: ss 306(1), 310(1). An organisation may apply to intervene in the application: s 310(4).

307. A pecuniary penalty order is a civil debt payable to the Commonwealth: s 306(2). Separate provision is made for orders for compensation suffered by an organisation resulting from a contravention: s 307(1). The organisation may apply for such an order: s 310(3). That is the application made by the HSU in Health Services Union v Jackson (No 4). Compensation orders pursuant to s 307(1) were made by Tracey J. No separate penalty orders were made. There are no provisions of the Act precluding separate proceedings being brought by the General Manager.

[2015] FCA 865 at [54], [275]-[276] (inter alia).
This Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against Katherine Jackson for pecuniary penalty orders for her contraventions of s 287. It is true that Katherine Jackson is an undischarged bankrupt. Hence no penalty may ever be paid. It is also true that the entity which has been harmed by her conduct, the HSU, has obtained a civil damages award. However, these are matters the General Manager can consider and take into account when determining how to deal with the referral.

D – ALLEGATIONS AGAINST CRAIG THOMSON

Procedural background

Craig Thomson was National Secretary of the HSU from 16 August 2002 until his resignation on 14 December 2007, after being elected to Federal Parliament. He was succeeded by Kathy Jackson.

Auditors were engaged by the National Executive of the HSU. They identified concerns about misuse of Union funds by Craig Thomson. Fair Work Australia then commenced an investigation into the affairs of Craig Thomson. That extremely thorough investigation proceeded for three years. The report of the investigation was tabled in the Senate on 7 May 2012.520

Civil proceedings were commenced by the General Manager of the Fair Work Commission on 15 October 2012. Broadly, the civil claim was based on alleged contraventions of ss 285(1), 286(1) and 287(1) of Schedule 1B (later Schedule 1) of the WRA.

Craig Thomson filed a defence on 4 December 2012. He denied or did not admit the factual allegations made by the General Manager. He did not file any further defence (despite multiple amendments to the statement of claim). He led no evidence. He made no submissions on the merits of the case.

On 30 January 2013, 149 criminal charges were laid against Craig Thomson for breaches of various provisions of the Crimes Act 1958 (Vic). The principal relevant provisions were s 74 (theft), s 81 (obtaining property by deception) and s 82 (obtaining a financial advantage by deception). A further five charges were laid against Craig Thomson on 5 February 2013. On 26 April 2013 the Federal Court of Australia (Jessup J) refused an application to stay the whole of the civil proceedings, pending the outcome of the criminal proceeding.

On 18 March 2014 Craig Thomson was convicted of 87 of the counts of theft and obtaining financial advantage by deception. He appealed against 65 of the convictions. On 15 December 2014 Judge Douglas of the County Court of Victoria acquitted him of all of the counts of


522 General Manager of the Fair Work Commission v Thomson [2013] FCA 380 at [25]. Some parts of the civil proceedings directly referable to the criminal charges were held to be stayed by operation of s 312 of the FW(RO) Act.
obtaining a financial advantage by deception. But she convicted him of 13 of the counts of theft. 523 In sentencing Craig Thomson for those counts, Her Honour reiterated an earlier statement of hers that this outcome was not an endorsement of his conduct of using HSU funds for his own purposes. In these criminal proceedings Craig Thomson agreed to a statement of facts dated November 2014. It was radically inconsistent with his defence in the civil proceedings.

315. An application by Craig Thomson, acting for himself on the first day of the trial of the civil proceedings, that the case against him be dismissed or struck out was dismissed on 30 March 2015. 524

316. In the civil proceedings Jessup J gave judgment on 11 September 2015. 525 He found a number of contraventions of ss 285, 286 and 287 of Schedule 1 to the WRA. 526

317. As set out at paragraph 4 above, on 15 December 2015 Jessup J delivered judgment on penalty and compensation orders.

Specific allegations

318. The particular allegations against Craig Thomson may be summarised as follows:

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523 DPP v Craig Thomson (Victorian County Court, Judge Douglas, 15/12/2014).
524 General Manager of The Fair Work Commission v Thomson (No 2) [2015] FCA 308 at [23].
526 Until 26 March 2006, Schedule 1B to that Act, later Schedule 1 to the FW(RO) Act.
(a) Making personal expenditure on Union-issued credit cards.

(b) Obtaining the services of Criselee Stevens, at the cost of the HSU, to work on his federal election campaign.

(c) Utilising the services and meeting the expenses of Matthew Burke, by use of an HSU credit card, while working on his federal election campaign.

(d) Using the funds of the HSU to meet the expenses of his federal election campaign.

(e) Using the funds of the HSU to meet the expenses of a community group, Coastal Voice, rather than the business of the Union.

(f) Causing the HSU to enter into a sponsorship agreement with the Central Coast Rugby League Club.

(g) Causing the HSU to make donations without proper authority.

These will be examined in turn.

**Personal expenditure – criminal charges**

319. The charges against Craig Thomson fell within two broad categories:

(a) That Craig Thomson dishonestly obtained a financial advantage by use of HSU credit cards, either by using the
card to pay for unauthorised expenses (including for sexual services and travel), or by representing that the expenses charged to the cards were authorised and for the purposes of HSU business; and

(b) That Craig Thomson obtained property by deception by making cash withdrawals using HSU credit cards.


321. Her Honour accepted that Craig Thomson opened a business account with the Commonwealth Bank of Australia (CBA) on 25 October 2002 for the HSU National Office in Victoria. She accepted that he was issued with a CBA MasterCard, for which he was the only signatory and in respect of which he established a cash withdrawal facility using a PIN. She found that the HSU National Executive was ignorant of the existence of the CBA MasterCard. She declined to find beyond reasonable doubt that it was beyond Craig Thomson’s authority to maintain a cash withdrawal facility on the card. She found that the authority to expend Union funds in reimbursement of Union-related

527 HSU Tender Bundle, 6/10/15, tab 11, pp 2392-2393 [40].
528 DPP v Craig Thomson (Unreported, Victorian County Court, Judge Douglas, 15/12/2014), page 42.29-30; HSU Tender Bundle, 6/10/15, tab 11, p 2393 [43].
529 DPP v Craig Thomson (Unreported, Victorian County Court, Judge Douglas, 15/12/2014), page 43.14-22.
travel expenses did not extend to the withdrawal of cash for purposes other than the business of the HSU.\footnote{DPP v Craig Thomson (Unreported, Victorian County Court, Judge Douglas, 15/12/2014), page 49.1-5.}

322. Judge Douglas accepted that Craig Thomson, on each of the occasions in respect of which he was convicted of theft, withdrew cash using his CBA credit card and then used that cash for purposes unrelated to HSU business, namely the services of an escort (and on one occasion, dinner with his then wife).\footnote{DPP v Craig Thomson (Unreported, Victorian County Court, Judge Douglas, 15/12/2014), at 61-83; HSU Tender Bundle, 6/10/15, tab 11, pp 2409 [108]–2411 [118] (charge 9), 2415 [142]–2416 [159] (charge 22), 2417 [160]2419 [176] (charge 151), 2421 [191]–2424 [209] (charge 32), 2425 [210]–2427 [226] (charge 160), 2428 [231]–2430 [246] (charge 163), 2430 [247]–2431 [256] (charge 47), 2432 [257]–2433 [268] (charge 219), 2436 [290]–2439 [302] (charge 58), 2439 [303]–2442 [319] (charge 169), 2443 [326]–2445 [338] (charge 173), 2445 [339]–2446 [352] (charge 223).} On most occasions, the withdrawals were accounted for in the MYOB accounts of the HSU as ‘Travel Expense’ or ‘Meetings – National Office’.

323. In respect of the charges of obtaining a financial advantage by deception, Craig Thomson was acquitted for a particular reason. The charges alleged that he had unlawfully evaded a debt to the relevant credit card issuer. But the relevant debt relationship existed between the HSU and the credit card issuer. And every debt the subject of the charges was satisfied by the HSU.\footnote{DPP v Craig Thomson (Unreported, Victorian County Court, Judge Douglas, 15/12/2014), at 86.16-26, 87.8-18.} The acquittals thus did not go to the admitted facts about what he did.
324. On 17 December 2014 Craig Thomson was sentenced to a fine of $25,000 for the theft offences.  

**Personal expenses – civil proceedings**

325. In the civil proceedings Jessup J made findings that Craig Thomson used his Diners Club card and his CBA MasterCard to pay for escort services while on trips away from his residences from time to time. In his defence to the original statement of claim Craig Thomson denied these allegations.

326. The finding of Jessup J was that Craig Thomson caused these expenditures to be described as ‘meetings or ‘teleconferencing’ within the HSU National MYOB system, caused the credit card debts to be paid by the HSU, and did not disclose the expenditures to the National Executive.

327. The total expenditure incurred by Craig Thomson in this way was $4,708.

328. Jessup J also considered personal expenses associated with Craig Thomson’s relocation from Melbourne to the Central Coast in the second half of 2005. He took a day’s leave on Friday 16 September

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533 *DPP v Craig Thomson* [2014] VCC (17 December 2014) at [51].

534 *General Manager of the Fair Work Commission v Thomson (No 3)* [2015] FCA 1001 at [23]-[24], [29]-[32], [35]-[37], [49]-[53], [56]-[59].

535 HSU Tender Bundle, 6/10/15, tab 12, pp 2456-2458 [18], [20], [23], [24], [26], [28], [31], [33], [37], [40], [45].

536 *General Manager of the Fair Work Commission v Thomson (No 3)* [2015] FCA 1001 at [25], [33], [38], [54], [60].
2005. He travelled with his wife to Sydney. He stayed at the Westin Hotel until Monday 19 September. The sum of $3,575.68 for flights, accommodation, car and meal expenses was charged to his HSU Diners Club Card. The finding of Jessup J was that the expenses were unrelated to the business of the Union. They were paid for by the HSU in discharging the credit card debt. But the expenditure was not disclosed to nor authorised by the National Executive. Yet in his defence, he had not admitted that the expenditures were incurred. He denied that he authorised the payment of the credit card debt. He denied that the expenditure was not disclosed to and authorised by the National Council or National Executive.

On Jessup J’s findings, the use of HSU credit cards to procure sexual services and other personal expenses was in contravention of both s 286(1) and s 287(1) of the Schedule to the WRA.

Craig Thomson used Union issued credit cards for personal expenditure, in the knowledge that the debts created by that use would be discharged by the Union. That is an obvious misfeasance. Craig Thomson incurred expenditures that could not on any view be described as related to the business of the Union. Craig Thomson did not, unlike Katherine Jackson, attempt to justify the expenses as having been approved by the National Council or National Executive. Rather, he sought in most cases to conceal them by making cash withdrawals

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537 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [40]-[45].

538 HSU Tender Bundle, 6/10/15, tab 12, p 2460 [71]-[72].

539 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [26]-[28], [34], [39], [46]-[47], [55], [61].
to avoid a traceable record of his more nefarious expenditures, and by causing false MYOB categories to be allocated to them.

**Election campaign staff**

331. In about August 2005 Craig Thomson interviewed and employed Criselee Stevens as a trainee with the National Office of the HSU. She was active in the ALP. She was a resident of the Central Coast. She worked from home at Woongarrah. She completed her traineeship and trusteeship and communicated with her HSU mentor (located in Melbourne) by email. She also said she performed certain duties for Craig Thomson. One was campaigning to ‘increase the profile of the HSU on the Central Coast’. The other was ‘to get rid of Workchoices and to get the ALP elected’. From April 2007, Criselee Stevens worked full time in Craig Thomson’s campaign office and dedicated herself to that campaign. She remained employed and paid by the HSU.540

332. Criselee Stevens explained that her energies were devoted to a ‘Your Rights at Work’ campaign being undertaken by the ACTU. That explanation was rejected by Jessup J. That part of the campaign directed at the seat of Dobell was organised by Unions New South Wales and not the HSU.541

540 *General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001* at [62]-[67]. These allegations were denied by Craig Thomson in his defence filed on 4 December 2012: HSU Tender Bundle, 6/10/15, tab 12, p 2464 [115]-[126].

541 *General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001* at [68]-[71].
The employment of Criselee Stevens at the National Office was not reported to the National Council or the National Executive. According to Jessup J’s findings, the majority of her work was directed at building Craig Thomson’s profile on the Central Coast and then prosecuting his election campaign. His Honour concluded that Craig Thomson had no right to use a member of the employed staff of the HSU in this manner without disclosing that fact to, and obtaining the approval of, the National Executive or National Council. But was it the case that the HSU might not have expected a trainee to devote herself fully to Union work? Was it the case that Criselee Stevens may in fact have performed some work for the benefit of the Union? His Honour held that it did not matter what the answer to the questions was, on the evidence.

Without the authorisation of the National Council or the National Executive, the respondent did not have authority to use the services of staff of the HSU on work or activities not related to the functions or legitimate interests of the HSU (indeed, the National Council and the National Executive themselves may not have had that authority, an issue which it is unnecessary to investigate in the present case). And, if he did not in fact know, at least he ought to have known, of that limitation on his authority. Under the Rules, the respondent was responsible for the property and moneys of the HSU, and, between meetings of the National Executive, he had control and conduct of the business of the HSU. His position was a fiduciary one. The avoidance of conflicts of interest is a fundamental element (or “theme”) of the fiduciary obligation. If the respondent intended, as he clearly did, to deploy Ms Stevens on work which was of benefit to himself and of little or no benefit to the HSU, it was his duty to secure the HSU’s fully-informed consent to such an arrangement.

542 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [72]-[73].
543 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [76]-[78].
To use the services of Ms Stevens for his own purposes was the clearest of improprieties on the respondent’s part. It was no different from the manager of a construction company, for example, using the services of a carpenter employed by the company to carry out renovations on his or her domestic premises without the authorisation of the board of directors (or possibly, depending on the company’s constitution, the shareholders).

In these circumstances, it would not lie upon the HSU to prove how much of Ms Stevens’ time was occupied on what I would call illegitimate activities. As the fiduciary, the respondent would have to account. And, in a case brought by a regulator such as the present one, it does not lie upon the applicant to prove how much of Ms Stevens’ time was so occupied.

334. The conclusion of Jessup J was that the conduct of Craig Thomson in relation to the employment of Criselee Stevens contravened s 285(1) of the Schedule to the WRA (to the extent that Craig Thomson failed to keep an account of the work performed by Criselee Stevens on Union and non-Union purposes). He also concluded that it contravened ss 286(1) and 287(1). In so finding, Jessup J held that it was impossible for Craig Thomson fairly to believe that the deployment of Criselee Stevens’ services in service of his campaign was in the best interests of the HSU.546

335. Craig Thomson also employed Matthew Burke from about July 2006. He was a delegate of the Federal Electoral Council for the seat of Dobell. Prior to that Matthew Burke received a payment from the HSU of $3000.00 on 4 April 2006. Matthew Burke worked from his home in Wamberal, elsewhere in the Central Coast and occasionally in Sydney. He was responsible for the HSU website, but otherwise worked on Coastal Voice547 as a ‘media/executive assistant’ to Craig

546 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [78]-[84] (esp [80]).
547 See paras 339-340.
Thomson. Matthew Burke resigned from the HSU to work as an electoral officer for Senator Hutchins. But he worked for Craig Thomson on a voluntary basis. Craig Thomson caused Matthew Burke to be issued with a HSU Diners Club card. He caused expenses on that card to be paid by the HSU. Between March and December 2007 the HSU paid $10,120.37 in respect of Matthew Burke’s credit card.548

336. The holding of Jessup J was that the conduct of Craig Thomson in relation to the employment of Matthew Burke contravened ss 285(1), ss 286(1) and 287(1) of the Schedule to the WRA in the same way as it did in respect of Criselee Stevens’s employment.549

Election expenses

337. The Federal Court also investigated a number of expenses incurred by the HSU in relation to Craig Thomson’s election campaign. The holding of Jessup J in respect of each of them was that the expenses were attributable to Craig Thomson’s campaign, and had nothing to do with the HSU. His Honour concluded that the HSU should never have paid them.550

(a) One expense related to the purchase of tables at Dobell Federal Election Council functions in July and December

548 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [85]-[87]. Craig Thomson denied these allegations in his defence filed 4 December 2012: HSU Tender Bundle, 6/10/15, tab 12, pp 2466-2467 [136]-[146], [150]-[153].

549 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [87]-[88].

550 Craig Thomson denied these allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, pp 2468-2469 [174]-[175].
2006, without disclosure to or authorisation by the National Council or National Executive.\textsuperscript{551}

(b) There were expenses for various goods and services relating to the establishment of Craig Thomson’s campaign office in Long Jetty. These included the purchase of furniture and an air conditioner. They included internet access. They included the use of Craig Thomson’s and Criselee Stevens’s credit cards. They included telephone and facsimile services which were billed direct to the HSU.\textsuperscript{552}

(c) There were expenses relating to the maintenance of a campaign bus. They were billed direct to the HSU and paid by Belinda Ord at Craig Thomson’s direction.\textsuperscript{553}

(d) There were postage charges associated with campaign mail-outs. They were invoiced to Craig Thomson personally but paid by the HSU.\textsuperscript{554}

\textsuperscript{551} General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [101]-[102]. Craig Thomson denied these allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, p 2468 [163]-[164].

\textsuperscript{552} General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [104]. Craig Thomson denied these allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, p 2468 [165]-[168].

\textsuperscript{553} General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [107]. Craig Thomson did not admit these allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, p 2468 [169].

\textsuperscript{554} General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [110]-[111]. Craig Thomson denied these allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, p 2468 [170].
(e) There were advertising charges from the ALP. They were invoiced to the HSU with Craig Thomson’s name as the customer reference. They were approved and paid by the HSU in 2008. It is unclear who approved the invoice for payment. But Jessup J found that the expenditure was not raised and approved by the National Council or National Executive, which, since it was outside the usual business of the Union, it should have been.555

(f) There were advertising charges from Central Coast Radio Centre, addressed to Craig Thomson but paid by HSU National Office, and one advertising invoice paid by Craig Thomson using his CBA MasterCard.556

(g) There were charges by a stationer for printing campaign materials, some of which was paid using Craig Thomson’s CBA MasterCard.557

338. The total of these transactions was $58,141.53. The finding was that Craig Thomson caused each item of expenditure to be paid by the

555 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [114]-[116]. Craig Thomson did not admit these allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, p 2468 [171].

556 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [119]. Craig Thomson did not admit these allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, p 2468 [172].

557 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [122]. Craig Thomson did not admit these allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, p 2468 [173].
HSU, in contravention of ss 285(1), 286(1) and 287(1) of the Schedule to the WRA.558

**Coastal Voice**

339. In about March-April 2006 Craig Thomson established an unincorporated association, Coastal Voice Community Group Incorporated. The intention of the group was to campaign on local issues of concern to the residents of the Central Coast. But it was not to have an affiliation with a political party. Craig Thomson was appointed interim President. Criselee Stevens was appointed interim Secretary. However, no formal elections of office bearers were held. Advertisements published for Coastal Voice were paid for with Criselee Stevens’s HSU Diners Club card. Payments relating to the launch of Coastal Voice were made by Craig Thomson and Criselee Stevens using their HSU credit cards. These expenses were not disclosed to or approved by the HSU National Council or National Executive.559

340. The objects of Coastal Voice were community minded. Furthering Craig Thomson’s personal political goals was outside them. Despite these matters, Jessup J held that the commitment of Union funds was not part of the business or administration of the Union. Hence it was not open to Craig Thomson to authorise the expenditure within his

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558 *General Manager of the Fair Work Commission v Thomson (No 3)* [2015] FCA 1001 at [103], [106], [109], [113], [118], [121], [123].

559 *General Manager of the Fair Work Commission v Thomson (No 3)* [2015] FCA 1001 at [92]-[93]. Craig Thomson did not admit, or deny, these allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, p 2470 [192]-[200].
authority as National Secretary. Having regard to the location of the
community to which Coastal Voice was committed, Jessup J concluded
that the group was established for the purpose of furthering Craig
Thomson’s profile and political career. Hence there was a direct
conflict of interest requiring disclosure to the National Council or
National Executive. The commitment of HSU funds and employees to
the activities of Coastal Voice was an abuse of Craig Thomson’s
fiduciary position. It was a contravention of ss 285(1), 286(1) and
287(1) of the Schedule to the WRA.560

Central Coast Rugby League

341. HSU entered into a contract for the sponsorship of the Central Coast
Rugby League Division for the 2006 to 2008 seasons. The sponsorship
contract provided for annual payments of $30,000 exclusive of GST
over three years with a consumer price index adjustment. The HSU
received season passes and sponsors’ box access. Craig Thomson
presented the grand final trophy in 2006 and 2007. The invoices in
respect of the first two instalments were paid on the approval of Craig
Thomson. The final invoice was paid in 2008 after Craig Thomson
had resigned his post. It was paid on the authority of the National
Executive because they considered that the Union was contractually
obliged to make the payment.561

560 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at
[96]-[99].

561 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at
[124]-[126]. Craig Thomson admitted the agreement, but did not admit, or deny these
allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, p 2475 [252]-[255].
The finding of Jessup J was that entry into the transaction was beyond Craig Thomson’s authority, regardless of whether it was of any benefit to the HSU. His Honour observed that, had the matter been raised with the National Council or National Executive, the sporting body chosen may not have been one that directly benefited Craig Thomson’s political ambitions. His Honour found that Craig Thomson contravened s 265(1) of the Schedule to the WRA by failing to seek the approval of the National Council or National Executive. He found that this was the more so because of the possible conflict of interest.

Donations

The Federal Court also considered the making of five donations exceeding $1,000 at Craig Thomson’s instigation. One of the donations was to a fund-raiser with which the wife of the then President of the HSU was associated. Another was to a charity on the Central Coast. Another was a donation of goods to a fundraising lunch held by the Dobell Federal Electoral Council.

The conclusion of Jessup J was that the donations were in each case in breach of r 36(f) of the HSU Rules. That is because they were made without the prior approval of the National Council or the National

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562 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [127].
563 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [128].
564 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [129]-[139], Craig Thomson did not admit, or denied these allegations in his defence: HSU Tender Bundle, 6/10/15, tab 12, pp 2471-2474, 2479-2480 [210]-[213], [223]-[230], [239]-[243], [317]-[318].
Executive. His Honour held that Craig Thomson, in causing them to be made, acted in contravention of s 285(1) and s 286(1) of the Schedule to the WRA. Where the donations were made in respect of ‘Central Coast’ causes, Jessup J also found that the existence of a conflict of interest arising from the obvious furtherance of Craig Thomson’s political ambitions created a contravention of s 287(1) of the Schedule to the WRA.

The circumstances in which the conduct occurred

345. Counsel assisting made the following submissions about Craig Thomson. They are correct.

346. Craig Thomson’s wrongdoing fell into two categories:

(a) Causing the HSU to pay for personal expenses; and

(b) Causing the HSU to pay for, and to deploy its resources in aid of, his campaign for election to the Central Coast seat of Dobell.

347. That Craig Thomson was in a position to do either created the prospect of a conflict between his personal interests and those of the Union he represented.

565 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [130], [132], [134], [137].

566 General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [133], [137], [139].
348. As to the latter category, the prospect of impropriety arising from an unregulated dedication of resources to an election candidate is well known. It may arise just as easily by, for example, a developer making donations to a candidate for election to a State legislature in the hope of a favourable outcome in relation to future development proposals. That is why there are laws regulating the disclosure of donations.

349. Craig Thomson’s conduct in causing the HSU to contribute funds and resources towards his ultimate success at the 2007 Federal Election is not validated by any suggestion that the HSU might have welcomed that outcome. He took decisions as to what should be done without, it seems, any meaningful discussion with the National Council or National Executive as to how the HSU’s resources might best be deployed to further its political aims. By acting unilaterally, he directly benefited his own campaign rather than some broader political object. By committing Union resources in the manner that he did, he also caused the HSU to avoid any proper disclosure of the manner in which members’ funds were deployed for political purposes. The effect of this was to expose the Union to penalties for breaches of the disclosure laws outlined above. But it also rested on an assumption that what was good for Craig Thomson was good for the members of the HSU.

350. The statement of undisputed facts reveals the discretionary spending powers conferred on Craig Thomson in his position as National Secretary. It also reveals the National Executive’s role in overseeing those powers.
(a) Union funds were sourced almost entirely from the payment of members’ fees, paid to the State Branches. The Branches then paid capitation fees to the National Office. They were managed and accounted for by the National Secretary and the National Office.\textsuperscript{567} The National Secretary had responsibility for keeping accounts and records of capitation fees and National Office expenditure.\textsuperscript{568}

(b) Craig Thomson was paid a salary of $130,000 per annum. He had entitlements to the use of a mobile telephone and motor vehicle for business and personal use. He also had a Diners Club Card.\textsuperscript{569}

(c) The performance of his duties as National Secretary included extensive travel, often overnight. The expenses of that travel were met through bookings made by the National Office and paid for on the Diners Club Card.\textsuperscript{570}

(d) The entitlements were approved by the National Executive on 23 July 2002. They were varied by a resolution in February 2003 to empower Craig Thomson to approve expenditure up to $50,000 at any one time. His entitlements were otherwise governed by the ‘Health Services Union of Australia – Health Professionals – Victorian Public Sector’ Enterprise

\textsuperscript{567} HSU Tender Bundle, 6/10/15, tab 11, pp 2385-2386 [13].
\textsuperscript{568} HSU Tender Bundle, 6/10/15, tab 11, p 2386 [17], Registered Rules 32(e)-(j), p 2390 [29]-[30].
\textsuperscript{569} HSU Tender Bundle, 6/10/15, tab 11, p 2384 [3].
\textsuperscript{570} HSU Tender Bundle, 6/10/15, tab 11, p 2385 [10].
Agreement 2002-2004. This made no provision for credit card or personal expenses.\(^{571}\)

(e) The undisputed evidence of members of the National Executive, Finance Committee, and branch executives was to the effect that the HSU did not require cash for its operations.\(^{572}\) To the extent that cash was required for Union-related expenditure, the practice of Union officials was to use their own cash and claim a reimbursement from the Union, verifying that the expense was Union related.\(^{573}\)

(f) The HSU issued credit cards to its officers. Those cards drew on HSU funds.\(^{574}\) The purpose of these credit cards was to facilitate the making of payments that were necessary for operating the Union and simple accounting for those payments.\(^{575}\) The card generally issued for HSU National Office officers was Diners Club.\(^{576}\) HSU was the holder of these cards and responsible for all invoices. These cards were issued without a PIN and did not have a cash withdrawal facility.\(^{577}\) Some HSU National Executives and staff...

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\(^{571}\) HSU Tender Bundle, 6/10/15, tab 11, p 2384 [4].
\(^{572}\) HSU Tender Bundle, 6/10/15, tab 11, p 2399 [68].
\(^{573}\) HSU Tender Bundle, 6/10/15, tab 11, p 2399 [69].
\(^{574}\) HSU Tender Bundle, 6/10/15, tab 11, p 2392 [35].
\(^{575}\) HSU Tender Bundle, 6/10/15, tab 11, p 2392 [36].
\(^{576}\) HSU Tender Bundle, 6/10/15, tab 11, p 2392 [37].
\(^{577}\) HSU Tender Bundle, 6/10/15, tab 11, p 2392 [38].
members (including Craig Thomson) were issued with a CBA MasterCard.578

(g) There was no formal spending limit in relation to credit card use. There was no written policy in place for credit card use.579 There was, however, a Union-wide policy that recoverable expenses were to be strictly business related and not personal.580 Craig Thomson himself personally communicated this requirement to HSU staff.581

(h) Accordingly, it was not the practice of HSU officials and staff to use HSU credit cards issued to them to incur personal expenses and then reimburse the Union.582

(i) In about December 2005, the then financial controller of the HSU National Office, Belinda Ord, prepared a policy document concerning the use of mobile phones and credit cards, namely that they were to be used solely for Union business purposes.583

(j) The policy also established a procedure for the verification of Union-related credit card expenditures. The procedure required the production of receipts and vouchers attached to a

578 HSU Tender Bundle, 6/10/15, tab 11, p 2392 [39].
579 HSU Tender Bundle, 6/10/15, tab 11, p 2392 [38].
580 HSU Tender Bundle, 6/10/15, tab 11, pp 2393 [44], 2394 [46].
581 HSU Tender Bundle, 6/10/15, tab 11, pp 2400-2401 [74]-[75].
582 HSU Tender Bundle, 6/10/15, tab 11, p 2394 [47].
583 HSU Tender Bundle, 6/10/15, tab 11, p 2395 [49]-[50]; General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [48].
signed credit card statement on a regular basis. It required an explanation of any unusual transactions or transactions for which there was no receipt. There was an obligation to ensure that the expense was cost effective.\footnote{HSU Tender Bundle, 6/10/15, tab 11, pp 2395-2397 [50], [52], [60]-[61].} Each official had to verify that the expenses were work-related. The statements were checked by Craig Thomson, who also signed them.\footnote{HSU Tender Bundle, 6/10/15, tab 11, p 2397 [62].} Expenditures were accounted for within MYOB using designations that were typical for Union expenditure (meetings, travel etc),\footnote{General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [21].} nominated by Craig Thomson.\footnote{HSU Tender Bundle, 6/10/15, tab 11, pp 2384 [5], 2397 [64].} The designations were not detailed. The individual expenditure items were not made available to the Finance Committee or National Committee.\footnote{HSU Tender Bundle, 6/10/15, tab 11, p 2399 [67].}

\(k\)  In respect of cash withdrawals, explanations were initially provided to accounts staff orally by Craig Thomson, supported where possible by receipts.\footnote{HSU Tender Bundle, 6/10/15, tab 11, p 2398 [64(a)].} Later, when Belinda Ord commenced as financial controller, typed memoranda were supplied justifying cash expenses.\footnote{HSU Tender Bundle, 6/10/15, tab 11, p 2398 [65].}

\(l\)  On a single occasion Craig Thomson asked Nurten Ungen to withdraw cash using his CBA MasterCard for the purpose of buying stationery and other supplies. The expenses were

\footnote{HSU Tender Bundle, 6/10/15, tab 11, pp 2395-2397 [50], [52], [60]-[61].}
\footnote{HSU Tender Bundle, 6/10/15, tab 11, p 2397 [62].}
\footnote{General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [21].}
\footnote{HSU Tender Bundle, 6/10/15, tab 11, pp 2384 [5], 2397 [64].}
\footnote{HSU Tender Bundle, 6/10/15, tab 11, p 2399 [67].}
\footnote{HSU Tender Bundle, 6/10/15, tab 11, p 2398 [64(a)].}
\footnote{HSU Tender Bundle, 6/10/15, tab 11, p 2398 [65].}
justified by attaching receipts to the relevant credit card statement in accordance with the established practice.\(^{591}\)

(m) The financial reporting practices during Craig Thomson’s tenure were not made subject to any policies. Detailed information about National Office expenditure was rarely provided when requested by the National Executive.\(^{592}\) Craig Thomson in February 2003 drew up a finance policy that set expenditure limits and established a finance committee. However, neither the Finance Committee nor the National Executive reviewed individual items of expenditure.\(^{593}\) Members of the National Executive, including Christopher Brown, were of the opinion that during Craig Thomson’s tenure the provision of information in respect of National financial expenditure and controls was limited. This, combined with the autonomous nature of the individual Branches and limited contact between the Branches and the National Office, meant that awareness of Craig Thomson’s activities was limited.\(^{594}\)

(n) From about late 2005, Craig Thomson established a National Office in Pitt Street, Sydney, away from the original National Office in Melbourne. The evidence before the Federal Court did not establish whether anyone else worked from that

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\(^{591}\) HSU Tender Bundle, 6/10/15, tab 11, p 2400 [71].

\(^{592}\) HSU Tender Bundle, 6/10/15, tab 11, p 2396 [53]-[54].

\(^{593}\) HSU Tender Bundle, 6/10/15, tab 11, p 2396-2397 [57].

\(^{594}\) General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [13]-[14].
office. Throughout 2006 and 2007, he involved himself more heavily in activities on the Central Coast of New South Wales, with a view to furthering his campaign in his future electorate.\textsuperscript{595} This must have further limited oversight of his activities.

(o) At no time did the National Executive approve, or become aware of, expenditure by Craig Thomson on sexual services or other personal expenses charged to his Union issued credit cards.\textsuperscript{596}

(p) All Craig Thomson’s expenditure was audited by Iaan Dick until December 2007. No item of expenditure was challenged or queried by the auditor during that time.\textsuperscript{597}

351. This presents a picture of a Union head office in which all of the financial control is reposed in a single powerful figure. No staff member and no other officer was given the responsibility of testing and querying the financial outlays of the National Secretary. The National Executive was not supplied with sufficient information to enable a proper control of expenditure, either by Craig Thomson or by the Union at his instigation. This arose because branch autonomy and the relative size of the National Office led to a lack of oversight over the conduct of the National Office by the general membership and those representing them (and vice versa). And there was an obvious degree

\textsuperscript{595} General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 at [15]-[17].

\textsuperscript{596} HSU Tender Bundle, 6/10/15, tab 11, p 2392 [33]-[34].

\textsuperscript{597} HSU Tender Bundle, 6/10/15, tab 11, p 2384 [5].
of centrality to the manner in which Craig Thomson ran the National Office. His level of control over expenditure policies and approvals gave him the opportunity to take advantage of the systems that were in place.

352. Perhaps ironically, Craig Thomson introduced some financial accountability and control during his tenure as National Secretary. Insofar as it related to his officials and staff, he enforced it. So far as it related to him, he circumvented it.

353. It can be inferred from the manner in which Iaan Dick conducted the audits of the No 3 Branch that his audits of the National Office were equally deficient.

E – GOVERNANCE ISSUES

354. Counsel assisting advanced the following submissions on this subject. They are accepted.

355. Governance issues do not raise merely technical or formal questions. A senior Union official occupies a position of great responsibility and great power. The official enjoys great responsibility because he or she must protect and advance the interests of the Union’s members. Those members rely upon the official to discharge his or her duties properly and carefully.
356. Katherine Jackson repeatedly conceded\(^\text{598}\) that her conduct fell short of proper governance practices. In particular, she accepted that the use of an exercise book to record the disbursements from the NHDA was unsatisfactory.\(^\text{599}\) She accepted that no disclosure was made of the $50,000 payment to Jeff Jackson as a related party transaction, and, presumably, that it should have been.\(^\text{600}\) She accepted that what she called the ‘slush fund’ constituted by the NHDA was another example of poor governance.\(^\text{601}\) She accepted that the ‘kitty’ arrangement led to breaches of s 237 of the FW(RO) Act.\(^\text{602}\) She also accepted, in her evidence before the Commission, that the way that she conducted the NHDA account ‘would fall short of proper practice in relation to what the public expect’.\(^\text{603}\)

357. Counsel assisting submitted that the civil findings against both Katherine Jackson and Craig Thomson disclose serious breaches of their statutory duties as officers of the HSU. The breaches were cynical exploitations of their positions so as to prefer their personal interests over those of the members of the Union under their control.

\(^{598}\) Submissions of Katherine Jackson, 14/11/14, paras 8, 242; Submissions of Katherine Jackson, 16/10/15, para 178.

\(^{599}\) Submissions of Katherine Jackson, 14/11/14, para 210; Submissions of Katherine Jackson, 16/10/15, para 178.

\(^{600}\) Submissions of Katherine Jackson, 14/11/14, para 223; Submissions of Katherine Jackson, 16/10/15, para 178.

\(^{601}\) Submissions of Katherine Jackson, 14/11/14, paras 231-232; Submissions of Katherine Jackson, 16/10/15, para 178.

\(^{602}\) Submissions of Katherine Jackson, 14/11/14, para 238; Submissions of Katherine Jackson, 16/10/15, para 178.

\(^{603}\) Katherine Jackson, 19/6/14, T:865.28-36.
For her part, Katherine Jackson disagreed.\textsuperscript{604} But the submission is irresistible.

358. Without being exhaustive, some of the governance failures which may be identified are as follows.

Financial accountability

359. One example is the use of Union issued credit cards for the purposes of discretionary spending. That is not an uncommon business practice. There appears to have been an understanding that the use of the cards was limited to purposes relating to the business of the Union. Certainly, in the case of Craig Thomson, steps were taken to implement controls on personal spending on Union issued credit cards. The vice that manifested itself at both the No 3 Branch and the National Office was that the person given the task of accounting for the expenditure was, in each case, the person incurring it. There was no independent oversight of the expenses incurred by Katherine Jackson and Craig Thomson that might have allowed their scandalous levels of personal expenditure to be detected earlier than it was.

360. In the case of the No 3 Branch the principal financial oversight mechanism provided for in the HSU Rules was the BCOM. In the case of the National Office, the principal financial oversight mechanism provided for in the HSU Rules was the National Council and National Executive. The financial information provided to the BCOM was high level at best. The available minutes of the BCOM meetings record no

\textsuperscript{604} Submissions of Katherine Jackson, 16/10/15, para 179.
meaningful discussion of the financial reports of the No 3 Branch. Only rarely is there an express approval of an expenditure item. Katherine Jackson’s contentions that the BCOM were given, and approved, itemised statements of expenditure must be rejected. The reality was that the BCOM simply had no idea what was being charged to Katherine Jackson’s cards. It had no means of testing the propriety of the expenditures. It can be inferred that a similar situation prevailed in relation to the National Executive of the HSU. Certainly, it appears to be accepted that the information given to the National Executive to permit them to discharge their financial oversight responsibilities under HSU Rules 27 and 36 was deficient. There is equally no doubt that the records of the BCOM meetings (so far as they are available) lacked detail about what the BCOM in fact considered, or approved, at any one meeting.605

361. One explanation Katherine Jackson gave for her conduct is particularly relevant to the governance issues facing the No 3 Branch. She claimed that much of the credit card expenditure that would otherwise be questionable was in some way ‘pre-approved’ by means of various allowances conferred upon her by the BCOM. Whether those approvals were in fact made, and whether they were capable of authorising the expenditures incurred over the whole of the relevant period, is addressed elsewhere.606

362. However, even assuming that the BCOM in fact did approve discretionary allowances of this kind, their propriety was seriously

606 See paras 189, 191-192, 197, 211, 213, 216, 218.
questionable. So were the techniques for ensuring that the approval for them was complied with. How were the entitlements accounted for? Who ensured that Katherine Jackson was properly claiming expenditure that fell within the terms of the allowance? Who checked that she kept within the monetary limit of the allowance? The suggestion that the No 3 BCOM would be so cavalier with the funds of the Branch’s members, for the sole benefit of one person, indicates a serious lack of proper attention to the financial governance of the branch. This is especially so when one has regard to the relatively modest asset position of the No 3 Branch. 607

363. Moreover, during the relevant period, there was a single external mechanism of oversight of the Branch finances, being the auditor of accounts. For the reasons already canvassed, the practices adopted by the auditors leave much to be desired.

The use of discretionary funds

364. The governance issues that attend Katherine Jackson’s use of discretionary ‘slush’ funds are addressed elsewhere. 608

365. One further observation may be made. The attitude of Katherine Jackson to the accounting and reporting requirements that attach to the discretionary funds she established was almost disarmingly frank. However, they reveal a real uncertainty about the proper scope of the

607 See para 269. Katherine Jackson recorded her disagreement with the contents of this and the preceding two paragraphs: Submissions of Katherine Jackson, 16/10/15, para 179. Unfortunately the submissions in those three paragraphs are entirely correct.

608 See paras 266-302.
reporting and disclosure obligations that attach to Union funds. Katherine Jackson disclosed an awareness of the requirements and an intention to get away with evasion of them by means of some quite dubious attributions in relation to the status of the funds.609

The use of Union funds for political purposes

366. The issues that arise from the unrestricted and undeclared expenditure of Union resources on political objects are discussed elsewhere.610

Governance structures

367. The governance issues over the tenures of Katherine Jackson and Craig Thomson were, in the main, permitted to arise because of the concentration of power in the position of Secretary. It is evident that both Katherine Jackson and Craig Thomson acted as chief executive of their respective branches with very little executive input from anyone else. The No 3 Branch BCOM was ineffectual at best. That is no criticism of the individual members of the BCOM. They were all professionals who dedicated themselves to their roles part time and for little remuneration. It is understandable that there would in those circumstances be a degree of deference to the executive who works full time to the management of the branch. This deference was almost


610 See Volume 5, Chapter 2. See also section 3.5 Options for Law Reform: Royal Commission into Trade Union Governance and Corruption, Discussion Paper – Options for Law Reform, 19/5/15.
certainly exacerbated by the minimal degree of information given to the BCOM members to enable them to discharge their functions.

368. Both National and Branch Secretaries were given significant power to manage the business of the Union between meetings of the governing body. Moreover, each had, by HSU Rules 32 and 56, total responsibility for accounting for the management and finances of the Union. That degree of power, coupled with control over the Union’s oversight mechanisms, invites a lack of accountability.

369. In the case of the No 3 Branch, that manifested itself in accounting practices that were, on their face, typical business practices and competently carried out. But on closer scrutiny they depended too heavily on Katherine Jackson for information and oversight. The BCOM, for its part, seemed readily to accept her suggestions that they adopt financial management practices that further removed accountability for the funds of the Union. The use of the NHDA and the ‘kitty’ are examples of this.

370. Counsel assisting correctly submitted that in general it may be said that it is likely that changes to the Rules to ensure that there is an increase in executive governance in the day-to-day management of the Union would go a long way to removing the opportunity for a single figure to exert power over the Union’s finances. For example, a requirement that there be a separate Treasurer with responsibility for financial reporting, but no authority over expenditure, would be an effective dispersal of power. A requirement that there be governance training to ensure that BCOM and National Executive members are properly apprised of their responsibilities would also be of assistance.
Recent reforms

371. The HSU has in fact recently introduced changes in its Rules. The following submissions of counsel assisting are accepted. The HSU helpfully offered various explanations in its submissions for the changes. Those submissions are also accepted. It is convenient to integrate the latter into the former.

372. The reforms that the Union has made to its policies and Rules were set out in Christopher Brown’s undated statement to the Commission. The reforms were instituted in response to the events of the period 2002 to 2012 involving Michael Williamson, Craig Thomson and Katherine Jackson.

373. The Union has introduced policies dealing with the authorisation of expenditure, credit card use, travel, related party transactions, conflicts of interest and board appointments.611

374. The HSU Rules were changed in June 2014. The main changes regarding financial accountability are summarised in Christopher Brown’s statement as follows:

375. Rule 74 expressly adopted the statutory duties contained in the FW(RO) Act.

376. Rule 74 also created an express duty to ensure that the financial reports of the Union and its Branches are prepared in an accurate and timely

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611 Christopher Brown, witness statement, 17/8/14, paras 169-170, tab 22F.
manner. All officers are expressly obliged to answer fully and frankly such questions as are reasonably asked, and provide such information as is reasonably requested, by the National Executive, the National Auditor, a Branch committee of management or a Branch Auditor.

377. Rule 74 created an express duty to inform the Executive, BCOM and the Auditor, of any matter that the officer is aware of which, unless disclosed, might result in the financial reports not providing a true and fair view of the financial position and performance of the Union.

378. Rule 75 required that there be a Finance Committee of the National Executive and each BCOM. Its functions are to include developing a budget; monitoring and reporting on the financial performance against the budget; ensuring that there are adequate internal control systems in place and functioning to promote operational efficiency, minimise financial risk and fraud, and to ensure financial accountability; examining and monitoring all credit card expenditure to ensure compliance with applicable policy and procedures; ensuring applicable rules and Financial Management Policy and Procedures are complied with at all times; monitoring and ensuring that the Union or Branch is complying with all statutory obligations regarding financial management and reporting requirements. The Committee is also to cooperate with the auditor to ensure that obligations are met, that the financial statements are accurate and that matters of concern (or recommendations for change) are brought before the relevant Executive or BCOM. Rule 75 is directed to one problem faced by those who wish to challenge corruption by their leaders: without majority support on the governing committee of management, an attempt to discipline or remove a corrupt official will fail.
379. Rule 75 imposed a range of positive obligations on officers. This enables those who wish to challenge corruption to obtain an order under s 164 of the FW(RO) Act for the performance and observance of the Union’s rules. These applicants gain the benefit of financial assistance under s 324 of the FW(RO) Act. The rule change is deliberately designed to help those who might otherwise be powerless against a corrupt Union official who exerts power over a governing committee of management. Further, it is important that the rules establishing finance committees at each Branch impose obligations on members of the committees to examine and monitor expenditure (including credit card expenditure) to ensure that expenditure is consistent with governing rules, policy and procedures. This rule confronts the problem about the financial oversight of expenditure. Further, establishing the finance committees means that, pursuant to the FW(RO) Act, s 154C, and Rule 91, a broader range of BCOM members must receive financial management training. It also does all that is reasonably possible to force involvement by those BCOM members with the sometimes tedious, but crucial, role of providing financial oversight of expenditure.

380. Rule 76 required the National Executive to adopt policies and procedures governing all matters associated with the control of Union funds and property. Further, rule 76(d) requires that there be policies developed and published governing a wide range of financial expenditure, including the use of credit cards. This deals with any
issue about uncertainty about the purposes for which the Union funds and credit cards can be used.  

381. Rule 84 made it clear that members of National Executive have the right of access to the financial records of the Union. These records include all records kept – every invoice, receipt and transfer.

382. Rule 85 required every officer to disclose, in writing, the remuneration the officer (or a related party) receives from boards to which he or she was nominated etc by the Union and account for that remuneration to the Union. Rule 85(h)(vi), for example, is important in deeming non-compliance with certain disclosure obligations to be a substantial breach of the rules. That is important as, under the FW(RO) Act, elected officers can only be removed in a narrow range of circumstances, including a substantial breach of the rules: s 141(1)(c). The Union’s rules arm governing bodies with the power to discipline and remove officers who contravene a range of financial accountability measures.

383. Rule 91 required each officer whose duties relate to financial management to undertaking training approved by the General Manager of the Fair Work Commission that covers the financial duties of the officer.

384. The HSU submissions described this as a well thought out scheme designed to prevent the recurrence of corruption within the Union. They saw it as deliberately arming dissidents to enable them more effectively to challenge alleged misfeasance. ‘These measures are

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612 Submissions of Counsel Assisting, 2/10/15, paras 304, 310.
above and beyond those required by law.’ They said it exhibited the culture of accountability embraced by the Union.\textsuperscript{613}

385. Counsel assisting submitted, accurately, that many of the new rules are repetitions or augmentations of the rules that were in force during the period considered in these submissions (particularly as they relate to the availability of financial information to the officers of the Union and its members). Notwithstanding this, many of these altered rules, if applied and enforced efficiently, should be effective in introducing better governance practices within the HSU.

386. However, the culture of the governing members of the Union can cause the rules of the Union to be disregarded or actively circumvented. The HSU submissions were right to stress the importance of a change in the culture of the Union. Counsel assisting pointed out that that can be very difficult to achieve. The evidence has revealed a procession of figures whose primary focus appears to be the attainment and maintenance of power, at the obvious expense of the members. The bitter factionalism of the HSU leaders appears to have led to a culture in which some of them would stop at nothing to further their ambitions. In order to achieve that, they had to exert dominance over their supporters and attack their opponents. Once that position is attained, it is a short leap to the use of the funds and resources of the Union for personal benefit.

387. The HSU criticised this last submission of counsel assisting. It said:\textsuperscript{614}

\textsuperscript{613} Submissions of the HSU, 19/10/15, paras 44-46.

\textsuperscript{614} Submissions of the HSU, 19/10/15, paras 38-43.
The criticisms of counsel assisting … to the extent they are addressed to continuing problems in the Union, are expressed at a high level of generality. They do not grapple with the fact that the National Executive of the Union has been diligent, devoted and tireless in its efforts to root out corruption, pursue those who were corrupt and to embed institutional changes to eliminate such misconduct in the future.

It was the Union who set up the investigation of Craig Thomson. It was the Union who identified the misuse of funds. It was the Union who referred the allegations to the regulator. It was the Union who cooperated exhaustively with the regulator. It was the Union whose officers gave evidence against Thomson. It was the Union who made the complaint to the police about Craig Thomson. It is the Union that continues to pursue compensation from Thomson.

Jackson referred the allegations about Williamson to the police. It was the Union who established the Temby Inquiry. It was the Union who resolved to co-operate fully with the police investigation. It was the Union who took the unprecedented action of removing Williamson and 85 other office holders from office in the Flick [sic; scil Justice Flick] proceedings. It was the Union who pursued Williamson through the courts seeking recovery of Union funds. Similar points can be made about the pursuit of Mylan.

When the Union discovered allegations about Ms Jackson’s misappropriation of funds, it was the Union who commenced civil proceedings. It was the Union who pursued her to judgment. It was the Union whose officers gave evidence against her. It was the Union who referred allegations against Ms Jackson to the police.

The Union has not been compelled by law to take these steps. It has not needed a regulator to force it to act. It has been pro-active and successful in identifying the corrupt and holding them accountable. In each of these cases, the perpetrators have been powerful figures. They have to varying

615 Christopher Brown, witness statement, 29/8/14, paras 132-141.
616 Christopher Brown, witness statement, 29/8/14, paras 175-180.
617 Christopher Brown, witness statement, 29/8/14, para 206.
618 Christopher Brown, witness statement, 29/8/14, para 208.
619 Christopher Brown, witness statement, 29/8/14, para 210.
620 Christopher Brown, witness statement, 29/8/14, paras 228-231.
621 Christopher Brown, witness statement, 29/8/14, para 253.
622 Christopher Brown, witness statement, 29/8/14, paras 56-61.
623 Christopher Brown, witness statement, 29/8/14, para 80.
624 Health Services Union v Jackson (No 4) [2015] FCA 865.
degrees each used the media skillfully to allege that their accusers were motivated by malice and political bias. But the National leadership has remained indefatigable and relentless in holding them accountable.

Accountability is more than a matter of form. It involves developing a culture of compliance. In addition to its financial governance policy, the Union has introduced a range of policies dealing with the authorisation of expenditure, credit card use, travel, related party transactions, conflicts of interest and board appointment. The Union subjects its policies to an annual review. It has engaged independent accountants to conduct finance governance and compliance reviews. This ensures that the policies are being complied with and are not merely a matter of form. The introduction of policies governing related party transactions and the remission of rules of board fees preceded the introduction of similar obligations imposed by the *Fair Work (Registered Organisations) Act* 2012.

388. To repeat, of course the Health Services Union is right to express the importance of culture in assuring accountability. But is the tone not a little inappropriate? Is it not possible to retort to the long list of claims about the HSU’s role in exposing Craig Thomson, Michael Williamson and Katherine Jackson: ‘Yes, but how did all the misconduct – operating at many different levels and places – start? Why did it take so long to discover? Why was the 22 September 2011 resolution leading to the Temby/Robertson inquiry instantly undermined by leaving Michael Williamson in control and by lies being told to Ian Temby and Dennis Robertson? Has the culture really changed?’

389. The Health Services Union’s submissions draw attention to the damage which the breaches of duty by the triumvirate have caused to the HSU,

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625 Christopher Brown, witness statement, 29/8/14, para 169.
626 Christopher Brown, witness statement, 29/8/14, para 170.
627 Christopher Brown, witness statement, 29/8/14, paras 171, 172.
628 Christopher Brown, witness statement, 29/8/14, paras 265, 278, 279.
629 See Appendix G to this Chapter.
to its members and to the Union movement generally. These submissions are entirely correct. But they were put in 2015. It is unfortunate that they did not enter the heads of responsible officials many years earlier.

390. There is an Italian proverb quoted by Robert Michels: ‘Si cambia il maestro di cappella, ma la musica è sempre quella’. He translated it: ‘There is a new conductor, but the music is just the same.’ It will take vigilance to prevent this continuing to apply to the HSU.

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630 Submissions of the HSU, 19/10/15, paras 7-15.
631 Political Parties, p 391.
# APPENDIX A – NHDA TRANSACTIONS

<table>
<thead>
<tr>
<th>Date of transfer of funds from VIC 3 to NHDA</th>
<th>Amount transferred</th>
<th>Date funds withdrawn/ expended from NHDA</th>
<th>Description of withdrawal/ expenditure</th>
<th>Amount expended</th>
<th>Trips taken by Ms Jackson</th>
<th>Deposit of funds into Ms Jackson’s personal account</th>
<th>Katherine Jackson evidence before Commission</th>
<th>Type of expenditure</th>
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<tbody>
<tr>
<td>27 Feb 2004</td>
<td>$80,000(^1)</td>
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<td></td>
<td></td>
<td></td>
<td>Ms Jackson was on a trip in Hong Kong and the US from 5 December 2003 to 22 March 2004(^2)</td>
<td>Ms Jackson gave evidence that the $80,000 transferred to the NHDA was spent in connection with her scholarship to the United States.(^3)</td>
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<td>Date funds withdrawn/ expended from NHDA</td>
<td>Description of withdrawal/ expenditure</td>
<td>Amount expended</td>
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<td>13 Apr 2004</td>
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<td>$20,00015</td>
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<td>On 14 April 2004 Jackson deposited $20,000 into her CBA streamline account.</td>
<td>Ms Jackson gave evidence that she does not believe this withdrawal was made to pay off credit card bills from her overseas trip.</td>
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<td>27 Apr 2004</td>
<td>Withdrawal</td>
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<td>Ms Jackson gave evidence that she does not believe this withdrawal was to pay off credit card bills from her overseas trip.</td>
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<td>15 Oct 2004 Withdrawal</td>
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<td>Ms Jackson was on a trip in Hong Kong from 21 October to 25 October 2004.28 Ms Jackson denied that these withdrawals were in connection with the October 2004 Hong Kong trip.29</td>
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<td>31 Mar 2005</td>
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<td>Withdrawal</td>
<td></td>
<td>$5,000&lt;sup&gt;40&lt;/sup&gt;</td>
<td>on a trip in the United States from 1 April to 17 April 2005&lt;sup&gt;47&lt;/sup&gt;</td>
<td>2005, Ms Jackson deposited $3800 into her CBA streamline account.&lt;sup&gt;38&lt;/sup&gt;</td>
<td>that she could not recall the purpose of these withdrawals.&lt;sup&gt;39&lt;/sup&gt;</td>
<td>Cash withdrawal</td>
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<td>$20,000&lt;sup&gt;41&lt;/sup&gt;</td>
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<td>$800&lt;sup&gt;42&lt;/sup&gt;</td>
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<td>$10,000&lt;sup&gt;43&lt;/sup&gt;</td>
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<td>$500&lt;sup&gt;44&lt;/sup&gt;</td>
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<td>$7,500&lt;sup&gt;46&lt;/sup&gt;</td>
<td>Ms Jackson was on a trip in the United States from 4 April to 20 April 2006&lt;sup&gt;47&lt;/sup&gt;</td>
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<td>Ms Jackson says this withdrawal was ‘possibly’ associated with a trip to the US&lt;sup&gt;48&lt;/sup&gt;</td>
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<td>$4,800&lt;sup&gt;49&lt;/sup&gt;</td>
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<td>Ms Jackson says this withdrawal was ‘possibly’ associated with a trip to the US&lt;sup&gt;50&lt;/sup&gt;</td>
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<td>3 Apr 2006</td>
<td>Withdrawal</td>
<td>$3,000^2</td>
<td>On 7 April 2006 Ms Jackson deposited $3,000 in cash into her CBA streamline account.^5</td>
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<td>20 Apr 2006</td>
<td>American Airlines FCU Los Angeles CA US</td>
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<td>Ms Jackson was On 18 Aug</td>
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<td>15 Aug 2006 Withdrawal</td>
<td>$3,000&lt;sup&gt;65&lt;/sup&gt;</td>
<td>on a trip to Europe from 25 August to 9 September 2006&lt;sup&gt;62&lt;/sup&gt;</td>
<td>2006 Jackson deposited $5,000 into her Westpac account&lt;sup&gt;63&lt;/sup&gt; On 25 Aug 2006 Jackson deposited $4,000 into her CBA streamline account&lt;sup&gt;64&lt;/sup&gt;</td>
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<td>Cash withdrawal</td>
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<td>9 Oct 2006 Issa Homes Ivanhoe Vic</td>
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<td>30 Nov 2006 Withdrawal</td>
<td>$5,500&lt;sup&gt;68&lt;/sup&gt;</td>
<td>Ms Jackson was on a trip in Hong Kong from 30 November 2006 to 14 December 2006&lt;sup&gt;69&lt;/sup&gt;</td>
<td>On 30 Nov 2006 Ms Jackson deposited $2,000 in cash into her CBA streamline account&lt;sup&gt;70&lt;/sup&gt;</td>
<td></td>
<td>Cash withdrawal</td>
<td></td>
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<td>27 Dec 2006 ABWDL Balwyn East Op</td>
<td>$800&lt;sup&gt;71&lt;/sup&gt;</td>
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<td>ATM withdrawal</td>
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<td>29 Dec 2006 ABWDL Balwyn East Op</td>
<td>$200&lt;sup&gt;72&lt;/sup&gt;</td>
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<td>ATM withdrawal</td>
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<tr>
<td></td>
<td></td>
<td>29 Jan 2007 Withdrawal</td>
<td>$3,000&lt;sup&gt;73&lt;/sup&gt;</td>
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<td>Cash withdrawal</td>
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<td>Date of transfer of funds from VIC 3 to NHDA</td>
<td>Amount transferred</td>
<td>Date funds withdrawn/expended from NHDA</td>
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<td>Deposit of funds into Ms Jackson’s personal account</td>
<td>Katherine Jackson evidence before Commission</td>
<td>Type of expenditure</td>
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<tr>
<td>29 Jun 2007</td>
<td>$5,000</td>
<td>26 Jul 2007</td>
<td>Withdrawal</td>
<td>$2,500</td>
<td></td>
<td>On 9 Aug 2007 Ms Jackson deposited $2,000 cash into her Streamline account. On 7 August 2007 Ms Jackson cashed a cheque for $8,400 on the Union’s funds.</td>
<td>Cash withdrawal</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 Nov 2007</td>
<td>ANZ ATM South Melbourne South Melb VIC</td>
<td>$500</td>
<td></td>
<td>Ms Jackson gave evidence that this withdrawal was expended for union purposes.</td>
<td>ATM withdrawal</td>
<td></td>
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<td></td>
<td></td>
<td>26 Nov 2007</td>
<td>Y.G’s Young Generat</td>
<td>$214.80</td>
<td></td>
<td>Ms Jackson gave evidence this was a personal expense as part of her $4,000 allowance per annum.</td>
<td>Retail expenditure</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>4 Dec 2007</td>
<td>Kip McGrath Education</td>
<td>$400</td>
<td></td>
<td>Ms Jackson says this was a personal expense as part of her $4,000 allowance per annum.</td>
<td>Retail expenditure</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>6 Dec 2007</td>
<td></td>
<td>$8,000</td>
<td></td>
<td>Ms Jackson says in</td>
<td></td>
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<tr>
<td>Date of transfer of funds from VIC 3 to NHDA</td>
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<tr>
<td>21 Dec 2007</td>
<td>$8,000$^{87}</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>relation to the money that was transferred into the NHDA in December 2007, that when it was withdrawn it, ‘sat in that grey box’, i.e. the kitty.$^{86}$</td>
<td>Ms Jackson gives evidence that, despite not being Branch Secretary from January 2008 to May 2008, she was entitled to withdraw funds because the NHDA account was not an account of the Union’s.$^{89}$</td>
<td>Retail expenditure</td>
</tr>
<tr>
<td>3 Mar 2008</td>
<td></td>
<td>3 Mar 2008 Grangers Camping World Nunawading</td>
<td>$800$^{88}</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Retail expenditure</td>
</tr>
<tr>
<td>6 Mar 2008</td>
<td></td>
<td>6 Mar 2008 Withdrawal</td>
<td>$6000$^{90}</td>
<td></td>
<td>Ms Jackson was on a trip to Sydney in early March 2008$^{91}$</td>
<td></td>
<td>Ms Jackson could not recall the purpose of this withdrawal.$^{92}$</td>
<td>Cash withdrawal</td>
</tr>
<tr>
<td>19 Mar 2008</td>
<td></td>
<td></td>
<td></td>
<td>$115.80$^{93}</td>
<td></td>
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<td></td>
<td>Retail expenditure</td>
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<tr>
<td>26 Mar 2008</td>
<td></td>
<td></td>
<td></td>
<td>$510$^{94}</td>
<td></td>
<td></td>
<td></td>
<td>Retail expenditure</td>
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<tr>
<td>14 Apr 2008</td>
<td></td>
<td></td>
<td></td>
<td>$151.88$^{95}</td>
<td></td>
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<td></td>
<td>Retail expenditure</td>
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<td>Date of transfer of funds from VIC 3 to NHDA</td>
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<td></td>
<td>18 Apr 2008</td>
<td>FIFTY 4</td>
<td>$349$96</td>
<td></td>
<td></td>
<td>Ms Jackson gave evidence that this expenditure was for a personal purpose.97 Ms Jackson agrees that the smaller amounts taken from the account were generally for personal purposes and the larger withdrawals were generally for some other purpose.98</td>
<td>Retail expenditure</td>
</tr>
<tr>
<td></td>
<td></td>
<td>24 Apr 2008</td>
<td>ABWDL 150 Lonsdale</td>
<td>$700$99</td>
<td></td>
<td></td>
<td></td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6 May 2008</td>
<td>Dr Mala Desai</td>
<td>$508.66$100</td>
<td></td>
<td></td>
<td>Ms Jackson says this expenditure was for a personal purpose.101</td>
<td>Retail expenditure</td>
</tr>
<tr>
<td></td>
<td></td>
<td>12 May 2008</td>
<td>Laser Medical Centre Melbourne</td>
<td>$165$102</td>
<td></td>
<td></td>
<td></td>
<td>Personal expenditure</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14 May 2008</td>
<td>Withdrawal</td>
<td>$4000$103</td>
<td>Ms Jackson was on a trip to Hong Kong in June 2008,$104 On 29 May 2008 Ms Jackson deposited</td>
<td></td>
<td>Ms Jackson says that these withdrawals were either for political or industrial purposes.$10</td>
<td>Cash withdrawal</td>
</tr>
<tr>
<td>Date of transfer of funds from VIC 3 to NHDA</td>
<td>Amount transferred</td>
<td>Date funds withdrawn/expended from NHDA</td>
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<td>$4,700 in cash into SGE mortgage account(^{10}) and $550 in cash deposited into SGE Access account.(^{10}) Ms Jackson also cashed cheques on the Union’s funds for $4,500 on 19 May 2008(^{10}) and $6,500 on 3 June 2008.(^{10}) Ms Jackson admits that the cash drawn from the cheques was the source, or a significant part of the source of the deposits into the SGE accounts.(^{10})</td>
<td></td>
<td>Cash withdrawal</td>
</tr>
<tr>
<td>27 Jun 2008</td>
<td>$7,000(^{12})</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td>30 Jun 2008</td>
<td>ABW DL Balwyn East Op</td>
<td>$700(^{13})</td>
<td></td>
<td></td>
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<td>Date of transfer of funds from VIC 3 to NHDA</td>
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<tr>
<td>7 Jul 2008</td>
<td></td>
<td>No Five Port Douglas Qld</td>
<td>$275$114</td>
<td></td>
<td>Ms Jackson was on a trip to North Queensland from 6 July 2008 to 13 July 2008,115</td>
<td></td>
<td></td>
<td>Retail expenditure</td>
</tr>
<tr>
<td>14 Jul 2008</td>
<td></td>
<td>Your Eyedentity Port Douglas</td>
<td>$189$116</td>
<td></td>
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<td>Retail expenditure</td>
</tr>
<tr>
<td>21 Jul 2008</td>
<td></td>
<td>Gaz Man Hawthorn East</td>
<td>$118$117</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Retail expenditure</td>
</tr>
<tr>
<td>23 Jul 2008</td>
<td></td>
<td>Withdrawal</td>
<td>$3000$118</td>
<td></td>
<td>On 23 July 2008 Ms Jackson deposited $3,000 in cash into her SGE Mortgage account 116 On 23 July 2008 Ms Jackson also cashed a cheque for $8,500 on the Union’s funds.120</td>
<td></td>
<td></td>
<td>Cash withdrawal</td>
</tr>
<tr>
<td>4 Aug 2008</td>
<td></td>
<td>ABWDL Victoria GDN</td>
<td>$300.00121</td>
<td></td>
<td></td>
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<td></td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td>4 Aug 2008</td>
<td></td>
<td>Safeway Balwyn</td>
<td>$167.99122</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Retail expenditure</td>
</tr>
<tr>
<td>4 Aug 2008</td>
<td></td>
<td>Maple Homewares and Balwyn Vic</td>
<td>$262.46$123</td>
<td></td>
<td></td>
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<td></td>
<td>Retail expenditure</td>
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<td>Date of transfer of funds from VIC 3 to NHDA</td>
<td>Amount transferred</td>
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<tr>
<td>5 Aug 2008</td>
<td></td>
<td>Gaz man Nunawading</td>
<td>$254.95124</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Retail expenditure</td>
</tr>
<tr>
<td>6 Aug 2008</td>
<td></td>
<td>Gaz man South Melbourne</td>
<td>$444.90125</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Retail expenditure</td>
</tr>
<tr>
<td>13 Aug 2008</td>
<td></td>
<td>Balwyn North Podiatry North Balwyn</td>
<td>$32.30126</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Personal expenditure</td>
</tr>
<tr>
<td>14 Aug 2008</td>
<td></td>
<td>Bob Stewart of Kew, Kew Vic 2</td>
<td>$77.80127</td>
<td></td>
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<td></td>
<td></td>
<td>Retail expenditure</td>
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<tr>
<td>4 Sept 2008</td>
<td>$8,000128</td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>22 Sep 2008</td>
<td></td>
<td>Eyeballs Eyewear Paddington NSW</td>
<td>$590124</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Retail expenditure</td>
</tr>
<tr>
<td>23 Sep 2008</td>
<td></td>
<td>Withdrawal</td>
<td>$3,000130</td>
<td></td>
<td></td>
<td>Ms Jackson cannot recall the purpose of this withdrawal.131</td>
<td>Cash withdrawal</td>
<td></td>
</tr>
<tr>
<td>26 Nov 2008</td>
<td></td>
<td>Withdrawal</td>
<td>$7,000132</td>
<td></td>
<td></td>
<td>On 26 November 2008 Ms Jackson deposited $3,000 in cash into her SGE mortgage account.133</td>
<td>Ms Jackson cannot recall the purpose of this withdrawal, but says it would have been for industrial or political purposes.134</td>
<td>Cash withdrawal</td>
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<tr>
<td>Date of transfer of funds from VIC 3 to NHDA</td>
<td>Amount transferred</td>
<td>Date funds withdrawn/ expended from NHDA</td>
<td>Description of withdrawal/ expenditure</td>
<td>Amount expended</td>
<td>Trips taken by Ms Jackson</td>
<td>Deposit of funds into Ms Jackson’s personal account</td>
<td>Katherine Jackson evidence before Commission</td>
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<td>5 Dec 2008</td>
<td>$5,000$^{135}</td>
<td></td>
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<td></td>
<td>Ms Jackson gave evidence that the bulk of withdrawals from the end of 2008 were provided to Jeff Jackson in the battle against Pauline Fegan and to meet requests for money from political allies of the Union within the ALP or other unions. $^{136}$</td>
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<td>Date of transfer of funds from VIC 3 to NHDA</td>
<td>Amount transferred</td>
<td>Date funds withdrawn/ expended from NHDA</td>
<td>Description of withdrawal/ expenditure</td>
<td>Amount expended</td>
<td>Trips taken by Ms Jackson</td>
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<td>Type of expenditure</td>
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<td></td>
<td>24 Dec 2008</td>
<td>Withdrawal</td>
<td>$5,000[^37]</td>
<td></td>
<td>On 24 December 2008 Ms Jackson deposited $5000 into her SGE Mortgage account[^38] On the same date, Ms Jackson cashed a cheque on the Union’s funds.[^39] Ms Jackson admits that this cheque was the source, or a significant part of the source, of this transfer into her SGE account.[^40] Jackson cannot recall the purpose of this $5,000 withdrawal, but says that it would have been for political or industrial purposes.[^41]</td>
<td>Cash withdrawal</td>
<td></td>
</tr>
<tr>
<td>7 Jan 2009</td>
<td>$12,000[^42]</td>
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<td>Date of transfer of funds from VIC 3 to NHDA</td>
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<td><strong>29 Jan 2009</strong></td>
<td></td>
<td>ABWDL South Melb 03</td>
<td></td>
<td><strong>$800.00</strong></td>
<td></td>
<td>Ms Jackson said that withdrawals from South Melbourne were commonly used for entertainment expenses for union staff and purchases of envelopes and/or stamps.</td>
<td>ATM withdrawal</td>
<td></td>
</tr>
<tr>
<td><strong>10 Feb 2009</strong></td>
<td></td>
<td>Bunnings Nunawading 6140 Reg 04</td>
<td></td>
<td><strong>$265.13</strong></td>
<td></td>
<td></td>
<td>Retail expenditure</td>
<td></td>
</tr>
<tr>
<td><strong>2 Mar 2009</strong></td>
<td></td>
<td>STG ATM Paddington Branch Paddington N/A</td>
<td></td>
<td><strong>$800.00</strong></td>
<td></td>
<td></td>
<td>ATM withdrawal</td>
<td></td>
</tr>
<tr>
<td><strong>4 Mar 2009</strong></td>
<td></td>
<td>Withdrawal</td>
<td></td>
<td><strong>$7,500.00</strong></td>
<td>Ms Jackson went on a trip to Hong Kong from 6 March 2009 to 11 March 2009</td>
<td></td>
<td>Cash withdrawal</td>
<td></td>
</tr>
<tr>
<td><strong>23 Mar 2009</strong></td>
<td><strong>$50,000</strong></td>
<td></td>
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<tr>
<td>24 Mar 2009</td>
<td></td>
<td>Withdrawal</td>
<td>$50,000.00</td>
<td></td>
<td></td>
<td>On 25 March 2009, $50,000 was deposited into the Westpac account of Mr and Mrs Jackson&lt;sup&gt;151&lt;/sup&gt;</td>
<td>Ms Jackson says her relationship with Mr Jackson was acrimonious at this time and that in no circumstances would she have gifted money to him for his personal benefit.&lt;sup&gt;152&lt;/sup&gt; Ms Jackson says she believes that payments were in relation to the internal struggle for control of the Vic No 1 Branch.&lt;sup&gt;153&lt;/sup&gt;</td>
<td>Cash withdrawal</td>
</tr>
<tr>
<td>27 Mar 2009</td>
<td>ABWDL Balwyn</td>
<td>$300.00&lt;sup&gt;154&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ATM withdrawal</td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td>5 May 2009</td>
<td>ABWDL 150 Lonsdale</td>
<td>$800.00&lt;sup&gt;155&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ATM withdrawal</td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td>11 May 2009</td>
<td>ABWDL 150 Lonsdale</td>
<td>$800.00&lt;sup&gt;156&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ATM withdrawal</td>
<td>ATM withdrawal</td>
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<tr>
<td>11 May 2009</td>
<td>ABWDL 150 Lonsdale</td>
<td>$800.00&lt;sup&gt;157&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ATM withdrawal</td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td>22 May 2009</td>
<td>Cashcard 7-11 William St 1213 Melbourne</td>
<td>$300.00&lt;sup&gt;158&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ATM withdrawal</td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td>18 Jun 2009</td>
<td>ABWDL 150 Lonsdale</td>
<td>$800.00&lt;sup&gt;159&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ATM withdrawal</td>
<td>ATM withdrawal</td>
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<tr>
<td>29 Jun 2009</td>
<td>NAB ATM Sydney – 101-103 Pitt S</td>
<td>$400.00&lt;sup&gt;160&lt;/sup&gt;</td>
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<td></td>
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<td>ATM withdrawal</td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td>1 Jul 2009</td>
<td>$7,500&lt;sup&gt;161&lt;/sup&gt;</td>
<td></td>
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<tr>
<td>Date of transfer of funds from VIC 3 to NHDA</td>
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<td>Deposit of funds into Ms Jackson’s personal account</td>
<td>Katherine Jackson evidence before Commission</td>
<td>Type of expenditure</td>
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<td>18 Aug 2009</td>
<td></td>
<td>Withdrawal</td>
<td></td>
<td>$1,500\textsuperscript{162}</td>
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<tr>
<td>7 Sep 2009</td>
<td></td>
<td>Bunnings Nunawading 6140 Reg 11</td>
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<td>$64.02\textsuperscript{163}</td>
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<td>Retail expenditure</td>
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<td>29 Sep 2009</td>
<td></td>
<td>Withdrawal</td>
<td></td>
<td>$4,800\textsuperscript{164}</td>
<td></td>
<td>On 29 September 2009 Jackson deposited $3,000 in cash into her streamline account.\textsuperscript{165} On the same date Ms Jackson cashed a cheque for $6,000 on the Union’s funds.\textsuperscript{166} Ms Jackson admits that this cheque was the source, or a significant part of the source, of this transfer into her SGE account.\textsuperscript{167}</td>
<td></td>
<td>Cash withdrawal</td>
</tr>
<tr>
<td>5 Oct 2009</td>
<td>$8,000\textsuperscript{168}</td>
<td></td>
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<td>Date funds withdrawn/ expended from NHDA</td>
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<td>Type of expenditure</td>
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<tr>
<td>16 Oct 2009</td>
<td></td>
<td>Withdrawal</td>
<td>$5000(^{09})</td>
<td>Ms Jackson was on a trip to Hong Kong from 29 October 2009 to 3 November 2009(^{30})</td>
<td>Ms Jackson cannot recall the purpose of this withdrawal(^{171})</td>
<td>Cash withdrawal</td>
<td></td>
<td>Cash withdrawal</td>
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<tr>
<td>22 Oct 2009</td>
<td></td>
<td>Withdrawal</td>
<td>$3,500(^{172})</td>
<td>Ms Jackson cannot recall the purpose of this withdrawal(^{173})</td>
<td>Cash withdrawal</td>
<td></td>
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<tr>
<td>26 Oct 2009</td>
<td>Safeway 3221 Camberwell VIC</td>
<td>$289.72(^{174})</td>
<td>Retail expenditure</td>
<td>Cash withdrawal</td>
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<td>Retail expenditure</td>
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<tr>
<td>26 Oct 2009</td>
<td>POB Aust Post Balwyn East 1 VIC</td>
<td>$500.00(^{175})</td>
<td>Cash withdrawal</td>
<td>Cash withdrawal</td>
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<td>Cash withdrawal</td>
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<tr>
<td>27 Oct 2009</td>
<td>$8,000(^{176})</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>29 Oct 2009</td>
<td>Withdrawal</td>
<td>$2,000.00(^{177})</td>
<td></td>
<td>Ms Jackson says depending on the timeframe, she would have used the money withdrawn from NHDA from this point onwards for election purposes, depending on the timeframe but was &quot;not positive&quot;(^{178})</td>
<td>Cash withdrawal</td>
<td></td>
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<td>Cash withdrawal</td>
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<tr>
<td>29 Oct 2009</td>
<td>Ray’s Outdoors Carlton</td>
<td>$259.99(^{179})</td>
<td></td>
<td>Retail expenditure</td>
<td></td>
<td></td>
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<td>Retail expenditure</td>
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<tr>
<td>2 Dec 2009</td>
<td>Withdrawal</td>
<td>$3,000.00(^{180})</td>
<td></td>
<td>Cash withdrawal</td>
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<td>Cash withdrawal</td>
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<tr>
<td>14 Jan 2010</td>
<td>AB WDL 150 Lonsdale</td>
<td>$800.00(^{181})</td>
<td></td>
<td>ATM withdrawal</td>
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<td>ATM withdrawal</td>
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<tr>
<td>Date of transfer of funds from VIC 3 to NHDA</td>
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<td>Amount expended</td>
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<td>Deposit of funds into Ms Jackson’s personal account</td>
<td>Katherine Jackson evidence before Commission</td>
<td>Type of expenditure</td>
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<td></td>
<td></td>
<td>19 Mar 2010</td>
<td>Handyway Grays AFRD 0001 South Melbourne</td>
<td>$98.00&lt;sup&gt;182&lt;/sup&gt;</td>
<td></td>
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<td>Retail expenditure</td>
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<tr>
<td></td>
<td>7 Apr 2010</td>
<td>$22,000&lt;sup&gt;183&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Ms Jackson denies that this payment, or earlier payments, were in connection with her property settlement.&lt;sup&gt;184&lt;/sup&gt;</td>
<td></td>
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<tr>
<td></td>
<td>27 May 2010</td>
<td>$12,000&lt;sup&gt;185&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Ms Jackson gives evidence that the consolidation of VIC 3 and HSU East Branch was not completed until late 2010.&lt;sup&gt;186&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4 Jun 2010</td>
<td>Withdrawal</td>
<td></td>
<td>$5,500&lt;sup&gt;187&lt;/sup&gt;</td>
<td>Ms Jackson was on a trip in Europe from 26 August 2010 until 1 October 2010.&lt;sup&gt;188&lt;/sup&gt;</td>
<td></td>
<td></td>
<td>Cash withdrawal</td>
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<tr>
<td></td>
<td>7 Jun 2010</td>
<td>The Observatory Hotel Sydney</td>
<td></td>
<td>$518&lt;sup&gt;189&lt;/sup&gt;</td>
<td></td>
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<tr>
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<td>16 Jun 2010</td>
<td>ABWDL South Melb B</td>
<td></td>
<td>$400&lt;sup&gt;190&lt;/sup&gt;</td>
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<tr>
<td></td>
<td>21 Jun 2010</td>
<td>ABWDL Balwyn East</td>
<td></td>
<td>$800&lt;sup&gt;191&lt;/sup&gt;</td>
<td></td>
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<td>ATM withdrawal</td>
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<tr>
<td></td>
<td>22 Jun 2010</td>
<td>ABWDL South Melb B</td>
<td></td>
<td>$400&lt;sup&gt;192&lt;/sup&gt;</td>
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<tr>
<td></td>
<td>1 Jul 2010</td>
<td>ABWDL St Vincent A</td>
<td></td>
<td>$480&lt;sup&gt;193&lt;/sup&gt;</td>
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<td>ATM withdrawal</td>
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<td></td>
<td></td>
<td>19 Jul 2010 ABWDL South Melb B</td>
<td></td>
<td>$300$⁹⁴</td>
<td></td>
<td></td>
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<td>ATM withdrawal</td>
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<td></td>
<td></td>
<td>13 Oct 2010 $6,000$¹⁰⁵</td>
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<td></td>
<td>26 Oct 2010 ABWDL St James B</td>
<td></td>
<td>$500$⁹⁶</td>
<td></td>
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<td>ATM withdrawal</td>
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<td></td>
<td></td>
<td>5 Nov 2010 ABWDL South Melb B</td>
<td></td>
<td>$800$⁹⁷</td>
<td></td>
<td>Ms Jackson said that withdrawals from South Melbourne were commonly used for entertainment expenses for union staff and purchases of envelopes and/or stamps.¹⁰⁸</td>
<td></td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6 Dec 2010 ABWDL Box Hill C</td>
<td></td>
<td>$500$⁹⁴</td>
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<td>ATM withdrawal</td>
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<td>19 Jan 2011 ABWDL Kew A</td>
<td></td>
<td>$800$¹⁰¹</td>
<td></td>
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<td>ATM withdrawal</td>
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<td>20 Jan 2011 Withdrawal</td>
<td></td>
<td>$8,000$¹⁰¹</td>
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<td></td>
<td>9 Feb 2011 ABWDL South Melb A</td>
<td></td>
<td>$500$¹⁰²</td>
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<td>ATM withdrawal</td>
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<td></td>
<td></td>
<td>17 Feb 2011 ABWDL South Melb B</td>
<td></td>
<td>$800$¹⁰³</td>
<td></td>
<td>Ms Jackson said that withdrawals from South Melbourne were commonly used for entertainment expenses for Union staff and purchases of envelopes and/or stamps.¹⁰⁴</td>
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<td>ATM withdrawal</td>
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<tr>
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<td></td>
<td>25 Mar 2011 Withdrawal</td>
<td></td>
<td>$5,000$¹⁰⁵</td>
<td></td>
<td></td>
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<td>Cash withdrawal</td>
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</table>

Ms Jackson said that withdrawals from South Melbourne were commonly used for entertainment expenses for Union staff and purchases of envelopes and/or stamps.
<table>
<thead>
<tr>
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<th>Type of expenditure</th>
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<tbody>
<tr>
<td>20 May 2011</td>
<td>Withdrawal</td>
<td>$1,600²⁰⁶</td>
<td></td>
<td></td>
<td></td>
<td>Ms Jackson said that withdrawals from South Melbourne were commonly used for entertainment expenses for union staff and purchases of envelopes and/or stamps.²⁰⁸</td>
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<td>Cash withdrawal</td>
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<tr>
<td>30 May 2011</td>
<td>AWBDL South Melb B</td>
<td>$800²⁰⁷</td>
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<td></td>
<td>Ms Jackson said that withdrawals from South Melbourne were commonly used for entertainment expenses for union staff and purchases of envelopes and/or stamps.²⁰⁸</td>
<td></td>
<td>ATM withdrawal</td>
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<tr>
<td>28 Jun 2011</td>
<td>ABWDL South Melb B</td>
<td>$800²⁰⁹</td>
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<td></td>
<td></td>
<td>Ms Jackson said that withdrawals from South Melbourne were commonly used for entertainment expenses for union staff and purchases of envelopes and/or stamps.²¹⁰</td>
<td></td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td>18 July 2011</td>
<td>ABWDL 21 Swanston B</td>
<td>$800²¹¹</td>
<td></td>
<td></td>
<td></td>
<td>Ms Jackson was on a trip to the United States from 22 July to 21 August 2011.²¹³</td>
<td></td>
<td>ATM withdrawal</td>
</tr>
<tr>
<td>21 July 2011</td>
<td>Withdrawal</td>
<td>$2,100²¹²</td>
<td></td>
<td></td>
<td></td>
<td>Ms Jackson says that this amount was provided in cash to Mr Bolano, Ms Behrens and Ms Hart for their election campaigns.²¹⁵</td>
<td></td>
<td>Cash withdrawal</td>
</tr>
<tr>
<td>6 Sep 2012</td>
<td>Wdl Branch South Melbourne</td>
<td>$9,000.00²¹⁴</td>
<td></td>
<td></td>
<td></td>
<td>Ms Jackson says that this amount was provided in cash to Mr Bolano, Ms Behrens and Ms Hart for their election campaigns.²¹⁵</td>
<td></td>
<td>Cash withdrawal</td>
</tr>
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<tr>
<td>14 Aug 2013</td>
<td></td>
<td>Budget Rent a Car Mascot NS Aus</td>
<td>$126.69(^{16})</td>
<td></td>
<td></td>
<td>Ms Jackson says that this expense was within BCOM approval.(^{17})</td>
<td></td>
<td>Retail expenditure</td>
</tr>
<tr>
<td>27 Aug 2013</td>
<td></td>
<td>Rental Car Toll Ph131865 Parramatta AUS</td>
<td>$8.87(^{18})</td>
<td></td>
<td></td>
<td>Ms Jackson says that this expense was within BCOM approval.(^{19})</td>
<td></td>
<td>Retail expenditure</td>
</tr>
<tr>
<td>26 Nov 2013</td>
<td></td>
<td>Closed Account Branch Doncaster S Town – balance withdrawn</td>
<td>$1,423.83(^{20})</td>
<td></td>
<td></td>
<td>Ms Jackson says that when she closed this account, she kept the remaining balance to compensate for Union-related debts she had incurred.(^{21})</td>
<td></td>
<td>Cash withdrawal</td>
</tr>
</tbody>
</table>

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2. *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [232].
13 Jackson MFI-5, 28/8/14, Vol 5, p 1066.
14 Jackson MFI-5, 28/8/14, Vol 5, p 1066.
16 HSU Tender Bundle, 6/10/15, tab 2, p 11.
18 Jackson MFI-5, 28/8/14, Vol 5, p 1066.
26 Jackson MFI-5, 28/8/14, Vol 5, p 1068.
28 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
31 Jackson MFI-5, 28/8/14, Vol 5, p 1068.
33 Jackson MFI-5, 28/8/14, Vol 5, p 1069.
34 Jackson MFI-5, 28/8/14, Vol 5, p 1069.
35 Jackson MFI-5, 28/8/14, Vol 5, p 1070.
36 Jackson MFI-5, 28/8/14, Vol 5, p 1070.
37 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
38 HSU Tender Bundle, 6/10/15, tab 2, p 42.
40 Jackson MFI-5, 28/8/14, Vol 5, p 1070.
41 Jackson MFI-5, 28/8/14, Vol 5, p 1071.
42 Jackson MFI-5, 28/8/14, Vol 5, p 1072.
43 Jackson MFI-5, 28/8/14, Vol 5, p 1073.
Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].


Jackson MFI-5, 28/8/14, Vol 5, p 1074.

Jackson MFI-5, 28/8/14, Vol 5, p 1074.

Jackson MFI-5, 28/8/14, Vol 5, p 1074.

Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].

HSU Tender Bundle, 6/10/15, tab 3, p 902.

HSU Tender Bundle, 6/10/15, tab 2, p 90.

HSU Tender Bundle, 6/10/15, tab 2, p 90.

HSU Tender Bundle, 6/10/15, tab 2, p 90.

HSU Tender Bundle, 6/10/15, tab 1, p 1.
Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
106 HSU Tender Bundle, 6/10/15, tab 8, p 2289.
107 McGregor MFI-1, 17/6/14, p 173.
108 McGregor MFI-1, 17/6/14, p 172.
109 HSU Tender Bundle, 6/10/15, tab 9, p 2358 [98].
111 Jackson MFI-4, 19/6/14, p 12.
112 Jackson MFI-4, 19/6/14, p 12.
113 Jackson MFI-4, 19/6/14, p 12.
114 Jackson MFI-4, 19/6/14, p 12.
115 *Health Services Union v Jackson (No 4) [2015] FCA 865* at [232].
116 Jackson MFI-4, 19/6/14, p 12.
117 Jackson MFI-4, 19/6/14, p 12.
118 Jackson MFI-4, 19/6/14, p 12.
119 HSU Tender Bundle, 6/10/15, tab 8, p 2338.
120 McGregor MFI-1, 17/6/14, p 174.
121 Jackson MFI-4, 19/6/14, p 12.
122 Jackson MFI-4, 19/6/14, p 12.
123 Jackson MFI-4, 19/6/14, p 12.
124 Jackson MFI-4, 19/6/14, p 12.
125 Jackson MFI-4, 19/6/14, p 13.
126 Jackson MFI-4, 19/6/14, p 14.
127 Jackson MFI-4, 19/6/14, p 14.
128 Jackson MFI-4, 19/6/14, p 14.
129 Jackson MFI-4, 19/6/14, p 14.
130 Jackson MFI-4, 19/6/14, p 14.
131 Katherine Jackson, 19/6/14, T:851.16-19.
132 Jackson MFI-4, 19/6/14, p 15.
133 HSU Tender Bundle, 6/10/15, tab 8, p 2339.
134 Katherine Jackson, 19/6/14, T:851.21-30.
135 Jackson MFI-4, 19/6/14, p 15.
136 Katherine Jackson, 28/8/14, T:792.39-793.31; Katherine Jackson, witness statement, 28/8/14, para 38.
137 Jackson MFI-4, 19/6/14, p 15.
138 HSU Tender Bundle, 6/10/15, tab 8, p 2339.
139 McGregor MFI-1, 17/6/14, p 195.
140 HSU Tender Bundle, 6/10/15, tab 9, p 2358 [98].
141 Katherine Jackson, 19/6/14, T:851.21-30.
142 Jackson MFI-4, 19/6/14, p 15.
143 Jackson MFI-4, 19/6/14, p 15.
144 Katherine Jackson, witness statement, 28/8/14, para 97.
145 Jackson MFI-4, 19/6/14, p 16.
146 Jackson MFI-4, 19/6/14, p 16.
147 Jackson MFI-4, 19/6/14, p 16.
148 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
149 Jackson MFI-4, 19/6/14, p 16.
150 Jackson MFI-4, 19/6/14, p 16.
151 HSU Tender Bundle, 6/10/15, tab 3, p 636.
152 Katherine Jackson, witness statement, 28/8/14, para 12.
154 Jackson MFI-4, 19/6/14, p 16.
155 Jackson MFI-4, 19/6/14, p 16.
156 Jackson MFI-4, 19/6/14, p 16.
157 Jackson MFI-4, 19/6/14, p 16.
158 Jackson MFI-4, 19/6/14, p 17.
159 Jackson MFI-4, 19/6/14, p 17.
160 Jackson MFI-4, 19/6/14, p 17.
161 Jackson MFI-4, 19/6/14, p 17.
162 Jackson MFI-4, 19/6/14, p 18.
163 Jackson MFI-4, 19/6/14, p 18.
164 Jackson MFI-4, 19/6/14, p 18.
165 HSU Tender Bundle, 6/10/15, tab 2, p 188.
166 McGregor MFI-1, 17/6/14, p 166.
167 HSU Tender Bundle, 6/10/15, tab 9, p 2358 [98].
168 Jackson MFI-4, 19/6/14, p 18.
169 Jackson MFI-4, 19/6/14, p 18.
170 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
172 Jackson MFI-4, 19/6/14, p 18.
174 Jackson MFI-4, 19/6/14, p 18.
175 Jackson MFI-4, 19/6/14, p 18.
176 Katherine Jackson, 19/6/14, T:852.21-29.
177 Jackson MFI-4, 19/6/14, p 18.
178 Katherine Jackson, 19/6/14, T:852.21-29.
179 Jackson MFI-4, 19/6/14, p 18.
180 Jackson MFI-4, 19/6/14, p 19.
181 Jackson MFI-4, 19/6/14, p 19.
182 Jackson MFI-4, 19/6/14, p 20.
183 Jackson MFI-4, 19/6/14, p 20.
184 Katherine Jackson, 28/8/14, T:793.33-797.22, 800.16-32.
185 Jackson MFI-4, 19/6/14, p 21.
187 Jackson MFI-4, 19/6/14, p 21.
188 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
189 Jackson MFI-4, 19/6/14, p 21.
190 Jackson MFI-4, 19/6/14, p 21.
191 Jackson MFI-4, 19/6/14, p 21.
192 Jackson MFI-4, 19/6/14, p 21.
193 Jackson MFI-4, 19/6/14, p 21.
194 Jackson MFI-4, 19/6/14, p 21.
195 Jackson MFI-4, 19/6/14, p 22.
196 Jackson MFI-4, 19/6/14, p 22.
Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
APPENDIX B – CHEQUES DRAWN ON VIC NO 3 BRANCH

<table>
<thead>
<tr>
<th>Date</th>
<th>Cheque number</th>
<th>BCOM meeting held within 7 days of withdrawal?</th>
<th>Amount drawn</th>
<th>Numbers attending</th>
<th>Retained by Ms Jackson</th>
<th>Proximate transfers to personal and mortgage accounts</th>
<th>Proximate trips</th>
</tr>
</thead>
<tbody>
<tr>
<td>3/7/2007</td>
<td>003308(^4)</td>
<td>Yes</td>
<td>$4,800</td>
<td>11</td>
<td>$3,700</td>
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<tr>
<td>7/8/2007</td>
<td>003311(^5)</td>
<td>No</td>
<td>$8,400</td>
<td></td>
<td>$8,400</td>
<td>On 9 August 2007 Jackson deposited into her CBA Streamline account an amount of $2,000.00.(^6) On 26 July 2007 she withdrew $2,500 from the NHDA.(^7)</td>
<td>Ms Jackson was on a trip in North Queensland from 6 July to 13 July 2008.(^4)</td>
</tr>
<tr>
<td>29/8/2007</td>
<td>003312(^8)</td>
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<td>11</td>
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<td>6/3/2008</td>
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\(^4\) Ms Jackson was on a trip in Fall’s Creek in early August 2007.
\(^6\) On 6 March 2008 Ms Jackson withdrew $6,000 from the NHDA.
<table>
<thead>
<tr>
<th>Date</th>
<th>Cheque number</th>
<th>BCOM meeting held within 7 days of withdrawal?</th>
<th>Amount drawn</th>
<th>Numbers attending</th>
<th>Retained by Ms Jackson</th>
<th>Proximate transfers to personal and mortgage accounts</th>
<th>Proximate trips</th>
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<tr>
<td>31/03/2008</td>
<td>003330</td>
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<td>$5,000</td>
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<tr>
<td>19/05/2008</td>
<td>003332</td>
<td>Yes</td>
<td>$4,500</td>
<td>11</td>
<td>$3,400. Ms Jackson admits that this cheque was the source, or a significant part of the source, of a $4,700 cash deposit on 29 May 2008 into the SGE Credit Union Mortgage Account of Ms Jackson and Mr Jeff Jackson.</td>
<td>Ms Jackson was on a trip to Hong Kong in June 2008.</td>
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<td>3/06/2008</td>
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<td>3/07/2008</td>
<td>003308</td>
<td>Yes</td>
<td>$4,800</td>
<td>9</td>
<td>$3,900</td>
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<td>Ms Jackson was on a trip in North Queensland from 6 July to 13 July 2008.</td>
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<td>4/07/2008</td>
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<td>23/07/2008</td>
<td>003318</td>
<td>No</td>
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<td>$8,500</td>
<td>On 23 July 2008, $3,000 was deposited into Ms Jackson’s SGE mortgage account.</td>
<td></td>
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<td>12/9/2008</td>
<td>003335</td>
<td>No</td>
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<td></td>
<td>$9,400</td>
<td></td>
<td>Ms Jackson was on a trip in the US and Hong Kong between 28 October and 10 November 2008.</td>
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<tr>
<td>24/12/2008</td>
<td>003403</td>
<td>No</td>
<td>$7,500</td>
<td></td>
<td>$7,500. Ms Jackson admits</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Cheque number</td>
<td>BCOM meeting held within 7 days of withdrawal?</td>
<td>Amount drawn</td>
<td>Numbers attending</td>
<td>Retained by Ms Jackson</td>
<td>Proximate transfers to personal and mortgage accounts</td>
<td>Proximate trips</td>
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<tr>
<td>------------</td>
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<td>11/02/2009</td>
<td>003341</td>
<td>Yes</td>
<td>$7,800</td>
<td>8</td>
<td>$7,000</td>
<td>that this cheque was a source of a $5,000 cash deposit on 24 December 2008 into Ms Jackson’s SGE mortgage account which reduced the mortgage owed by Ms Jackson.</td>
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<tr>
<td>27/03/2009</td>
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<td>$7,600</td>
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<td>8/5/2009</td>
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<td>29/09/2009</td>
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<td>$6,000</td>
<td>11</td>
<td>$4,900</td>
<td>Ms Jackson admits that this cheque was a source of a $5,000 cash deposit on 29 September 2009 into Ms Jackson’s CBA Streamline account.</td>
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<tr>
<td>6/10/2009</td>
<td>003403</td>
<td>No</td>
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<td>24/02/2010</td>
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<tr>
<td>Date</td>
<td>Cheque number</td>
<td>BCOM meeting held within 7 days of withdrawal?</td>
<td>Amount drawn</td>
<td>Numbers attending</td>
<td>Retained by Ms Jackson</td>
<td>Proximate transfers to personal and mortgage accounts</td>
<td>Proximate trips</td>
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<td>9/4/2010</td>
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<td>Yes</td>
<td>$9,400</td>
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<td>$8,300</td>
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<td>Ms Jackson was on a trip in Hong Kong from 10 April to 16 April 2010.\textsuperscript{56}</td>
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<tr>
<td>28/5/2010</td>
<td>003414\textsuperscript{57}</td>
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<td>$11,500</td>
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<td>25/6/2010</td>
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<td>$8,400</td>
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<td>Total</td>
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<td>$259,737</td>
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<td>$238,937</td>
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</tbody>
</table>
1 Health Services Union v Jackson (No 4) [2015] FCA 865 [147].
2 Health Services Union v Jackson (No 4) [2015] FCA 865 [147].
3 McGregor MFI-1, 17/6/14, p 176.
4 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
5 McGregor MFI-1, 17/6/14, p 177.
6 HSU Tender Bundle, 6/10/15, tab 2, p 128.
7 HSU Tender Bundle, 6/10/15, tab 1, p 1.
8 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
9 McGregor MFI-1, 17/6/14, p 178.
10 McGregor MFI-1, 17/6/14, p 179.
11 McGregor MFI-1, 17/6/14, p 180.
12 McGregor MFI-1, 17/6/14, p 181.
13 McGregor MFI-1, 17/6/14, p 174.
14 McGregor MFI-1, 17/6/14, p 182.
15 McGregor MFI-1, 17/6/14, p 174.
16 McGregor MFI-1, 17/6/14, p 184.
17 McGregor MFI-1, 17/6/14, p 185.
18 McGregor MFI-1, 17/6/14, p 187.
19 McGregor MFI-1, 17/6/14, p 183.
20 McGregor MFI-1, 17/6/14, p 188.
21 McGregor MFI-1, 17/6/14, p 174.
22 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
23 Jackson MFI-4, 19/6/14, p 10.
24 McGregor MFI-1, 17/6/14, p 174.
25 McGregor MFI-1, 17/6/14, p 173.
26 HSU Tender Bundle, 6/10/15, tab 9, p 2358 [98].
27 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
28 McGregor MFI-1, 17/6/14, p 172.
29 McGregor MFI-1, 17/6/14, p 174.
30 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
31 McGregor MFI-1, 17/6/14, p 189.
32 McGregor MFI-1, 17/6/14, p 174.
33 HSU Tender Bundle, 6/10/15, tab 8, p 2338.
34 McGregor MFI-1, 17/6/14, p 190.
35 McGregor MFI-1, 17/6/14, p 191.
36 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
37 McGregor MFI-1, 17/6/14, p 193.
38 McGregor MFI-1, 17/6/14, p 194.
39 McGregor MFI-1, 17/6/14, p 195.
40 HSU Tender Bundle, 6/10/15, tab 9, p 2358 [98].
41 McGregor MFI-1, 17/6/14, p 196.
42 McGregor MFI-1, 17/6/14, p 197.
43 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
44 McGregor MFI-1, 17/6/14, p 174.
45 McGregor MFI-1, 17/6/14, p 166.
46 HSU Tender Bundle, 6/10/15, tab 9, p 2358 [98].
47 McGregor MFI-1, 17/6/14, p 174.
48 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
49 McGregor MFI-1, 17/6/14, p 167.
50 McGregor MFI-1, 17/6/14, p 168.
51 McGregor MFI-1, 17/6/14, p 169.
52 McGregor MFI-1, 17/6/14, p 201.
54 McGregor MFI-1, 17/6/14, p 203.
55 McGregor MFI-1, 17/6/14, p 204.
56 Health Services Union v Jackson (No 4) [2015] FCA 865 at [232].
57 McGregor MFI-1, 17/6/14, p 170.
58 McGregor MFI-1, 17/6/14, p 171.
# APPENDIX C – CREDIT CARD EXPENDITURE (OTHER THAN IN CONNECTION WITH TRAVEL)

<table>
<thead>
<tr>
<th>Date</th>
<th>Credit Card</th>
<th>Description of Withdrawal/Expense</th>
<th>Amount</th>
<th>Evidence Reference</th>
</tr>
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<tbody>
<tr>
<td>22 Nov 2003</td>
<td>Diners</td>
<td>Myer Melbourne City 001</td>
<td>$474</td>
<td>HSU Tender Bundle, 6/10/15, tab 5, p 1622</td>
</tr>
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<td>Citibank</td>
<td>Myer 001 Melbourne Au</td>
<td>$100</td>
<td>HSU Tender Bundle, 6/10/15, tab 7, p 2199</td>
</tr>
<tr>
<td>10 Nov 2004</td>
<td>Citibank</td>
<td>David Jones Limited Melbourne Au</td>
<td>$321.10</td>
<td>HSU Tender Bundle, 6/10/15, tab 7, p 2199</td>
</tr>
<tr>
<td>25 Nov 2004</td>
<td>Diners</td>
<td>Myer Melbourne City 001</td>
<td>$203.95</td>
<td>HSU Tender Bundle, 6/10/15, tab 5, p 1653</td>
</tr>
<tr>
<td>26 Dec 2004</td>
<td>Citibank</td>
<td>Myer Megamart 327 Chadstone Au</td>
<td>$3,000</td>
<td>HSU Tender Bundle, 6/10/15, tab 7, p 2196</td>
</tr>
<tr>
<td>26 Dec 2004</td>
<td>Diners</td>
<td>Myer Megamart, Waverley</td>
<td>$4,000</td>
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<td>29 Dec 2004</td>
<td>Diners</td>
<td>Myer Megamart, Waverley</td>
<td>$4,154</td>
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<td>Myer 001 Melbourne Au</td>
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<td>Citibank</td>
<td>Myer 001 Melbourne Au</td>
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<td>Date</td>
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<td>Description of Withdrawal/Expense</td>
<td>Amount</td>
<td>Evidence Reference</td>
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<tr>
<td>30 July 2006</td>
<td>Diners</td>
<td>Myer Doncaster 008</td>
<td>$2,867</td>
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<td>31 Dec 2007</td>
<td>CBA Mastercard</td>
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<td>CBA Mastercard</td>
<td>Myer 219 Sydney NSW</td>
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<td>HSU Tender Bundle, 6/10/15, tab 6, p 2146</td>
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<td>Harvey Norman Electrics Nunawad</td>
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<td>Tasman AV Pty Ltd</td>
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<td>Harvey Norman Elect Nunawading Au</td>
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<td>15 Apr 2004</td>
<td>Citibank</td>
<td>Teds Cam 40 Melbourne Au</td>
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<td>10 Jul 2004</td>
<td>Citibank</td>
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Retail: homewares, furniture and party expenses
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Retail: miscellaneous expenses
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<td>Evidence Reference</td>
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APPENDIX D – KATHERINE JACKSON’S SUBMISSIONS ABOUT THE HSU PROCEEDINGS

1. Katherine Jackson’s written submissions took two important related points. One very ambitious submission was that the matters dealt with by Tracey J should not be dealt with in this Report at all. The other was less ambitious: the Report should reject various submissions of counsel assisting that findings made or chains of reasoning enunciated by Tracey J should be adopted.

2. The points were raised as preliminary points. However, it is more convenient for them to be examined now, after the reader has gained familiarity with the earlier contents of this Chapter.

3. Katherine Jackson assigned seven reasons for her twin submissions.\(^1\) It should be noted that if any one or more were sufficiently strong, it might be necessary to take a similar approach in relation to the findings of Jessup J against Craig Thomson in *General Manager of the Fair Work Commission v Thomson (No 3).*\(^2\) That is because to some extent the Report treats the findings of Jessup J similarly to the way it treats those of Tracey J.

4. The first reason Katherine Jackson assigned to justify the conclusion that Tracey J’s findings should not be adopted is that it would be wrong, as a matter of principle, to do so. The relevant ‘principle’ had four aspects.

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\(^1\) Submissions of Katherine Jackson, 16/10/15, paras 6-137.

\(^2\) [2015] FCA 1001.
5. The first was that adverse findings against Katherine Jackson should only be made on the basis of evidence before the Commission, not on the basis of the findings of some other body.

6. The second was that ‘in normal circumstances, the findings of one tribunal are not admissible in evidence before another tribunal’. For this the rule in *Hollington v F Hewthorn & Co Ltd*[^1] was cited.

7. The third arises out of counsel assisting’s contention that the evidence before the Commission is consistent with that received by Tracey J. That question is examined as a separate matter later. But Katherine Jackson submitted that if counsel assisting’s contention were correct, there was no need for the Report to adopt Tracey J’s findings. It could simply contain findings made on the basis of the evidence before the Commission.

8. The last aspect of ‘principle’ rested on the contention that to adopt Tracey J’s findings would be ‘fundamentally unfair’ to Katherine Jackson. A similar point is made in relation to others of the seven reasons. This is essentially a ‘rolled up plea’. If all, or a significant selection, of Katherine Jackson’s other arguments were valid, this conclusion might follow. But it has no independent status. Accordingly it is necessary to return to the first three aspects of ‘principle’.

9. The first aspect of ‘principle’ relied on must be rejected. It may be said, without prejudice to Katherine Jackson’s other submissions, that provided the Terms of Reference are adhered to, a Royal Commission

[^1]: [1943] KB 587.
is unfettered in the modes by which it conducts its inquiry.\(^4\) If the inquiry operates by recourse to testimony, the application of the principles underlying the rules of evidence will often enhance reliability and improve procedural fairness. Thus rules like the rule in *Browne v Dunn*,\(^5\) the rule against double questions, and the rule against confusing questions improve the quality of the evidence and foster fairness to witnesses and persons affected.\(^6\) The inquiry is not constrained, however, by the rules of evidence strictly so called, save for rules that have a higher status than mere rules of evidence (for example, legal professional privilege). Hence there is no objection to the Report of a Royal Commission relying, for example, on reports of other inquiries,\(^7\) on government papers, on learned treatises or on the findings of a court.

10. The second aspect of ‘principle’ relied on concerned the rule in *Hollington v F Hewthorn & Co Ltd*.\(^8\) Crudely stated, that rule prevents a judgment in one piece of litigation being received in another as evidence of the facts on which it is founded. Evidence lawyers have found that case to be endlessly fascinating ever since it was decided in 1943. But it is not a case which has enjoyed wide favour. It has been reversed by legislation to a greater or lesser degree in numerous jurisdictions of the common law world. It has received judicial criticism. Lord Diplock said it was ‘generally considered to have been

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4 *R v Collins; ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 8 ALR 691 at 699.
5 (1893) 6 R 67.
6 *R v War Pensions Entitlement Appeals Tribunal; ex parte Bott* (1933) 50 CLR 228 at 256.
7 For example, the two Nassios Reports: see paras 44, 310; the Temby/Robertson Report: see para 12.
8 [1943] KB 587.
wrongly decided”. In several jurisdictions it has not been followed. Its boundaries are not clear.

11. It is therefore difficult to appeal to this unfavoured creature of the common law of evidence in order to persuade a body not bound by the law of evidence to adopt a particular course. The appeal is harder, because the justification for the rule in *Hollington v F Hewthorn & Co Ltd* is that to receive a judgment as evidence of the facts on which it is founded offends two rules of evidence – the rule against hearsay and the opinion rule. The appeal is harder still in view of the fact that since 1943 a great many more exceptions to the hearsay rule have been created by the legislature, and the liberality of the opinion rule has increased.

12. It is sufficient for present purposes, however, to state that the authorities have held that the rule in *Hollington v F Hewthorn & Co Ltd* does not apply to bodies not bound by the rules of evidence. That is justifiable in principle. The courts determine finally the rights of persons who are parties to litigation. A Royal Commission does not. It is understandable that strict rules of evidence apply in litigation, because of the potentially damaging consequences of litigation to the parties. It is much less understandable that equivalent rules should

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9 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 543.


11 *Clough v Leahy* (1904) 2 CLR 139; *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 102.
apply in a Royal Commission, which cannot wreak these consequences.

13. The third aspect of ‘principle’ appealed to by Katherine Jackson is that so far as the evidence before the Royal Commission is identical with that considered by Tracey J, there was no need to adopt his findings: the Royal Commission could rely on the evidence before it. In very large measure the findings in the Report are based on an examination of the evidence which is independent of Tracey J’s findings even though they end up as having the same effect. But it would be foolish to avert attention from the labours of a distinguished Federal Court judge. The findings which flowed from those labours are not binding on this Commission and they have not been treated as binding. If Tracey J’s conclusions differed from what independent analysis of the evidence, or different evidence, would suggest is appropriate, they would be departed from. But it would not be sensible to ignore the value of their role as confirming other analysis or as establishing particular conclusions independently of other analysis.

14. The second reason why Katherine Jackson submits that the Report should not deal with the matters examined by Tracey J concerns the ‘highly unusual manner in which the trial proceeded before Tracey J’. The features relied on were as follows. Katherine Jackson did not appear at the trial. ‘As a bankrupt, she had no standing to do so.’\(^{12}\) The evidence led by the HSU was not challenged either by contradictory evidence or by cross-examination. No submissions on behalf of Katherine Jackson were advanced.

\(^{12}\) Submissions of Katherine Jackson, 16/10/15, para 28.
15. A short answer to these arguments is that Katherine Jackson is the authoress of her own misfortunes in this respect.

16. A longer answer is that Katherine Jackson’s arguments are seriously misleading, both in fact and law.

17. There is a judgment of Tracey J’s dealing with Katherine Jackson’s bankruptcy.\textsuperscript{13} It reveals the following history. After many adjournments, the trial was fixed to begin on 29 June 2015. On that day counsel for Katherine Jackson advised the Court that on 25 June 2015 she had filed a debtor’s petition for bankruptcy under s 55 of the \textit{Bankruptcy Act} 1966 (Cth). Paul Leroy was appointed trustee of her estate. Counsel for the HSU had no notice of the bankruptcy. He requested an adjournment. Section 58(3) provides:

\begin{quote}
Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:
\begin{itemize}
\item[(a)] to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
\item[(b)] except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.
\end{itemize}
\end{quote}

18. In due course counsel for the HSU applied for leave to take a fresh step in the proceedings against Katherine Jackson pursuant to s 58(3)(b). That application was served on Katherine Jackson. When the application was heard, the trustee in bankruptcy appeared. Katherine

\textsuperscript{13} \textit{Health Services Union v Jackson (No 3)} [2015] FCA 694.
Jackson did not. The reasons why Tracey J granted the HSU the leave it desired were put thus:\(^{14}\)

Many complex issues are raised in the present proceedings. The trustee has candidly advised the Court that he lacks the resources to deal with such complex claims were they to be advanced by the Union as a creditor in Ms Jackson’s bankrupt estate and the Union then sought to prove those claims. The trustee has not opposed the application.

It seems to me that, given the fact that the trial has been fixed for hearing and all necessary preparations made for that hearing, and having regard to the complexity of the issues involved, it is preferable that the Court resolve those issues rather than that they fall for determination by an under-resourced trustee in the course of his dealing with Ms Jackson’s estate. There is no suggestion that the Union is seeking to gain some advantage over Ms Jackson’s other creditors.

The consequence of Katherine Jackson’s petition was that, by operation of s 58(1)(a) of the Bankruptcy Act, she lacked standing to defend.\(^{15}\) There is uncertainty as to whether claims for compensation arising from contravention of the Corporations Act 2001 (Cth), s 1317H, and similar enactments, on which the Health Services Union was relying, were claims in respect of a provable debt. To the extent that they were not, Katherine Jackson may have had standing to appear. Even to the extent that they were, it was open to Katherine Jackson to seek leave to appear.\(^{16}\) But Katherine Jackson did not seek leave to appear. Nor did the trustee. In short, Katherine Jackson did not seek to rely on any standing to appear which she may have had or may have been able to obtain.

\(^{14}\) Health Services Union v Jackson (No 3) [2015] FCA 694 at [19]-[20].


\(^{16}\) Re-engine Pty Ltd (in liq) v Fergusson [2007] VSC 57 at [66]-[68].
20. So far as Katherine Jackson’s submissions suggest that there was no material contradicting the HSU’s claims, they are wrong. Before her bankruptcy, Katherine Jackson had filed an unusually detailed defence. Omitting formal parts, it comprised 28 closely-typed pages. It set her position out comprehensively. It was incomparably more useful than most defences prepared by trained lawyers. It will have alerted Tracey J to what Katherine Jackson’s approach was to every allegation against her. She also filed a very detailed affidavit, on which Tracey J relied. Its main part was 150 pages in length, with a further 35 pages referring to numerous documents. And the HSU relied heavily on a mass of documentary evidence, which speaks for itself, one way or the other.

21. Finally, so far as Katherine Jackson complains about incompleteness in the evidence before Tracey J, an enormous amount of testimonial evidence from her and other witnesses, and an enormous amount of documentary evidence, has been tendered to the Commission. That material includes two long witness statements by her and much transcript evidence for the five days she spent in the witness box (18-19 June 2014, 30 July 2014 and 28-29 August 2014). If Katherine Jackson had thought there was some gap in it capable of being filled, she could have taken advantage of the opportunity given by Practice Direction 10 to bring forward evidence concerning the matters dealt with in counsel assisting’s written submissions in chief, including the findings of Tracey J. For those submissions made plain the extent of counsel assisting’s invitation for Tracey J’s findings to be taken up. She did not act on that opportunity.

17 For example, Health Services Union v Jackson (No 4) [2015] FCA 865 at [88].
22. It should also be noted that relatively little testimonial evidence appears to have been tendered to Tracey J. The principal function of the affidavit evidence seems to have been to annex or exhibit documents.

23. Katherine Jackson’s third reason for contending that the Report should not deal with matters before Tracey J was that the vast bulk of the evidence before the Commission was not before Tracey J, and some of it contradicted what was before him. She coupled this with a stress on the submission that she had been prejudiced because most documentary material either had been deliberately destroyed by her opponents, as she alleged, or had simply been lost. She gave as instances some BCOM minutes, an exercise book recording NHDA transactions, and primary documents underlying credit card transactions. She complained that Tracey J relied on the absence of evidence without fully taking into account the prejudicial consequences to her of its absence. She also submitted that evidence before the Commission supporting the conclusion that a resolution as passed by BCOM establishing the NHDA account and authorising Katherine Jackson to operate it was not before Tracey J. This led him to doubt that it had been passed.

24. There is no doubt that in some measure the evidence before the Commission differed from that before Tracey J. But the findings of Tracey J are not being relied on blindly in the Report. Whether they are accepted depends on a review of all the evidence before the Commission. Further, the Report rests on a full awareness of the problems caused by the destruction or loss of the documents. So far as the 2004 Resolution is concerned, Katherine Jackson’s submissions
create a false issue. Whether it was passed or not, both Tracey J in his reasons for judgment\textsuperscript{18} and counsel assisting in their submissions\textsuperscript{19} operate on the assumption that it was passed. The same is true of the Report.\textsuperscript{20} Accordingly, that example of prejudice supposedly ignored by Tracey J falls flat.

25. Katherine Jackson’s fourth reason is that Tracey J’s orders are under appeal.

26. An important reason why the Interim Report did not deal with the matters which were the subject of the HSU Proceedings before Tracey J is that to have done so might have had a tendency to interfere with the administration of justice by prejudicing the civil proceedings.\textsuperscript{21} Where criminal cases are tried by jury, the public investigation conducted by a Royal Commission and the published parts of its Report may influence unduly the approach of the trier of fact – the jury. That is not a problem with the judge in civil proceedings. Judges, particularly in superior courts of record like the Federal Court of Australia, are made of quite stern stuff. Nor is the problem one of contempt of court. It may be, and often will be, a contempt of court to make findings about conduct which is the subject of pending criminal proceedings before those criminal proceedings have ended. However, a Royal Commission may carry out investigations and make findings about issues which arise in pending

\textsuperscript{18} Health Services Union \textit{v} Jackson (No 4) [2015] FCA 865 at [106].

\textsuperscript{19} Submissions of Counsel Assisting, 2/10/15, para 82.

\textsuperscript{20} See para 90.

\textsuperscript{21} \textit{X7 v Australian Crime Commission} (2013) 248 CLR 92 at [127]-[137], [148], [161]-[162].
civil proceedings not involving jury trials provided that the conduct of
the Royal Commission is not prejudicial to them. By ‘prejudice’ is
meant ‘a substantial risk of serious injustice’.22 The following
examples of prejudice have been given by Gibbs CJ:23

Conducting the inquiry in public in such a way as “to deter witnesses from
coming forward to give evidence” in the civil proceedings, or behaving in
such a way as to “influence the evidence that the witnesses will give”.

An example given by Mason J was conduct by the Commission putting
pressure on a party to compromise or abandon its case.24 It is not
enough to establish prejudice that there is a risk of inconsistent findings.

27. However, the risk of prejudicing the trial of civil proceedings, which
can be a real risk, is one thing. The risk of prejudicing the present
appeal is quite another. Katherine Jackson’s submissions point to no
actual risk. The evidence is complete. New evidence is hardly ever
received on appeals. The risks referred to by Gibbs CJ and Mason J do
not exist in relation to the appeal.

28. Katherine Jackson’s fifth reason is that it would be otiose for the
Report to include reliance on Tracey J’s findings. She contended that
she has suffered enough from exposing the wrongs of Michael

22 Victoria v Australian Building Construction Employees and Builders Labourers’
Federa7on (1982) 152 CLR 25 at 99 per Mason J. See also at 100.
23 Victoria v Australian Building Construction Employees and Builders Labourers’
24 Victoria v Australian Building Construction Employees and Builders Labourers’
Federa7on (1982) 152 CLR 25 at 100.
Williamson and Craig Thomson. Her career is ruined. Her health is affected. She is an undischarged bankrupt. She is unemployable. She may be prosecuted. Hence she submitted that there is no point in adopting Tracey J’s adverse findings.

29. Words are cheap. The cheapest words are words of pity. But Katherine Jackson’s plight is undoubtedly sad. Yet her arguments prove too much. They are arguments for not dealing with her in the Report at all. But the HSU and her behaviour in relation to it are central to the Terms of Reference. The Report must deal with it. In doing so, to take account of Tracey J’s findings in the way the Report does is sensible.

30. Katherine Jackson’s sixth reason boils down to a claim that it was right for the Interim Report not to deal with the allegations against her because of the impending proceedings before Tracey J, and that it remains right. That is a non sequitur. The circumstances that made it right not to deal with those allegations last year no longer exist, because the proceedings before Tracey J are over. Accordingly there is no reason not to deal the allegations this year. Katherine Jackson contended that there is a risk of inconsistent findings as between Tracey J’s reasons for judgment and the Report. In litigation that consideration matters. It does not matter, however, if there are differences between a judge’s conclusions and the conclusions of a Royal Commission Report. In any event, there are no inconsistencies in this instance.

31. Katherine Jackson’s seventh and final reason rested on the idea that there has been a change in approach on the part of the Commission to
her. She contended that the change has been caused by a media campaign against her. This is wrong on a number of counts.  

But even if it had been true, it goes nowhere. All that matters is the evidence before the Commission and the conclusions and inferences that may be drawn from that evidence.

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25 See Appendix E.
APPENDIX E – SUBMISSIONS OF THE HEALTH SERVICES UNION

1. There is a certain silliness in the Health Services Union’s submissions served on 19 October 2015. For example, in part they attack the behaviour of Katherine Jackson and Craig Thomson in language employing many colourful and repetitive adjectives and adverbs. Sometimes this is necessary. But a little goes a long way. Action years ago instead of words now would have been better. The facts narrated in the submissions of counsel assisting, which have been accepted, and with which the Health Services Union substantially agrees, sufficiently state the relevant breaches of duty.

2. Another difficulty is that the written submissions annex 121 paragraphs of a statement by Christopher Brown. Those paragraphs have not previously been tendered. This is not an appropriate way to tender them, but if the intention was to tender them, Katherine Jackson objects to them.¹ That objection is upheld.

3. Much more serious is that the submissions made a most violent attack on the conduct of counsel assisting.

4. It is not proposed to set out the Health Services Union’s submissions in this regard in detail. To do that would be to repeat unjustifiable libels. But the tone can be seen from the following passages.

5. The submissions opened as follows:²

¹ Submissions of Katherine Jackson, 30/10/15, para 32.
² Submissions of the HSU, 19/10/15, para 1.
The submissions of counsel assisting about Ms Jackson and Mr Thomson are too soft. They understate the harm caused [by] their conduct. The approach of counsel assisting to the evidence concerning the HSU and Ms Jackson has damaged the Commission itself and witnesses who have appeared before it.

6. Later, in a section headed ‘Ms Jackson’s pulpit and how the worm turned’, the submissions said:\(^3\)

Counsel assisting has not served the Commission well in its treatment of Ms Jackson. The approach of counsel assisting to Ms Jackson’s evidence, particularly concerning the NHDA and the cashed cheques, has now been turned 180 degrees. However, doing so has caused collateral damage, both to the Commission itself and to witnesses who have appeared before it.

7. Then it was said:\(^4\) ‘Ms Jackson was treated with kid gloves when she first gave evidence to the Commission.’ Later it was said:\(^5\) ‘What counsel assisting has done is to provide a pulpit for a thief that she used to hector the union movement about ethics.’ It was contended that Katherine Jackson was given considerable assistance in preparing her evidence.\(^6\) In contrast, the submissions said that Christopher Brown was treated in a ‘juvenile’ way.\(^7\) And it was submitted that Craig McGregor was wrongly criticised.\(^8\) The submissions stated:\(^9\)

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\(^3\) Submissions of the HSU, 19/10/15, para 19.
\(^4\) Submissions of the HSU, 19/10/15, para 20.
\(^5\) Submissions of the HSU, 19/10/15, para 21.
\(^6\) Submissions of the HSU, 19/10/15, para 22.
\(^7\) Submissions of the HSU, 19/10/15, para 24.
\(^8\) Submissions of the HSU, 19/10/15, paras 27-32.
\(^9\) Submissions of the HSU, 19/10/15, para 32.
In his haranguing of the whistle blower Mr McGregor counsel assisting committed the very wrong the Commission was supposed to be investigating: he made ‘accusations of misconduct against whistle blowers … in part to deflect attention from the more serious allegation raised against the incumbent (Ms Jackson)’.

8. Then the submissions stated:10

[I]t was the Union that first explained why Ms Jackson’s conduct was contrary to the *FWRO Act*. Kudos should be given to counsel assisting for changing his approach to Ms Jackson; kudos belongs to the union for convincing him to do so.

9. By the standards of these submissions, this appears to be a relatively emollient remark. However, the passage appears in the section headed: ‘Ms Jackson’s pulpit and how the worm turned’.

10. Before turning to the response of counsel assisting to the Health Services Union’s submissions, there are three primary points to be made.

11. The Health Services Union’s submissions are not signed. There is no indication of authorship. They ought never to have been filed. That is because of their excessively personal tone and their resort to vulgar abuse.

12. The second primary point is this. What matters is the evidence and the quality of the reasoning which is based on it which counsel assisting proffer. It does not matter how that evidence came into being. Criticism of counsel assisting’s handling of the evidence, if it seeks to

10 Submissions of the HSU,19/10/15, para 34.
command an intellectual assent, is not effectively made by employing sneering and personal remarks.

13. The third primary point is that the criticisms which the Health Services Union made of counsel assisting’s conduct between 16-19 June 2014 and 27-28 August 2014, if valid, are all criticisms which could have been made in the Health Services Union’s written submissions dated 14 November 2014. Yet there was no criticism of counsel assisting in those written submissions. If the complaints now made had any substance, they would have been raised then. They are now only raised as an afterthought. That alone has serious consequences for their weight.

14. Counsel assisting set out a temperate and balanced – and correct – response to the Health Services Union’s submissions as follows.

15. The Commission was established by Letters Patent on 13 March 2014. Those Letters Patent named the HSU as one of the employee associations into whose affairs the Commission was to inquire.

16. On 31 March 2014 the Commission issued Notices to Produce to the unions named in the Terms of Reference. Notice to Produce 5 (NTP 5) was issued to the Health Services Union. NTP5 requested documents including records of payments or benefits conferred on related parties of officers of the Union. The issue of NTP 5 set in train a series of events that are detailed in Craig McGregor’s evidence.11 In particular Craig McGregor stated: ‘In the course of searching the No 3 Branch records to comply with the Notice, I became aware of certain

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11 Craig McGregor, witness statement, 17/6/14, paras 29-48.
matters of which I was not previously aware." One of these was the NHDA. Hence it was the Commission’s decision to issue NTP 5 which initiated that train of inquiry.

17. The first hearing into the HSU began on 16 June 2014. In that hearing Katherine Jackson gave evidence for the first time. As counsel assisting said in their opening address on 9 April 2014: ‘A Royal Commission is not adversarial litigation. It is an inquiry. The lines of inquiry may change and evolve over time.’ That hearing was undertaken in accordance with Practice Direction 1. That entailed the adjournment of each witness’s evidence to enable the preparation of possible further statements and the possible cross-examination of the witness. It was thus always contemplated that Katherine Jackson would give evidence at a further hearing. That contemplation existed partly because of Practice Direction 1, and partly because of the state of the investigations at the time when the hearing commenced.

18. A primary focus of the hearings commencing on 16 June 2014 was the treatment of whistle blowers. The opening address of Counsel Assisting on 16 June 2014 explained that point. The Commission’s concentration on the treatment of whistle blowers has been dealt with elsewhere. Much of Katherine Jackson’s evidence on 16 June 2014 dealt with this topic. Much of her evidence in that regard was not controversial. Indeed the HSU itself has rightly acknowledged

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12 Craig McGregor, witness statement, 17/6/14, para 32.
13 Practice Direction 1, paras 45-48.
14 See for example, Submissions of Counsel Assisting, 31/10/14, ch 1.1, paras 22-25, ch 19.2. See also Chapter 2 of this Report.
Katherine Jackson’s important role in uncovering fraud.\textsuperscript{15} The public interest was served in putting her account on the public record.

19. As at the 16 June 2014 hearing the investigations of the Commission into Katherine Jackson were still developing. Many lines of inquiry necessarily remained incomplete. For example, the relevant financial institutions had not yet produced complete credit card statements.

20. As other lines of inquiry became more fully developed, their products were put to Katherine Jackson at further hearings on 30 July 2014 and 28 and 29 August 2014. On those days serious allegations of wrongdoing were put to her. It was not appropriate to put them to her at the 16 June 2014 hearing, because it is quite inappropriate to put serious allegations of wrongdoing to a witness in the absence of a detailed and proper basis for doing so. As the material accumulated, it became appropriate to do in July and August what it was not yet appropriate to do in June.

21. Hence there was an unfolding process over a number of weeks in the period June-July 2014, and for matter since that time, pursuant to which evolving lines of inquiry were examined and more evidence came to light. The outcome of the process is that counsel assisting have now been able to make submissions based on all of the reasonably available evidence. That is the result of their review, consideration and taking into account of material as it came to light in the period 16 June to 30 July 2014.

\textsuperscript{15} See, for example, Submissions of the HSU, 19/10/15, para 40.
22. As to the suggestion that Katherine Jackson was given considerable assistance in the preparation of her evidence and that it was disproportionate to the assistance to other witnesses, like any party who came forward to assist the Commission, Katherine Jackson was afforded the opportunity to make a statement setting out her evidence. Like many witnesses who were not legally represented, as she was not until just after 30 July 2014, she was given assistance with this task by Commission staff. For example, Commission staff also dealt directly with Craig McGregor for a brief period in relation to the preparation of a statement by him, until he retained legal representation. And even though Christopher Brown was legally represented, discussion took place between Christopher Brown’s legal representatives and Commission staff concerning the content of Christopher Brown’s statement during the course of its preparation.

23. Further, the suggestion that counsel assisting has conducted some form of attack on Christopher Brown and Craig McGregor is misstated.\textsuperscript{16} Counsel assisting’s submissions of 31 October 2014 deal with the evidence concerning the conduct of Christopher Brown and Craig McGregor. No adverse submission was made in respect of Craig McGregor. Indeed it should be stated now, even if it scarcely needs stating, that Craig McGregor gave most useful assistance at some inconvenience to himself in relation to Diana Asmar’s role concerning entry tests for particular employees which they themselves did not sit.\textsuperscript{17} Limited adverse submissions were made in relation to the conduct of Christopher Brown in relation to Katherine Jackson, on the basis of

\textsuperscript{16} Submissions of the HSU, 19/10/15, paras 22-32.

primary records of telephone conversations and concessions made by Christopher Brown in cross-examination. Neither Christopher Brown nor Craig McGregor personally have made submissions in relation to the matters that concerned them in counsel assisting’s submissions to date. The 2014 submissions of the Health Services Union in response to counsel assisting’s submissions contain a lengthy defence of the conduct of Christopher Brown.

24. Counsel assisting concluded by agreeing with many of the other points made in the Health Services Union’s submissions. One concerned the broader impact of the conduct of Craig Thomson and Katherine. Another concerned the difficulty of reconciling some of Katherine Jackson’s testimony with the facts as they have now emerged. A third concerned the value of Christopher Brown’s very detailed statement of evidence initially provided on 18 July 2014 in treating a great deal of material in a comprehensive and helpful way.

25. On that graceful note, not matched by the anonymous author of the Health Services Union’s submissions of 19 October 2015, it is desirable to leave this distasteful subject.

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18 Submissions of Counsel Assisting, 31/10/14, Ch 19.2, paras 9-11.
19 Submissions of HSU, 14/11/14, paras 12-36.
APPENDIX F – LOSS OF DOCUMENTS

A – OVERVIEW AND SUMMARY

1. An issue of some importance to the affairs of the No 3 Branch relates to the state of its records and the reasons why some records cannot be found. One source of its importance is that Katherine Jackson submitted that the missing records could have vindicated her position. The evidence is extraordinarily obscure and contradictory.

B – RELEVANT FACTS

Clean-up of the HSU No 3 Branch Office

2. The HSU No 3 Branch office was flooded sometime in 2010. However, the witnesses who gave evidence on this topic could not recall precisely the date of the flooding.

3. The following table provides a summary of the evidence given surrounding the timing of the flood of the No 3 Branch and the subsequent clean-up.
<table>
<thead>
<tr>
<th>Issue</th>
<th>Katherine Jackson</th>
<th>Peter Mylan</th>
<th>Barry Gibson</th>
<th>Robert Hull</th>
<th>Jane Holt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date of the flood</td>
<td>March 2010</td>
<td>August 2011</td>
<td>Around March 2010</td>
<td>No evidence</td>
<td>Cannot recall</td>
</tr>
<tr>
<td>Amount of destruction</td>
<td>Flooding was &quot;significant&quot;</td>
<td>Documents and premises were affected by the flood</td>
<td>Floor was waterlogged for about a month</td>
<td>No evidence</td>
<td>A lot of damage to records, but not to the accounting records</td>
</tr>
<tr>
<td>Date of</td>
<td>July or August 2010</td>
<td>No evidence</td>
<td>A number of months after the flooding but cannot recall exactly when</td>
<td>About September 2010</td>
<td>No evidence</td>
</tr>
<tr>
<td>clean-up</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Present at clean-up</td>
<td>No evidence</td>
<td>Michael Williamson, Darren Williamson, Barry Gibson, Gerard Hayes, Robert Hull, Kerry Seymour, Frances Lindsay, Bradley Bird, Peter Mylan and a person called Diana (surname unknown) and, perhaps, Julie Astill</td>
<td>Michael Williamson, Darren Williamson, Peter Mylan, Ken McIntosh, Barry Gibson, Katherine Jackson, Gerard Hayes and, perhaps, Julie Astill</td>
<td>Peter Mylan, Barry Gibson, Darren Williamson, Robert Hull, Stuart Miller and others Robert Hull cannot recall</td>
<td>No evidence</td>
</tr>
<tr>
<td>Who managed the clean-up</td>
<td>No evidence</td>
<td>Michael Williamson</td>
<td>No evidence</td>
<td>Peter Mylan</td>
<td>No evidence</td>
</tr>
</tbody>
</table>

1 Katherine Jackson, witness statement, 18/6/14, para 404; Katherine Jackson, 18/6/14, T:793.24.
2 Peter Mylan, witness statement, 27/8/14, para 7.
3 Barry Gibson, witness statement, 26/8/14, para 15.
4 Katherine Jackson, witness statement, 18/6/14, para 404; Katherine Jackson, 18/6/14, T:793.22-34.
5 Peter Mylan, witness statement, 27/8/14, para 7.
6 Barry Gibson, witness statement, 26/8/14, para 15.
7 Jane Holt, witness statement, 17/6/14, para 42.
8 Katherine Jackson, witness statement, 18/6/14, para 406.
9 Barry Gibson, 26/8/14, T:650.34-44.
11 Peter Mylan, witness statement, 27/8/14, para 8.
12 Barry Gibson, witness statement, 26/8/14, para 17.
13 Robert Hull, witness statement, 27/8/14, paras 6, 8.
14 Peter Mylan, witness statement, 27/8/14, para 9.
4. Despite the factual inconsistencies disclosed above, there is little dispute that the flooding of the No 3 Branch premises took place in about March 2010. It is also beyond dispute that some damage was caused to the HSU No 3 Branch office and some of the documents contained within. Some assistance in establishing an approximate date for the flood may be had from available BCOM minutes. The minutes of a meeting held on 23 March 2010 record that the flood occurred ‘two weeks previously’. Peter Mylan’s evidence that the flood occurred in August 2011 is inconsistent with that of the other witnesses and contemporaneous records.

5. Nonetheless, Peter Mylan adhered to his position in written submissions. He questioned the timing of the 23 March 2010 minutes on the basis of the apparent unlikelihood of the No 3 Branch remaining in a flood-damaged state for several months, and questioned why the members of the Sydney-based officers would concern themselves with visiting the Victorian Branch ‘when everything was still rosy on [sic] his relationship with the Victorian branches ...’ Peter Mylan suggests that it is more logical for the flood and the visit to have taken place in 2011, as that is consistent with Kathy Jackson’s allegation that her exercise book recording transactions in relation to the NHDA went missing. However, no cogent reason is given why the many witnesses who gave evidence of the date of the flood and clean-up should not be accepted. Moreover, the precise date of the flood is largely immaterial when it is common ground that it occurred and that damage was suffered that necessitated a clean-up.

16 McGregor MFI-2, 17/6/14, p 11.
17 Submissions of Peter Mylan, 19/11/2014, paras 84-85.
6. Sometime after the flood, in about August or September 2010, the clean-up of the HSU No 3 Branch office took place.

7. The clean-up was attended by a number of HSU officials, many of whom were from the NSW officers of the HSUeast branch. However as indicated in the table above, the identity of those present is a matter of some dispute. Three witnesses gave evidence that they attended the clean-up – Peter Mylan, Robert Hull and Barry Gibson. The witnesses were consistent in identifying Darren Williamson as being present at the clean-up. Peter Mylan and Barry Gibson both recall that Gerard Hayes was present. Katherine Jackson was on leave at the time and was not present at the clean-up. However, Barry Gibson’s evidence is that she was present and came ‘in and out’ of the office during the clean-up, but did not take part in sorting the documents. His evidence on this issue is not consistent with the evidence of the other persons present, or with contemporaneous documents. There is one objective record of the attendance, being the minutes of the HSUeast Executive of 13 February 2012, which suggest that Barry Gibson, Michael Williamson, Stuart Miller, Peter Mylan and Frances Lindsay were present at the clean-up.

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18 Katherine Jackson, witness statement, 18/6/14, para 406.
19 Robert Hull, witness statement, 27/8/16, para 6; Peter Mylan, witness statement, 27/8/14, para 8; Barry Gibson, witness statement, 26/8/14, para 17.
20 Peter Mylan, witness statement, 27/8/14, para 8; Barry Gibson, witness statement, 26/8/14, para 17.
21 Katherine Jackson, witness statement, 18/6/14, para 406; Jackson MFI-1, 18/6/2014, tab 45, pp 944, 946; Robert Hull, witness statement, 27/8/14, para 14.
22 Barry Gibson, witness statement, 26/8/14, para 17.
23 Jackson MFI-1, 18/6/14, Vol 3, tab 45, p 944.
8. Different witnesses gave different accounts as to who instigated, and who controlled, the clean-up. Peter Mylan stated that ‘Michael Williamson advised that the clean up was necessary.’ He stated that he was told by Michael Williamson that the office ‘was a mess with carpet and documents affected by the flood.’ Peter Mylan said that he ‘did not give instructions or directions, as [Michael] Williamson was doing so’.

9. However, Robert Hull said: ‘[b]efore commencing with the task, about five of us gathered in the boardroom and received instructions from Mr Mylan’. Robert Hull recalled Peter Mylan’s directions, which ‘included a direction not to throw out any current files or files with historical importance, financial records or personal material’. Additionally, he says that the clean-up party was instructed not to touch anything in [Katherine] Jackson’s office. Robert Hull’s evidence, however, was that Michael Williamson was not present at the clean-up. That is contradicted by the evidence of Peter Mylan and Barry Gibson.

10. Robert Hull recollected that the documents being sorted were not limited to those which had been water damaged. Robert Hull stated:

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24 Peter Mylan, witness statement, 27/8/14, para 7.
25 Peter Mylan, witness statement, 27/8/14, para 7.
26 Peter Mylan, witness statement, 27/8/14, para 9.
30 Robert Hull, witness statement, 27/8/14, paras 6, 8.
31 Barry Gibson, witness statement, 26/8/14, para 17; Peter Mylan, witness statement, 27/8/14, para 8.
‘we were instructed by [Peter] Mylan to sort all of the documents in the office and not just those documents affected by water damage’.

Robert Hull did not recall having seen many water damaged documents or boxes. His evidence was that the part of the office in which he was working was largely unaffected by the flood.

11. The evidence given by Robert Hull suggests that a broad range of No 3 Branch documents were sorted and then brought to the boardroom and placed into three separate piles designated by Peter Mylan: industrial records, financial records and personal material. Robert Hull’s evidence is that material that was discarded included documents such as awards, notes about industrial issues and transcripts of industrial proceedings, or notepads with scribbled notes.

12. However, Peter Mylan stated that the documents were brought to the boardroom, where they were then sorted by Michael Williamson, Barry Gibson and Frances Lindsay of the ‘Victorian Branch’. This raises a question: was Peter Mylan a person who merely executed Michael Williamson’s instructions and had no responsibility for the sorting and eventual extraction of the documents of the former No 3 Branch, even though he himself at the time was a very senior official of the NSW HSU and HSUeast? Peter Mylan stated that documents identified for retention by Michael Williamson, Barry Gibson and Frances Lindsay

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32 Robert Hull, witness statement, 27/8/14, para 16.
34 Robert Hull, witness statement, 27/8/14, para 22.
36 Peter Mylan, witness statement, 27/8/14, para 10.
were put against one wall of the boardroom and documents for
destruction were lined up on another wall.37

13. Barry Gibson stated that there were a significant number of documents
in the boardroom to be sorted.38 It was also Barry Gibson’s recollection
that ‘no-one in particular was in charge of deciding that it was
necessary’ but he was ‘heavily involved in deciding which records to
retain or save and which could be disposed of during the process’.39
His evidence was that as Chief Financial Controller within the Union,
he identified as best as he could which records were financial records
and to his knowledge, all financial records identified were kept.40

14. What was the fate of the No 3 records? Who was responsible for the
removal of those earmarked for destruction? Both Robert Hull and
Peter Mylan stated that the documents identified as being for
destruction were stored at the bottom of a disused lift well, and
according to Peter Mylan, in the basement car park.41 Robert Hull
understands that the material placed in the skip bin was later taken
away and destroyed.42 Barry Gibson did not know whether the
documents were securely destroyed, however, he recalled a garbage
service was contracted by the Union to dispose of documents.43 Peter
Mylan did not give any evidence about what happened to the

37 Peter Mylan, witness statement, 27/8/14, para 10.
38 Barry Gibson, witness statement, 26/8/14, para 18.
39 Barry Gibson, witness statement, 26/8/14, paras 19-20.
40 Barry Gibson, witness statement, 26/8/14, para 20.
41 Robert Hull, witness statement, 27/8/14, para 25; Peter Mylan, witness statement, 27/8/14,
para 10.
42 Robert Hull, witness statement, 27/8/14, para 27.
43 Barry Gibson, witness statement, 26/8/14, para 21.
documents placed into the skip bin. Peter Mylan did state that he does not know what happened to the ‘documents that Michael Williamson, Barry Gibson and Frances chose to retain’. Robert Hull did not know what was intended to be done with the sorted documents.

15. The above evidence does not allow for a ready determination of what documents of the Victoria No. 3 Branch were retained as a result of the clean-up exercise, and what were destroyed. The evidence suggests that financial documents were retained. There is no evidence suggesting either way whether minutes of the BCOM were destroyed or whether they were retained.

**Removal of the HSU No 3 Branch records**

16. On 13 February 2012, after the ‘clean-up’ of the HSU No 3 Branch office, a motion was passed by the HSUeast Executive Committee that authorised ‘the removal of boxes of documents containing records from the former No. 3 branch’. Peter Mylan said that he authorised the removal of the boxes in order to locate documents that were necessary for the completion by the HSUeast auditors, BDO, of the 2010-2011 financial year reports. He said that Katherine Jackson had refused to make the documents available for that purpose.

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44 Peter Mylan, witness statement, 27/8/14, para 11.
46 Jackson MFI-1, 18/6/14, Vol 3, tab 45, p 944.
47 Peter Mylan, witness statement, 27/8/14, para 13.
48 Peter Mylan, witness statement, 27/8/14, para 14.
49 Peter Mylan, witness statement, 27/8/14, para 14.
17. The minute of the HSUeast Executive Committee meeting held on 13 February 2012 recorded that the financial documents had been placed in a separate part of the boardroom during the clean-up of the No 3 Branch offices described above. The resolution stated that the documents were to be provided by the former Vic No 3 Branch by 20 February 2012.

18. In a statement tabled at the HSUeast Executive Committee meeting of 13 February 2012, Katherine Jackson denied that she had refused to provide relevant documents to the HSUeast branch auditors. She contended that the Victorian staff who were present during the clean-up made protests about the New South Wales staff ‘being careless in what they were throwing out’ and telling the New South Wales staff that they should have waited until Katherine Jackson returned. She described the process as a ‘reckless “chuck fest”’ by Darren Williamson. She herself, of course, was not present.

19. Peter Mylan directed Gerard Hayes to travel to Melbourne and attend the Victorian office to ‘supervise the removal of what [he] originally understood was a small number of boxes’.

20. Gerard Hayes stated that when he arrived, he announced that he was there and that he was to collect the documents. He then stood outside the office while the documents were collated. While standing outside, Gerard Hayes could see through the window of the office and he said

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50 Jackson MFI-1, 18/6/14, Vol 3, tab 45, p 944.
51 Jackson MFI-1, 18/6/14, Vol 3, tab 45, p 946.
52 Peter Mylan, witness statement, 27/8/14, para 15.
that he saw Katherine Jackson and Marco Bolano going through the boxes of documents. 53

21. Robert Hull recalls a conversation he had with Peter Mylan the day that Gerard Hayes attended the Victorian office. Robert Hull stated that he believed that Peter Mylan was very angry during that conversation because Gerard Hayes had not carried out his instructions, thereby allowing Katherine Jackson and Marco Bolano to go through the documents as Mr Hayes waited outside the office. 54

22. On 22 February 2012 Katherine Jackson wrote a letter to the HSUeast executive addressing her concerns about the removal of the documents the day before. Katherine Jackson asserted in that letter that she did not remove any documents prior to their collection, but that she was boxing and repacking the documents to be collected by Gerard Hayes, as some of the boxes were broken. 55

23. In any event, it appears Gerard Hayes waited until the documents were collected. Once the courier had collected the boxes of documents, Gerard Hayes’s involvement with the documents ended. He has no further knowledge of what happened to the documents after they were taken to Sydney. 56 Robert Hull gave evidence of a telephone conversation with Gerard Hayes some days later, during which Gerard Hayes told him that Katherine Jackson and Marco Bolano refused him

53 Gerard Hayes, supplementary witness statement, 26/8/14, para 14.
55 Jackson MFI-1, 18/6/14, Vol 3, tab 45, p 951.
56 Gerard Hayes, supplementary witness statement, 26/8/14, paras 16-17.
access to the branch, and abused him. Gerard Hayes did not give evidence to this effect. His evidence was that he waited outside at his own election.

24. After the documents were removed from the Victorian office on 21 February 2012, they were transported to a storage facility in Melbourne which already contained a large number of boxes of documents. The evidence indicates that all of the boxes in the Melbourne storage facility, which according to Peter Mylan numbered in the hundreds, were transported to Sydney on or about 9 March 2012.

Perusal of records

25. Peter Mylan stated that when the documents were moved to Sydney, they were held at the 370 Pitt Street office. Once they were located in the office, Peter Mylan directed Melissa Torvis, HSUeast Sydney Financial Controller, and Julie Astill to go through the boxes and identify what was in there, including the documents required by BDO for the purposes of the audit.

26. In his evidence, Peter Mylan stated that he did not believe that Michael Williamson went through the material that was transported to the Sydney office. However, the evidence given to the Commission of

58 Gerard Hayes, supplementary witness statement, 26/8/14, para 15.
59 Peter Mylan, witness statement, 27/8/14, para 15.
60 Peter Mylan, witness statement, 27/8/14, para 16.
61 Peter Mylan, witness statement, 27/8/14, para 17.
Christopher Brown, Acting National Secretary of the National HSU, and other material tendered to the Commission suggests that Michael Williamson was involved in perusing the documents and directing the strategy surrounding the documents as set out below.

27. Michael Williamson’s involvement in the transportation of the boxes to Sydney became evident through intercepted telephone calls played in the Commission’s public hearings. These calls were between Michael Williamson and Christopher Brown. On 12 March 2012, Michael Williamson spoke to Christopher Brown about the records that were transferred to Sydney. Michael Williamson said: 63 ‘[w]e also have now got all of the boxes out of Victoria, and to our surprise there are 91 of them.’

28. Later in the same call, Michael Williamson is heard to say: 64

...I think there’s enough ammunition around if you want to go and then this independent forensic auditor under the rules we can suspend her for six months and we may do that just for good measure, just for something to do.

29. And later: 65

... there’s 91 boxes that I am going to go and have a look at to see what’s in there, because I think I know most probably clearer than anyone else what I’m looking for.

30. In his oral evidence, Christopher Brown accepted that he knew Michael Williamson had planned to go through the documents. He accepted that he did nothing to inform anyone or to prevent Michael

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Williamson from perusing the documents. That was so despite Michael Williamson being on leave from HSUeast, and under investigation for serious allegations of fraud against the Union.\textsuperscript{66}

31. Robert Hull recalled seeing the boxes of documents on the ninth floor at the Sydney office location. Robert Hull once viewed the office where the boxes were held. He did not, on that occasion, witness any other person go in or out of the office. Robert Hull was aware of three people who had access to the office where the boxes were located, being Peter Mylan, Barry Gibson and Cheryl McMillan.\textsuperscript{67}

32. Peter Mylan stated that there were no documents disposed of from the boxes in Sydney, and that the boxes remained at the 370 Pitt Street address until the orders made by Flick J on 21 June 2012.\textsuperscript{68}

33. The position is that at least 91 boxes, perhaps more than 100, were removed from Katherine Jackson’s control in February 2012. Only 15 boxes were produced to the Commission in 2014. What happened to the rest that were up in Sydney, and in the control of Michael Williamson and Peter Mylan? No convincing explanation was given of where the records went and at whose instruction.

\textsuperscript{66} Christopher Brown, 27/8/14, T:682.8-T:683.13.

\textsuperscript{67} Robert Hull, witness statement, 27/8/14, paras 48-52.

\textsuperscript{68} Peter Mylan, witness statement, 27/8/14, para 18.
Allegations against Katherine Jackson

34. Peter Mylan stated in his witness statement that he ‘authorised the removal of the boxes in order to locate documents that were necessary for the completion by the HSUeast auditors, BDO, of the 2010-2011 financial year reports.’

35. However, Robert Hull and Barry Gibson recall that the documents were used for the purpose of Peter Mylan making a complaint to the Victoria Police against Katherine Jackson. Robert Hull stated that he ‘recall[s] a conversation with Mr Mylan where he told [him] that he had written to the Victoria Police about the documents’.

Barry Gibson gave evidence that he believed ‘from that investigation [the review of the boxes of documents] as to what transpired was that Peter put a statement together and sent it off to the Victorian police’. Barry Gibson understood that the review of the documents was an attempt by Michael Williamson and Peter Mylan to ‘get dirt’ on Katherine Jackson.

36. Peter Mylan’s evidence on this issue is that he directed Melissa Torvis and Julie Astill to go through the boxes, that Melissa Torvis brought to

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69 Peter Mylan, witness statement, 27/8/14, para 14.
70 Robert Hull, witness statement, 27/8/14, para 54.
71 Barry Gibson, 26/8/14, T:656.20-23.
72 Barry Gibson, 26/8/14, T:656.45-47.
his attention some matters arising from the documents, and that she assisted in preparing a report to the Victorian Police.\textsuperscript{73}

37. Michael Williamson’s role in at least partially orchestrating this plan was made evident in an intercepted telephone call tendered to the Commission and referred to in paragraphs 27 to 29 above.

38. On 20 March 2012, Peter Mylan in his capacity as Acting General Secretary of HSUeast, wrote a letter to Chief Commissioner Ken D Lay of the Victorian Police. In that letter, Peter Mylan wrote that ‘[t]here have been a number of transactions identified … that may require further clarification.’\textsuperscript{74} Peter Mylan makes no specific complaint or allegation in that letter of 20 March 2012, but particularises a number of transactions.

39. It was put to Peter Mylan and he agreed that he did not wish to allow Katherine Jackson to see the referral to the Victoria Police.\textsuperscript{75} Peter Mylan said that he obtained advice from HSUeast’s lawyers, Slater and Gordon, that he should provide the information to the Victorian Police before Katherine Jackson.\textsuperscript{76} However, the transcript of a telephone call between Peter Mylan and Michael Williamson dated 22 March 2012 suggests that, whatever advice Peter Mylan may have obtained from lawyers, his intent may have been cynical. In the course of that call Michael Williamson instructed Peter Mylan that his response to any request by Katherine Jackson to have a copy of the letter to the

\textsuperscript{73} Peter Mylan, witness statement, 27/8/14, para 17; Peter Mylan, 27/8/14, T:738.3-739.7.

\textsuperscript{74} Jackson MFI-1, 18/6/14, Vol 3, tab 45, p 959.

\textsuperscript{75} Peter Mylan, 27/8/14, T:739.17-38.

\textsuperscript{76} Peter Mylan, 27/8/14, T:739.25-31.
Victorian Police was to be, ‘No. I’m not prepared to give you that until the police have told us we can get access to the records’.77

40. The HSU East Branch Executive, at a meeting held on 28 March 2012, passed a resolution about the information provided to Peter Mylan from the review of the No 3 Branch records, as follows:78

**ITEM 4 – INACCURACIES IDENTIFIED IN THE FINANCIAL RECORDS OF THE FORMER VIC NO. 3 BRANCH**

The Acting General Secretary referred to information that was provided to him by the Union Financial Officers’ [sic] of what appears to be a number of irregularities/ inaccuracies in the records of the former No. 3 Branch.

The Acting General Secretary advised that he had written to Ian Temby AO QC and the Victorian Police advising them of these irregularities. Further, he advised that he had written to Victorian Police advising that he had arranged for all of the Union’s records (Vic 1 and Vic 3) to be removed from Grace Storage in Melbourne and have them relocated into NSW. He further advised that he had informed the Victorian Police that no staff member would access the Grace Security storage facilities until the Police had indicated they had not further requirements for them. He further added that upon receipt that the Police had no further interest in these records he was intending [sic] appoint a forensic auditor to undertake a thorough review of the income and expenditure of the former Vic No. 3 Branch.

41. After a request by Katherine Jackson for the particulars of any complaint against her on 29 March 2012, Detective Sergeant John Tyquin informed her that he had received a file from Peter Mylan, but that there had been no complaint of criminal behaviour. He said: ‘Victoria Police is not currently undertaking an investigation into those matters’.79

77 Mylan MFI-6, 25/9/14, p 3.30-32.
78 Jackson MFI-1, 18/6/14, Vol 3, tab 45, p 973.
79 Jackson MFI-1, 18/6/14, Vol 3, tab 45, p 979.
42. On 22 May 2012, Peter Mylan wrote to Detective Sergeant John Tyquin again to make a formal complaint against Katherine Jackson, detailing ten incidences of alleged irregular financial dealings.\(^{80}\)

**Victoria Police obtain the HSU No 3 Branch records**

43. It is unclear whether any further documents were transported to the Sydney office of HSU East, or whether any were provided to the Victorian Police, in accordance with the 28 March 2012 resolution. Peter Mylan says that he remembers only one occasion on which documents were transported to the Sydney office, being in execution of the 13 February 2012 resolution. Peter Mylan stated that the documents were in the Sydney office as at 21 June 2012 when the administrator was appointed to HSUeast.\(^{81}\) Barry Gibson stated that Christopher Brown made a request for the documents to return to Victoria in about September 2012.\(^{82}\) Barry Gibson concluded his employment with the HSU Branch at about this time.\(^{83}\)

44. Craig McGregor gave evidence in his witness statement about the movements of the HSU No 3 Branch records after the administrator took control of the Union. He stated that the administrator, Michael Moore, made arrangements for the documents to be located in the Park Street premises in Melbourne which was to be shared with the HSU No

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\(^{80}\) Jackson MFI-1, 18/6/14, Vol 3, tab 45, p 985.

\(^{81}\) Peter Mylan, witness statement, 27/8/14, para 18.

\(^{82}\) Barry Gibson, 26/8/14, T:657.28-35.

\(^{83}\) Barry Gibson, 26/8/14, T:657.19-21.
1 Branch.  

Craig McGregor stated that six of the boxes he believed were seized by the Victorian Police were returned ‘in about February 2014 by Detective Jenkins of Victoria Police Fraud Squad’.  

There is evidence that Detective Jenkins and Detective Acting Sergeant Coates returned, not six, but ten boxes of documents, together with other documentary materials, to Lloyd Williams at the HSU No 2 Branch on instruction from Christopher Brown. The following material was delivered to the No 2 Branch at 7 Grattan Street, Carlton South on 11 February 2014:

(a) boxes numbered 1 to 10;

(b) three HSU bags, each containing three folders; and

(c) one envelope.

The Executive Assistant to Lloyd Williams, Corinne Ioannov, signed Detective Jenkins’s diary indicating receipt of the records. A communication from Detective Jenkins to the Commission reveals that at some stage prior to their return, Craig McGregor had attended the

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84 Craig McGregor, witness statement, 17/6/14, para 16(a).
85 Craig McGregor, witness statement, 17/6/14, para 25.
86 Craig McGregor, witness statement, 17/6/14, para 25.
87 HSU supplementary tender bundle, 31/10/14, p 85.
88 HSU supplementary tender bundle, 31/10/14, pp 85-86.
Victorian Police office to inspect the material held by the police and copied numerous items from the boxes and folders.89

47. Counsel assisting submitted that if only six boxes were returned to the No 3 Branch (as Craig McGregor said), then the remaining four boxes, three HSU bags and one envelope returned by Victoria Police on 11 February 2014 appear to have gone missing from the possession of Lloyd Williams at the No 2 Branch. On the other hand, the HSU submitted, on the strength of a further statement from Christopher Brown on which there has been no oral examination, that the correct position is that six boxes were returned to the No 3 Branch, and the remainder were retained by the National Office and the No 1 Branch.90 It is not possible to resolve this dispute.

48. Craig McGregor stated that the records were locked in a secure room at the building and he did not view them before January 2013. In early 2013, the documents were moved by the Secretary of the No 1 Branch, Diana Asmar. This meant that Craig McGregor’s branch no longer had access to them.91 The No 3 Branch sought legal advice in order to regain access to the records from Diana Asmar. Craig McGregor believes that ‘someone sorted through the documents over the weekend before the No 3 Branch was given access to them.’92

89 HSU supplementary tender bundle, 31/10/14, p 85.
90 Submissions of the HSU, 14/11/14, paras 9-11.
91 Craig McGregor, witness statement, 17/6/14, para 21.
92 Craig McGregor, witness statement, 17/6/14, para 23.
Current state of the HSU No 3 Branch records

49. As a result of the movements of the records of the No 3 Branch, the No 3 Branch was left with limited financial information in hard copy.\(^{93}\) It did not have a complete hardcopy financial record for any financial year.\(^{94}\) The No 3 Branch did not have a complete set of MYOB records for the Branch.\(^{95}\) The Branch was also unsure what documents have been retained by the Victorian Police Fraud Squad. The Commission has, however, received confirmation from Victoria Police that all documents had been returned to the No 2 Branch as instructed by Christopher Brown.\(^{96}\)

50. In response to a Notice to Produce dated 31 March 2014, the No 3 Branch, through the National HSU Branch produced a range of documents. Craig McGregor stated that four staff from the Branch sorted the documents into the relevant records required by the Commission. The No 3 Branch sent all relevant documents to the National HSU office on about 4 April 2014, and certain further documents directly to the Commission on 4 May 2014. Craig McGregor said that his Branch did not keep a list or record of what documents it sent to the National office, so as to be able to compare it to what the National office then provided to the Commission.\(^{97}\)

\(^{93}\) Craig McGregor, witness statement, 17/6/14, para 25.
\(^{94}\) Craig McGregor, witness statement, 17/6/14, para 25.
\(^{95}\) Craig McGregor, witness statement, 17/6/14, para 28.
\(^{96}\) HSU supplementary tender bundle, 31/10/14, p 85.
\(^{97}\) Craig McGregor, witness statement, 17/6/14, paras 45-46.
51. Importantly, the No 3 Branch was only able to locate four minutes of meetings held by the Branch for the entirely of the period 1 January 1997 to 1 April 2010. The minutes retained by the Branch relate to meetings on the following dates: 24 March 1999, 12 May 1999, 11 February 2009 and 23 March 2010.

C – CONCLUSIONS

52. From this mass of conflicting evidence four things are clear. There was a flood at the No 3 Branch. After the flood there was a clean-up attempted by New South Wales officials. Later, many boxes of documents were taken to Sydney. In the process some documents have been lost. Katherine Jackson would wish to have these events characterised in a sinister way. There are pieces of evidence that support a sinister construction. The high watermark is Michael Williamson’s statement in a telephone call on 12 March 2012 to Christopher Brown that he was going to go and have a look at 91 boxes because he knew what he was looking for. The disputes on the evidence are very difficult to resolve. There is no point in resolving them. But although there is no point in resolving them, the fact of the disputes is significant. That is because they are entirely characteristic of the internal affairs of the HSU at least in this period. Katherine Jackson’s contention that her position should not be damaged because the missing material might have supported her is dealt with above.98

98 Paragraphs 117-123 of this Chapter.
APPENDIX G – PETER MYLAN AS ACTING GENERAL SECRETARY

1. Peter Mylan’s behaviour in relation to Michael Williamson was touched on earlier in the course of explaining the latter’s status and conduct.\(^1\) This Appendix concentrates on some related conduct of Peter Mylan and some further conduct.

2. From 22 September 2011 until 21 June 2012 Peter Mylan was Acting General Secretary of HSU East. He had begun his career as a rank and file member. From 1988 he was an organiser. From 2002 he was Assistant General Secretary of the NSW Branch. From May 2010 he was Deputy General Secretary of HSU East. From 2002 on his immediate supervisor had been Michael Williamson.

3. Peter Mylan became Acting General Secretary because Michael Williamson went on leave during the police investigation of Katherine Jackson’s complaints about him. He ceased to be Acting General Secretary when Flick J vacated all offices of HSU East at the same time as he placed HSU East and HSU East Branch into administration.

4. There are two key background facts to Peter Mylan’s term as Acting General Secretary.

5. The first was the taking of leave by Michael Williamson was scarcely a voluntary act. He was under a cloud. His absence was seen as an opportunity to cleanse the Union. The second is that on 22 September 2011 Peter Mylan successfully moved a resolution that led to the institution of the Ian Temby/Dennis Robertson inquiry. That

\(^1\) See paras 12-13, 20 of this Chapter.
component of the resolution suggested that the task to hand was to develop more transparency, scrutiny, honesty and efficiency within the Union. Peter Mylan himself said that the resolution as intended to deal with governance and business practices, integrity of Union records, access to financial and business information, and transparency and scrutiny. He also said that it was important not to prejudice the police investigation of Michael Williamson.²

6. Counsel assisting made criticisms of Peter Mylan over the lost documents issue. It is, however, difficult to reach clear factual conclusions about that.³

7. Apart from that, counsel assisting put three main criticisms of Peter Mylan. It is desirable to concentrate on them and leave out of account all other more complex criticisms and the responses Peter Mylan made to them.

8. The first criticism was that far from ensuring that Michael Williamson – a scarcely satisfactory figure of the old regime – kept out of union affairs, Peter Mylan (and indeed other officials) not only let him continue to have a large say in the Union, but cooperated with him. That blow to transparency and scrutiny was referred to above.⁴ Peter Mylan defended himself by contending that he needed to rely on Michael Williamson’s experience. But he was a very experienced official. He should not have taken the job if he did not feel up to it. He also tried to rely on the fact that Michael Williamson was a very

² Peter Mylan, 24/9/14, T:1194.15-34.
³ See Appendix F.
⁴ See para 13 of this Chapter.
powerful man, and still remained Secretary. However, it was Peter Mylan who had the responsibilities of that role for the time being. It was on him that the duty to say ‘No’ to Michael Williamson lay. His tolerance and acceptance of Michael Williamson’s clandestine assistance made a mockery of any claim that henceforth members would be able to observe what was happening in their Union transparently.

9. The second and third criticisms are interlinked. They relate to the third and fourth charges on which Michael Williamson was later convicted.\(^5\) They arose as follows.

10. On 25 January 2012 Peter Mylan received an email from Ian Temby QC requesting ‘all documents relating to financial transactions or dealings between the union and … [CANME] Services.’ Peter Mylan then had a conversation with Michael Williamson. The latter explained that CANME Services was a company he and his wife, Julieanne Williamson, set up. It had performed work for the Union some years ago. It had also been paid some years ago. But Michael Williamson claimed that the invoices had never been approved. He asked Peter Mylan to approve retrospectively the invoices for work which Michael Williamson claimed had been performed.\(^6\) Additionally, Peter Mylan said that Michael Williamson also asked him to lie to Ian Temby and Dennis Robertson about his knowledge of CANME. Michael Williamson asked Peter Mylan to tell Ian Temby QC that he had seen the work being performed by Julieanne

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\(^5\) See paras 19-20 of this Chapter.

\(^6\) Mylan MFI-2, 25/9/14, p 19, paras 61-62.
Williamson. Peter Mylan told the police that he had been to the storage facility where Michael Williamson alleged that the work took place five or six times, and had never seen any evidence of the kind of records and activities that Michael Williamson was proposing that Peter Mylan should confirm he had knowledge about.

11. In short, the second criticism is that Peter Mylan, at Michael Williamson’s request, lied to Ian Temby and Dennis Robertson in his email of 5 March 2012. In it Peter Mylan replied to the 25 January 2012 email by saying: ‘The Invoices [were] received and I had no reason to doubt that the work had been done.’ This conveyed to Ian Temby and Dennis Robertson the false impression that the invoices had been approved at the time when payment was made and the work had purportedly been done. Peter Mylan admitted in evidence that this was a lie. The third criticism is that Peter Mylan approved invoices for work which Michael Williamson claimed was performed, but retrospectively, and without actually knowing whether it had been performed. He admitted that this latter conduct created the false impression that a 2007 invoice had been approved in 2007 when it had not been.

12. In relation to the first of counsel assisting’s three criticisms, counsel for Peter Mylan submitted that various parts of the 22 September 2011 resolution were severable, and that in effect Peter Mylan’s dealings with Michael Williamson were not in conflict with the motion.

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7 Mylan MFI-2, 25/9/14, p 19, para 68.
8 Peter Mylan, 25/9/14, T:1268.25-31.
9 Peter Mylan, 25/9/14, T:1278.30-35.
Counsel for Peter Mylan advanced a more elaborate defence of his conduct as follows.\textsuperscript{10}

The Motion sponsored by Mr Mylan at the 22 September Union Council meeting was a motion to initiate the independent inquiry – it did not specify that Mr Williamson was to be excluded from that investigation. Mr Williamson went on approved leave – he remained the elected General Secretary. For more than a decade Mr Williamson and HSU NSW were, in effect, one and the same. Mr Williamson was Mr Mylan’s immediate supervisor, and he was answerable to him. It was Union Council’s role to exclude Mr Williamson from the workplace; it was Mr Temby’s job to specify if Mr Williamson was not to be consulted. Mr Temby, Union Council, the National Executive, Gerard Hayes all condoned Mr Williamson’s continued hold on the General Secretary position.

13. Those submissions must fail. They ignore the substance of what happened on 22 September 2011. Michael Williamson was on the way out. ‘Approved leave’ was a genteel formula for forcing him aside, or out. He was the elected General Secretary. But he was in disgrace. The point of forcing Michael Williamson to go on leave on 22 September 2011 was to enable others to run the Union in his place, not as his agent or under his control. Of course it might have been difficult for Peter Mylan to operate independently of his boss of nine years. That boss was a man of many parts. In some circles, he was a man of popularity. But that was the task Peter Mylan had been given and had accepted. The suggestion that Ian Temby, the Union Council and the National Executive – Gerard Hayes is in a different category – all condoned Peter Mylan’s behaviour in relation to Michael Williamson is baseless. It is not shown that they had any idea of the lengths to which Peter Mylan was permitting Michael Williamson to go. Counsel for Peter Mylan, who has not demonstrated that Michael Williamson’s

\textsuperscript{10} Submissions of Peter Mylan, 19/11/14, para 58.
activities were well known, and who cannot rely on a lack of questioning of witnesses on the part of counsel assisting, could have endeavoured to elicit this evidence in cross-examination of those witnesses if it existed.

14. A related argument advanced by Peter Mylan was that there was nothing secret or non-transparent about his association with Michael Williamson. This is falsified by what happened at the HSU East Council meeting held on 7 February 2012 in Victoria. Several HSU members attended the venue seeking to be admitted as observers. One of them was Katrina-Anne Hart, President of the Randwick Campus Sub-Branch. She was a foe of the Williamson/Mylan faction and a supporter of the Katherine Jackson faction. Before the meeting began, Katrina-Anne Hart was informed by Kerry Seymour: ‘We’ve made a decision, you’re not allowed to go [to the meeting].’ Katrina-Anne Hart said that she understood Kerry Seymour’s reference to ‘we’ as being Peter Mylan and Gerard Hayes, as Michael Williamson had stood down by this time. However, unknown to Katrina-Anne Hart, Peter Mylan had a series of telephone conversations with Michael Williamson about what approach to take with the members who wanted to observe the meeting. In one intercepted telephone call Michael Williamson gave Peter Mylan direct instructions as to removing the observers and having the meeting abandoned. One of his instructions to Peter Mylan was: ‘Okay. Now what you should do – I’ve just been thinking about it – just go into another room that’s

11 Cf Submissions of Peter Mylan, 19/11/14, paras 61-65.
12 Katrina-Anne Hart, witness statement, 16/6/14, para 65.
13 Katrina-Anne Hart, witness statement, 16/6/14, para 66.
available.’ Another was: ‘See if there’s another room available quickly.’\textsuperscript{15} A third was: \textsuperscript{16} ‘Right. Speak to Phil [Pasfield, a solicitor] and say all of the observers are sitting in the room we booked and are not coming out.’ A fourth was: \textsuperscript{17} ‘If we then hold – we say the meeting’s now moved to another room.’ A fifth was: \textsuperscript{18} ‘…and the observers have already been told they can’t participate in the meeting, can we then just block them from coming into the room?’ Peter Mylan expressed some dissatisfaction at blocking the observers from entering the new room and did not want to make Katherine Jackson look like a martyr.\textsuperscript{19} Michael Williamson then gave the following series of directions: \textsuperscript{20}

Yeah, okay. Well, I think if you get – just talk to Phil and if Phil says abort the meeting, abort the meeting….

Go back in and you want to get a resolution with the observers in there – this is my take, ask Phil – that after having sought legal advice in relation to this and the refusal of the observers to leave the meeting, despite being resolved by council to do so, right?….

The resolution is that the meeting now be abandoned till a further date….  

Just ask Phil that. What you want to get in there, into the resolution, is it was abandoned – it was abandoned because council had voted and said the observers were not to be admitted….  

And they declined to leave the meeting and we had no other option than to postpone the meeting – not “cancel”, “postpone”, okay?

\textsuperscript{15} Mylan MFI-6, 24/9/14, p 1.33-34.  
\textsuperscript{16} Mylan MFI-6, 24/9/14, p 1.38-40.  
\textsuperscript{17} Mylan MFI-6, 24/9/14, p 1.44-45.  
\textsuperscript{18} Mylan MFI-6, 24/9/14, p 2.2-4.  
\textsuperscript{19} Mylan MFI-6, 24/9/14, p 2.14-19.  
\textsuperscript{20} Mylan MFI-6, 24/9/14, p 2.24-3.10.
15. Peter Mylan agreed with Michael Williamson’s suggested course of action.

16. Shortly after this call Peter Mylan again called Michael Williamson informing him of what he had been told by lawyers. Michael Williamson asked Peter Mylan to ‘write out the resolution and ring me back and tell me what it says, mate, if you don’t mind. You can type it even to me if you want to. Just take your time and sent it to me, okay?’

17. Peter Mylan then had two further telephone calls to Michael Williamson. They worked on finalising the wording for the resolution to suspend the meeting. Michael Williamson dictated the wording of the resolution to Peter Mylan and Steve Pollard, HSU East Branch President, who wrote it down verbatim in order to put it to the Council meeting.

18. Soon afterwards a resolution was passed in consequence of the mass support of the New South Wales supporters resolving that the matter be brought to an end.

19. Peter Mylan said in evidence that he did not inform any of the former No 1 Branch or No 3 Branch members that the resolution put to the Council was dictated by Michael Williamson on the phone.

21 Mylan MFI-7, 24/9/14, p 2.26-29.
22 Katrina-Anne Hart, witness statement, 16/6/14, paras 79, 81.
23 Peter Mylan, 24/9/14, T:1215.37-39.
20. This episode is an example of Peter Mylan’s faithlessness to the general understanding of 22 December 2011 that there should be transparency within the Union. Peter Mylan justified what had happened by saying that he was acting on legal advice and did not see it as being inconsistent with the Union Rules.\(^{24}\) He also justified the ejection of the observers on the basis that this was necessary because of the factional infighting within the Union from which Katherine Jackson was attempting to obtain political benefit.\(^{25}\) Peter Mylan said that Katherine Jackson had organised members of the media to come to the meeting and had organised New South Wales members to fly to Victoria in order to attend it. However, Katrina-Anne Hart said there was no such orchestration. She observed at the meeting conduct by Katherine Jackson which indicated that she did not even know the identity of one of the observers.\(^{26}\)

21. If the nature and extent of Michael Williamson’s continuing involvement in union affairs really was a matter which was openly acknowledged, then this conduct, and the content of the intercepted telephone calls, would make no sense. The only explanation for what happened is that Peter Mylan and others were content to have Michael Williamson maintain almost complete control despite the public belief that he was ‘on leave’ and wished to ensure that this took place clandestinely.

22. On the strength of these three criticisms of Peter Mylan, counsel assisting submitted that the following findings should be made.

\(^{24}\) Peter Mylan, 24/9/14, T:1216.6-8.

\(^{25}\) Peter Mylan, 24/9/14, T:1216.17, 27-31.

\(^{26}\) Katrina-Anne Hart, 16/6/14, T:621.43-622.1.
23. The first was that Peter Mylan had breached his fiduciary duty. He owed a duty to the Union to advance its interests. That conflicted with his loyalty to Michael Williamson and his evident desire to assist CANME Services and the Williamsons. By giving priority to his false loyalty, he caused detriment to the Union by increasing the costs of the Temby/Robertson investigation, prejudicing that investigation and creating false and misleading union records. Counsel assisting also submitted that by signing the retrospective CANME Services invoices as Acting General Secretary, he used his fiduciary position to give advantages to the Williamsons.

24. The second finding was that Peter Mylan may have breached ss 285(1), 286(1) and 287(1) of the FW(RO) Act in various fairly obvious ways, which counsel assisting set out.

25. There was a breach of s 285(1) for the following reasons. Peter Mylan failed to quarantine the affairs and records of the Union from interference from Michael Williamson. Indeed, Peter Mylan actively facilitated that interference. Peter Mylan continued to consult Michael Williamson and permit him to be involved in the affairs of the Union after serious criminal allegations of fraud had been made against Michael Williamson which had forced him to take leave during the police investigation. Peter Mylan’s conduct in continuing to consult and be associated with Michael Williamson was not commensurate with the degree of care and diligence a reasonable person would exercise if he or she were the officer of the organisation and held the same responsibilities. The same is true of Peter Mylan’s endeavours to thwart the Temby/Robertson inquiry.
26. There was a breach of s 286(1) because Peter Mylan admitted that he felt ‘uncomfortable’ about signing the bogus CANME invoices. That indicates a belief that his conduct was not in the best interests of the Union. Further, he did not sign those invoices for a proper purpose.

27. Section 287 was attracted because Peter Mylan used his position as Acting General Secretary to give advantages to Michael Williamson in his attempts to avoid scrutiny and cover up his corrupt conduct at the Union.27

28. Counsel for Peter Mylan submitted that these provisions could not apply. The first reason assigned was that s 283 provides that they only apply to the exercise of powers or duties of officers and employees of an organisation ‘related to the financial management of the organisation or branch’. Arguably falsification of the financial records of the organisation is part of its financial management. If not, this is a further illustration of the undesirable narrowness of s 283. The second reason assigned was that the organisation in which Peter Mylan was employed as Acting General Secretary was HSU NSW, an organisation registered under the Industrial Relations Act 1996 (NSW), not the FW(RO) Act, a federal statute.28 If that submission is correct, there is a gap in the State law. But there are reasons for questioning its correctness. In the Federal Court of Australia, Buchanan J has held that while Peter Mylan was Deputy General Secretary and Acting Secretary of HSU NSW, a New South Wales union registered under the Industrial Relations Act 1996 (NSW), he held identical positions in

27 Submissions of Counsel Assisting, 31/10/14, Chapter 10.3, paras 60-68.
28 Submissions on behalf of Peter Mylan, 19/11/14, para 33.
the Health Services Union, a federal union registered as a federal organisation under the FW(RO) Act, the relevant branch being HSU East. The State union was responsible for Peter Mylan’s salary and benefits. Whoever pays an employee’s salary and benefits is usually the employer. However, despite that, is a person who is an official in both a New South Wales union and a federal union is immunised from federal law merely because that person is employed by the New South Wales union?

29. Another way of putting the query which must be raised over Peter Mylan’s submission is whether it concentrates too much on which organisation employed him and too little on which organisation he held offices in. The relevant period is the period 22 September 2011-21 June 2012. That is because in that period, according to counsel assisting, Peter Mylan carried out the job of Acting General Secretary unsatisfactorily in three respects. In the relevant period, Peter Mylan was the Deputy General Secretary of the HSU East Branch, a branch of the Health Services Union, a federally registered union. Why should federal law not apply to an official who holds an office in a federally registered union, even if that official’s employer is a State-registered union.

30. Further, Buchanan J pointed to the fact that rule 18A(a) of the federal union provided that a person elected to ‘offices of the Health Services Union East Branch of the Health Services Union’, which Peter Mylan was, ‘shall be taken to be validly elected to the corresponding office of HSUeast, the State organisation.’ That suggests that the vital office so

29 Mylan v Health Services Union [2013] FCA 190 at [1]. Counsel for Peter Mylan in this case also appeared in the Commission.
to speak, was office in the federal union. It would therefore be surprising if federal law did not apply.

31. The convenient course is to consider the position under State law as well as federal.

32. Thus counsel assisting in response made a submission which would have had the effect of ejecting Peter Mylan from the frying pan of federal civil penalties into the hotter fire of State criminal penalties by submitting that he may have contravened s 267 of the *Industrial Relations Act* 1996 (NSW). That section provides that ‘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.’ The maximum penalty is 100 penalty units. A penalty unit is $1,100. Counsel for Peter Mylan submitted that counsel assisting had not put Peter Mylan on notice of what facts allegedly established a breach of s 267. Counsel assisting put on further submissions particularising various parts of earlier submissions. But counsel for Peter Mylan, whose written submissions have now reached the excessive number of five, to which must be added some oral submissions, continued this

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30 Section 268, on which counsel assisting did not rely, may also have application: ‘An officer of a State organisation must not make improper use of the officer’s position as such an officer to gain, directly or indirectly, an advantage to the officer or for any other person or to cause detriment, loss or damage to the organisation.’

31 *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 17.

32 Submissions of Peter Mylan, 23/10/15, para 8.

33 Submissions of Counsel, 2/11/15, paras 33-35.

34 28/7/14, T:56.5-61.36.
complaint. The complaint contained other elements as well. One was that very little was made of any fraud allegation against Peter Mylan until late 2014. Another was that the Commission had not unearthed much evidence against Peter Mylan except a police interview that could not be used against him. Peter Mylan’s submissions concluded: ‘Mr Mylan has not been properly put on notice of how the hotchpotch of allegations [in] counsel assisting’s 31 October 2014 Submissions would be used to prove beyond reasonable doubt any prosecution brought under the **Industrial Relations Act 1996**.’

That submission is rejected. The passages to which counsel assisting has referred support at least two formulations.

33. *First*, Peter Mylan’s conduct in signing retrospective invoices was a dishonest act in the exercise of the powers of his office as Acting General Secretary with intent to defraud the organisation or its members or its auditors or any person investigating its affairs.

34. *Secondly*, Peter Mylan’s conduct in giving a knowingly false answer to Ian Temby and Dennis Robertson was a dishonest act in the exercise of the powers of his office as Acting General Secretary with intent to defraud those two investigators.

35. In relation to the retrospective invoices, counsel for Peter Mylan submitted:

[I]t is Mr Mylan’s clear evidence that he did not consider that what he was doing involved any act of deceit. Rather, he accepted what he was told by Mr Williamson, namely that he was recording an authorisation that had

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35 Submissions of Peter Mylan, 23/11/15, para 8.
36 Submissions of Peter Mylan, 23/10/15, para 9.
properly occurred some years earlier but had not at that time been properly recorded. He also accepted assurances that the work had been performed. As a matter of fact, payments for the work had been made several years earlier, and no further payments were made to Williamson as a result of Mr Mylan’s signing the invoices. It was Mr Gibson who inserted the details of payments on the copy invoices, recording cheque numbers and amounts that had been made by Mr Gibson years before, without the authorisation of Union Council.

36. None of this in any way negates Peter Mylan’s deceit. Whether it was a large deceit or a small deceit is irrelevant. Whether he considered it deceit is irrelevant. Nor is it relevant that he thought his conduct related only to a deficiency in recording as distinct from a misstatement about whether the work had been performed. Even on his perception of his conduct, he was deceiving others into thinking that the backdated invoices were made at the time the work was supposedly done, not in 2011. It is strongly arguable that the process in which Peter Mylan engaged of signing the invoices and creating the appearance of authorisation as at the date of the invoices assisted in giving the misleading impression that work had been done or approved in accordance with the proper process, a question which was very controversial at the time.

37. Whether either of the formulations set out above could be proved beyond reasonable doubt is immaterial. One purpose of a Royal Commission is to see whether there is evidence of misconduct. Evidence given by Peter Mylan in the Royal Commission cannot be used against him in later proceedings, any more than the police interview can. But a Royal Commission can establish matters of fact which the prosecuting authorities may investigate to see whether proof can be gathered by some other means.
Finally, counsel assisting submitted that Peter Mylan may have contravened s 192H of the Crimes Act 1900 (NSW). It provides:

(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.

Counsel assisting submitted that the relevant conduct is the dishonest making or publishing of a statement that to Peter Mylan’s knowledge was or might have been false or misleading. Peter Mylan knew that the addition of his signature to the invoices led at least to a misleading and false representation that the invoices had been validly received and approved years earlier.37

Counsel assisting therefore advocated a recommendation that the matter be referred to the Director of Public Prosecutions of New South Wales for consideration of whether Peter Mylan should be prosecuted for a contravention of s 192H.

37 Submissions of Counsel Assisting, 31/10/14, ch10.3, para 57.
41. Peter Mylan criticised counsel assisting for failing to acknowledge that it was reasonable for Peter Mylan to rely on the central role of the Union counsel in controlling the affairs of HSU East. He submitted that it was the Union Council that was ultimately accountable for the failures of the Union’s system in relation to financial expenditure. It was also submitted that counsel assisting misunderstood the structure of the HSU. These two factors are no answer to counsel assisting’s complaints that Peter Mylan behaved wrongly in not keeping Michael Williamson away from the Union, in giving false information to the Temby/Robertson inquiry, and in signing false retrospective invoices. In each instance Peter Mylan fell below the standards of a trade union official, and in the last two he may have breached his fiduciary duty, may have contravened federal statutory law and may have contravened State statutory criminal law. The role of the Union Council and the structure of the HSU have nothing to do with those difficulties.

42. Further, it was submitted on behalf of Peter Mylan that no findings should be made that directly related to the HSU’s breach of contract claims against him in the Supreme Court of New South Wales. That problem has been cured by the passing of time. The proceedings in question have been brought to an end. Peter Mylan submitted that they had been ended in his favour, since judgment was entered for him in the sum of $300,000 and that this should be taken into account as militating against any adverse recommendations being made. However, the proceedings do not reflect any judicial findings. They were settled by consent, and the $300,000 order was inclusive of costs.

38 Submissions of Peter Mylan, 19/11/14, paras 2-3.
39 Submissions of Peter Mylan, 19/11/14, paras 7-13.
There is some controversy as to how much of the $300,000 is to be related to his costs rather than his employee entitlements. Whatever the truth of that matter, Peter Mylan’s recovery is not relevant to the factual matters which the Commission has been investigating.

43. A further submission of Peter Mylan was that in various ways he had been denied procedural fairness because counsel assisting had kept him ignorant of possible adverse findings. Even assuming without in any way accepting that that point may have had a little force at some stage in 2014, it has none whatever now. Peter Mylan has had ample time to work out what is said against him. He has had many opportunities, not taken up, to procure counsel assisting to call any supposedly necessary evidence.

44. Peter Mylan’s written submissions quibbled about what false impression had been conveyed by his signatures on the false invoices. The submission, however, did conclude with the inevitable concession that he accepted that his conduct had been misleading.

45. One persistent theme in the submissions of counsel for Peter Mylan was that others deserved criticism much more than he did, that the findings against him were ‘petty and pointless’, and that his career had been ‘battered’ and ‘destroyed not through any misconduct on his own behalf, but because the union movement itself made Peter Mylan – not Gerard Hayes, not Chis Brown – the scapegoat for Williamson’s misdeeds.’

40 Submissions of Peter Mylan, 23/11/15, para 5.
Williamson’s criminal conduct that embroiled a loyal and unsuspecting Mr Mylan”. 41

46. This stress on the misdeeds of Michael Williamson is not unreasonable and attracts some sympathy. But union officials confronted with a Michael Williamson have a duty to stand up to him, not accede to his criminal importunities.

47. Counsel’s submissions that Peter Mylan may have breached his fiduciary duties are correct. So are counsel assisting’s submissions that s 267 of the Industrial Relations Act 1996 (NSW) and s 192H of the Crimes Act 1900 (NSW) may have been contravened.

48. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth), and every other enabling power, the Report and all relevant materials have been referred to the Executive Director of NSW Industrial Relations for consideration of whether Peter Mylan should be prosecuted for possible contravention of s 267 of the Industrial Relations Act 1996 (NSW).

49. Also, pursuant to s 6P of the Royal Commissions Act 1902 (Cth), and every other enabling power, the Report and all relevant materials have been referred to the Director of Public Prosecutions of New South Wales and the New South Wales Commissioner of Police for consideration of whether Peter Mylan should be prosecuted for possible contravention of s 192H of the Crimes Act 1900 (NSW).

41 Submissions of Peter Mylan, 23/11/15, para 12.
50. Also, pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth), and every other enabling power, the Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against Peter Mylan for summary penalty orders in relation to possible contravention of ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).