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INTERIM REPORT

Volume 2

Royal Commission into Trade Union Governance
and Corruption

PART 8: CFMEU CASE STUDIES

CHAPTER 8.1

INTRODUCTION

1. This Part analyses various case studies relating to the Construction and General Division of the CFMEU.
2. The Interim Report has already dealt with two ‘relevant entities’ related to the CFMEU and its officers. One concerned Building Industry 2000 Plus Limited and officers of the Victorian Divisional Branch (see Chapter 3.4). The second concerned BERT, BEWT, CIPL and QCTF and officers of the Queensland and Northern Territory Divisional Branch (see Chapter 5.2).
3. The case studies concerning the CFMEU in this Part are directed to a consideration of one or more of the following matters:
 - (a) whether officers of the CFMEU have engaged in conduct 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 detriment to a person or organisation;

- (b) whether there has been any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party;
 - (c) which persons or organisations have participated in that conduct; and
 - (d) matters reasonably incidental to that conduct.
- 4. The evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law.
- 5. That evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:
 - (a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;
 - (b) officials prefer to lie rather than reveal the truth and betray the union;
 - (c) the reputations of those who speak out about union wrongdoing become the subject of baseless slurs and vilification.

6. The conduct undertaken by officers of the CFMEU has included:
- (a) conduct which may constitute the criminal offences of blackmail and extortion by officers of the CFMEU in Victoria and Queensland;
 - (b) behaviour by officers of the CFMEU in Victoria and Queensland which may give rise to contraventions of the boycott, cartel and other provisions of the *Competition and Consumer Act 2010* (Cth);
 - (c) covert action undertaken by the New South Wales State Secretary of the CFMEU to convince senior employees of Cbus secretly to hand over to the CFMEU the private information of Cbus members and the subsequent misuse of that information by the State Secretary;
 - (d) the making of a death threat by one CFMEU Construction and General New South Wales Divisional organiser to a fellow organiser (Mr Brian Fitzpatrick), the failure on the part of senior officials to undertake any proper and considered investigation into the incident, and the subsequent victimisation of the complainant by those same officials;
 - (e) organising and engaging in industrial action in deliberate defiance of orders made by the Fair Work Commission and the Federal Circuit Court of Australia; and

(f) obstructing Fair Work Building inspectors in the performance of their statutory duties through intimidation, insults and generally threatening behaviour.

7. The reasons why the conclusions concerning possible breaches of the law have been expressed in the language of possibility is explained in Chapter 1 of the Interim Report. In appropriate cases, the Interim Report contains a recommendation that the Interim Report be referred to the appropriate authority for consideration of whether the CFMEU or relevant officials should be prosecuted. A list of such recommendations is found in Chapter 1 of the Interim Report.

CHAPTER 8.2

BORAL

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A – OVERVIEW AND SUMMARY

1. This chapter of the Interim Report deals with Boral Limited and its related bodies corporate (together, **Boral**). To an unusually large extent, there was no significant attack on the factual submissions made by counsel assisting. That is because the CFMEU's main point was that no finding should be made until certain litigation was completed. What follows is based on the submissions of counsel assisting. The particular submissions of the CFMEU have been discussed at appropriate places.
2. Boral supplies concrete and other products to persons within the construction industry throughout Australia and overseas. Boral Limited has four operating divisions: Boral Construction Materials and Cement, Boral Building Products, Boral Gypsum and Boral USA. It is a public company listed on the Australian Stock Exchange. In 2014 Boral's profit after tax was \$171 million¹ and it had earnings before interest and tax of \$294 million.²
3. In Victoria, Boral operates a number of businesses through subsidiaries including:

¹ Boral MFI-2, Tab 1 (Boral Limited Annual Report to June 2014), p 4. This figure excludes significant items.

² Boral MFI-2, Tab 1 (Boral Limited Annual Report to June 2014), p 4.

- (a) Boral Resources (Vic) Pty Ltd, trading as Boral Concrete (**Boral Concrete**), which manufactures and supplies concrete for use in construction;
- (b) Alsafe Premix Concrete Pty Ltd, trading as Alsafe Pre-Mix Concrete (**Alsafe**), which manufactures and supplies concrete for use in construction;
- (c) Boral Bricks Pty Ltd, trading as Boral Bricks, which manufactures and supplies bricks for use in construction;
- (d) Boral Masonry Ltd, trading as Boral Masonry, which manufactures and supplies masonry for use in construction;
- (e) Boral Australian Gypsum Ltd, trading as Boral Plasterboard, which manufactures and supplies plasterboard products for use in construction; and
- (f) Boral Window Systems Ltd, trading as Boral Window Systems, which manufactures and supplies window products for use in construction.

4. The balance of this chapter is divided into four sections. Section B sets out a summary of the relevant evidence before the Commission. Section C contains the findings to be made in respect of that evidence. Section D deals with the legal issues thrown up by the evidence. Section E notes possible areas for reform.

5. In summary:

- (a) Since February 2013, the Victorian Branch of the Construction and General Division of the Construction, Forestry, Mining and Energy Union (the **CFMEU**) has black banned Boral from CFMEU-controlled construction sites in greater metropolitan Melbourne, as part of an ongoing 'war' between the CFMEU and Grocon Pty Ltd and its related companies (**Grocon**).
- (b) The CFMEU black ban has continued notwithstanding injunctions obtained by Boral from the Supreme Court of Victoria in February, March and April 2013 restraining the CFMEU from carrying on the ban.
- (c) By engaging in the ban, the CFMEU may have contravened ss 45D and 45E of the *Competition and Consumer Act 2010* (Cth) and ss 44ZZRF and 44ZZRJ of the *Competition Policy Reform (Victoria) Act 1995* (Vic).
- (d) On 23 April 2013, Mr John Setka, State Secretary of the CFMEU, and Mr Shaun Reardon, Assistant State Secretary of the CFMEU attended a meeting with Mr Paul Dalton and Mr Peter Head, officers of the Boral Group. During that meeting Mr Setka demanded that Boral cease supplying concrete to Grocon and threatened that if Boral did not stop supplying concrete to Grocon the CFMEU would continue to escalate its black ban, and ensure that Boral's overall market share was diminished.

- (e) By making that demand, Mr Setka may have committed the criminal offence of blackmail contrary to s 87 of the *Crimes Act* 1958 (Vic). Mr Reardon also may have committed the offence of blackmail or may have aided and abetted Mr Setka and may be liable as an accessory pursuant to s 323 of the *Crimes Act* 1958 (Vic).

B – SUMMARY OF EVIDENCE

- 6. This section provides a summary of the evidence before the Commission. That evidence principally consists of:
 - (a) The oral evidence given, and written statements provided, by officers of Boral (the **Boral witnesses**), and
 - (b) Written statements provided by ten employees/officers of various of Boral's customers (the **Boral customer witnesses**).
- 7. Despite being provided with every opportunity to do so, the CFMEU chose not to cross-examine any of the Boral witnesses or the Boral customer witnesses and not to provide evidence to contradict the evidence of those witnesses.
- 8. The CFMEU's decision not to contradict or challenge the evidence before the Commission could have an impact upon the factual findings to be made.³

³ Paragraphs 128ff.

Background

9. Boral is the exclusive supplier of wet concrete to Grocon.⁴ Grocon is a privately owned corporate group which operates a large development, construction and funds management business throughout Australia.
10. As at early 2013, the CFMEU had been engaged in a bitter and long-running industrial dispute with Grocon.⁵ From Grocon's perspective, the dispute appears to centre on Grocon's refusal to employ CFMEU union delegates (otherwise known as **shop stewards**) on its sites, and its decision to employ representatives chosen by Grocon management instead.⁶ From the CFMEU's perspective, the dispute would appear to centre on its contention that Grocon will not recognise the right of the CFMEU to represent workers on industrial and safety matters.⁷
11. That dispute has given rise to separate proceedings in the Victorian Supreme Court and the Federal Court:
 - (a) In late August and early September 2012, Grocon alleged that misconduct by the CFMEU and some of its leaders took place at several Grocon building sites in Victoria, including the Myer Emporium site in Melbourne and the McNab Avenue

⁴ Linda Maney, witness statement, 9/7/14, para 6.

⁵ Paul Dalton, witness statement, 9/7/14, para 2; Linda Maney, witness statement, 9/7/14, para 6; *Grocon Constructors (Victoria) Pty Ltd v CFMEU* [2013] VSC 275 at [100] per Cavanough J.

⁶ See the findings in *Grocon Constructors (Victoria) Pty Ltd v CFMEU* [2013] VSC 275 at [100] per Cavanough J.

⁷ See the findings at *Grocon Constructors (Victoria) Pty Ltd v CFMEU* [2013] VSC 275 at [100] per Cavanough J.

site in Footscray.⁸ On 17 August 2012, Grocon sought and was granted temporary injunctive relief in the Victorian Supreme Court against the CFMEU in relation to what was said to be an obstructive picket at the McNab Avenue site. That order was subsequently confirmed on 21 August 2012 and later extended on 22 August 2012 to prevent picketing of the Myer Emporium site.

- (b) Subsequently Grocon filed in the Supreme Court Proceeding a number of summonses seeking orders that the CFMEU be punished for contempt. Grocon ultimately brought 30 charges of contempt against the CFMEU centring on allegations that the CFMEU disobeyed the Court's orders by picketing the Myer Emporium and McNab Avenue sites or procuring others to do so. On 24 May 2013, Cavanough J upheld each of the charges and made five findings of contempt.⁹ In August 2013, his Honour made two further findings of contempt. On 31 March 2014, his Honour imposed penalties of \$1.15 million against the CFMEU.¹⁰ The CFMEU appealed against his Honour's orders and an appeal was heard by the Victorian Court of Appeal on 25 and 28 July 2014. On 24 October 2014, the CFMEU's appeal was dismissed.¹¹

⁸ See the summary recorded in *Grocon Constructors (Victoria) Pty Ltd v CFMEU* [2013] VSC 275 at [15] ff.

⁹ *Grocon Constructors (Victoria) Pty Ltd v CFMEU* [2013] VSC 275.

¹⁰ *Grocon Constructors (Victoria) Pty Ltd v CFMEU (No 2)* [2014] VSC 134.

¹¹ *CFMEU v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261.

- (c) On 5 August 2012, following an investigation by Fair Work Building and Construction, the Director of Fair Work Building Industry Inspectorate commenced a proceeding in the Federal Court arising out of the CFMEU's conduct in relation to the picketing of the Myer Emporium and McNab Avenue sites. After a number of interlocutory applications,¹² that proceeding was heard by Tracey J in August 2014 and on 8 October 2014. Judgment is reserved.

12. The relevance of Boral to the dispute between Grocon and the CFMEU was explained in evidence in this way:

Grocon is a very large customer of Boral's. We supply Grocon's concrete exclusively and have done for some time. The CFMEU and Grocon were having a battle over control of Grocon's sites. Concrete is a critical path item for Grocon's builds and their business. It is a large component both structurally and dollar wise for their buildings. If the CFMEU was able to stop Grocon getting concrete from Boral this would have a significant impact on Grocon's business.

The reason this would be so damaging to Grocon is that a lot of the work we [i.e. Boral] do for Grocon is high strength concrete, which is very challenging. Not all suppliers can supply concrete at such a high level of technical specification. If Boral stopped supplying to Grocon, that would mean that Grocon would not be able to operate without a lot of difficulty.¹³

Boral learns of the CFMEU's intention to implement black ban: the 2012 phone call

13. In late 2012 Mr Paul Dalton, the Executive General Manager (Southern Region) for Boral Construction Materials & Cement, received a

¹² See *CFMEU v Director of Fair Work Building Inspectorate* [2014] FCAFC 101.

¹³ Linda Maney, witness statement, 9/7/14, paras 6–7.

telephone call from Mr John Setka, State Secretary of the CFMEU. Mr Dalton's evidence was that Mr Setka said words to the effect: 'This is just a heads up that Boral's going to run into some trouble with this Grocon stuff. It's nothing personal'.¹⁴

14. Mr Dalton understood this to mean the high-profile dispute between Grocon and the CFMEU arising out of the Myer Emporium job in the Melbourne CBD.¹⁵

The events of 14 February 2013

15. Mr Richard Lane, Senior Account Manager for Boral Concrete gave the following evidence:

(a) On 14 February 2013 he received two phone calls from Boral customers advising that Boral Concrete had been black banned because of issues relating to Grocon.¹⁶ These phone calls were from Mr Glen Kirkwood, manager at Drive Projects Pty Ltd (**Drive Projects**), and Mr Brett Young, General Manager at Anglo Italian Concrete (**Anglo Italian**). The occurrence of the latter call was corroborated by Mr Young.¹⁷

(b) Later the same day, Mr Lane had a conversation with Mr Mark Milano, Sales Manager of Oceania Universal Paving

¹⁴ Paul Dalton, witness statement, 9/7/14, para 3; Paul Dalton, 9/7/14, T:9.13–16.

¹⁵ Paul Dalton, witness statement, 9/7/14, para 4.

¹⁶ Richard Lane, witness statement, 9/7/14, paras 4–10.

¹⁷ Brett Young, witness statement, 18/9/14, para 8.

Pty Ltd (**Oceania**). Mr Milano advised that Boral had been banned from a building project on the Cardinia Shire Offices at Officer.¹⁸ That conversation was corroborated by Mr Milano.¹⁹

- (c) At 4 pm on the same day, Mr Lane had a conversation with Mr Wally Gorlin, the CFMEU shop steward at Meridian Construction Services Pty Ltd (**Meridian**). Mr Gorlin informed Mr Lane that the CFMEU had decided to ban Boral ‘from all union controlled sites due to Boral’s reluctance to support the union at the Grocon pour’.²⁰

16. The evidence of Mr Dalton was that on 14 February 2013 Ms Linda Maney, General Manager Sales (Southern Region) for Boral Construction Materials and Cement advised him that a number of Boral sales employees had been told that the CFMEU had implemented a black ban on Boral supplying concrete to Melbourne construction sites.²¹

17. Mr Peter Head, General Manager, Boral Concrete Southern Region, gave evidence that a ‘black ban’ meant that Boral would not be permitted to supply concrete to any project where there was a CFMEU presence. This would be achieved either by stopping a truck carrying Boral concrete at the gate to the site, or if a truck had already gained

¹⁸ Richard Lane, witness statement, 9/7/14, paras 11–14

¹⁹ Mark Milano, witness statement, 18/9/14, paras 6–7.

²⁰ Richard Lane, witness statement, 9/7/14, para 21.

²¹ Paul Dalton, witness statement, 9/7/14, para 5.

entry to the site, by the CFMEU shop steward directing employees not to unload the concrete.²²

18. An email from Ms Sheri Tarr, Regional HR Manager for Boral Construction Materials copied to Mr Dalton on 14 February 2013 stated:

CFMEU had a meeting today of members (shop stewards) and organisers, they were told that as of Monday Boral will be turned away from all CFMEU sites due to Boral providing concrete to Grocon for a Sunday pour on 10/2/13. ... This information came from Meridian Concrete.²³

19. The email also listed a number of Boral's customers who had been advised by the CFMEU of its intended action, including Drive Projects, Meridian, Anglo Italian, Equiset and Oceania.
20. A customer questionnaire completed by Mr Biondo records that Mr Steve Richardson and Mr Bepi Murer at Equiset told him that the shop steward at 'Lyonsville [scil Lyonsville] – Pascoe Vale Road' told him that the CFMEU had instructed 'all their steward[s] to ban deliveries by Boral concrete and anyone affiliated tp [scil to] them including Alsafte'.²⁴

The events of 15 February 2013

21. On 15 February 2013 Mr Head received a telephone call at 10 am from Mr John Matthews, Production Manager of Boral Concrete in the Melbourne CBD. Mr Matthews told Mr Head that Boral was being

²² Peter Head, witness statement, 9/7/14, para 3.

²³ Paul Dalton, witness statement, 9/7/14, p 25.

²⁴ Paul Dalton, witness statement, 9/7/14, p 27.

banned from all construction sites because it was supplying concrete to Grocon.²⁵

22. Mr Head immediately telephoned Mr Frank Tringali, one of the members of Boral's lorry owner drivers' committee, to find out if he had heard about the issue. Lorry owner drivers are individual drivers contracted by Boral to deliver concrete in trucks that are not owned by Boral.²⁶ During the call, Mr Tringali told Mr Head that his drivers were telling him that the CFMEU had banned Boral concrete deliveries from Monday (18 February 2013).²⁷

23. Shortly thereafter at 11.30 am Mr Head received a telephone call from Mr Murray Billings, a fleet owner of approximately six agitator trucks, who contracts with Boral Concrete to provide transport services. Mr Billings said words to the effect:

I have been told that we cannot deliver to the Oceania job in Officer, the Drive job at Swinburne Uni in Hawthorn, the Meridian job at Cragieburn shopping centre, or any of the Equiset jobs in the CBD. I can't understand what this has to do with us and it's not going to impact Grocon because they are going to get their concrete.²⁸

24. Later that afternoon Mr Head spoke to Mr Ashley Martin, a lorry owner driver who contracts with Boral Concrete, in Errol Street, North Melbourne.²⁹ Mr Head's evidence was that Mr Martin asked him what was going on with the CFMEU ban on Boral concrete deliveries. Mr Martin stated, 'I spoke to the guys at Drive Projects today and they told

²⁵ Peter Head, witness statement, 9/7/14, para 4.

²⁶ Peter Head, witness statement, 9/7/14, para 5.

²⁷ Peter Head, witness statement, 9/7/14, para 6.

²⁸ Peter Head, witness statement, 9/7/14, para 7.

²⁹ Peter Head, witness statement, 9/7/14, para 8.

me not to come back to site next week as no Boral trucks will be allowed on.³⁰

CFMEU ban in operation from 18 February 2013: general

25. Mr Head gave evidence that on and from 18 February 2013 the following long-term customers of Boral ceased ordering concrete for ongoing major projects in the greater Melbourne metropolitan area:

- (a) Oceania;
- (b) Equiset Services Pty Ltd (**Equiset**);
- (c) Drive Projects; and
- (d) Meridian Construction Services Pty Ltd (**Meridian**).³¹

26. Mr Head's evidence was that in his experience with Boral he was unaware of any previous occasion where a customer had ceased ordering concrete from Boral mid-project and had switched to another supplier.³²

27. An email from Mr John Biondo, Business Manager at Alsafe to Mr Dalton on 18 February 2013 stated that Alsafe had lost approximately 50m³ in concrete orders over the next four days due to the ban.³³ The email also refers to Meridian receiving concrete from Pronto at

³⁰ Peter Head, witness statement, 9/7/14, para 8.

³¹ Peter Head, witness statement, 9/7/14, para 9. See also Peter Head, 9/7/14, T:31.5-38.

³² Peter Head, witness statement, 9/7/14, para 9. See also Peter head, 9/7/14, T:31.40ff.

³³ Paul Dalton, witness statement, 9/7/14, p 19.

‘Craigieburn SC’ in excess of 100m³. Mr Dalton’s evidence was that Pronto was a competitor of Boral’s and that the reference to Craigieburn was a shopping centre at which, until that point, Boral had been supplying concrete to Meridian. The project was already underway at the time.³⁴ By 21 February 2013, it was estimated that Boral had lost 500m³ of concrete at the Craigieburn site.³⁵

28. The existence of the CFMEU ban against Boral at this time was also supported by the evidence of the Boral customer witnesses.

CFMEU ban in operation from 18 February 2014: Oceania

29. Prior to 2013 Boral was Oceania’s preferred concrete supplier and, with the exception of a small family concreting project, Oceania used Boral exclusively for its concrete in 2012.³⁶ In 2012 Mr Mark Milano, Sales Manager and Director of Oceania, began to review Oceania’s concrete supply arrangements as he no longer wanted to have an exclusive concrete supplier.

CFMEU ban in operation from 18 February 2013: Cardinia Shire Offices³⁷

30. Mr Milano’s evidence was that in September and October 2012 Oceania started work on the Cardinia Shire Offices at Officer. That project required environmental concrete and Boral was engaged to supply its ‘greenstar’ concrete. In mid-February 2013, Mr Milano was

³⁴ Paul Dalton, 9/7/14, T:10.41–11.27.

³⁵ Paul Dalton, witness statement, 9/7/14, p 30 (email from Keith Hunt to Peter Head dated 21 February 2013).

³⁶ Mark Milano, witness statement, 18/9/14, para 3. See also Peter Head, 9/7/14, T31.8–15.

³⁷ Mark Milano, witness statement, 18/9/14, paras 5–9.

contacted by Mr Linus Humphrey, the site supervisor, who told Mr Milano that he had been advised by the 'health and safety representative that we cannot use Boral on site, we have to use someone else'. Mr Milano called Mr Lane to ask what the issue was. Mr Milano then spoke with the construction manager from Watpac to discuss the difficulty which would arise if he could not use Boral. The next day, the Watpac construction manager advised that 'you can use Boral for the vertical slabs and I am seeking dispensation to use Boral for the suspended slabs'. A few days later, the construction manager from Watpac advised that Oceania could still use Boral on the project as there was no other supplier of 'greenstar' concrete in the region.

CFMEU ban in operation from 18 February 2013: Ferntree Gully Road³⁸

31. In February 2013 Oceania was engaged on an office building on Ferntree Gully Road in Nottinghill. The job was almost complete, but a final pour was scheduled for a Saturday to complete some stairs. The afternoon before the pour was scheduled, Mr Milano received a call from Mr Humphrey, the supervisor of the site. Mr Humphrey said that the builder, Hansen Yuncken, had said to him, 'I have been told by the union that there are issues using Boral on the site.' Mr Milano understood the union to be the CFMEU. Mr Milano telephoned Mr Lane who suggested the solution of supplying concrete through Alsafe. Mr Milano then rang the builder, Hansen Yuncken, to ask whether he could use Alsafe. The builder advised him that it should be okay to use Alsafe. Alsafe then supplied the concrete for the stairs the following day.

³⁸ Mark Milano, witness statement, 18/9/14, paras 11–13.

CFMEU ban in operation from 18 February 2013: Tarneit Shopping Centre³⁹

32. Oceania started work on the Tarneit Shopping Centre in March 2013. It had engaged Boral as the concrete supplier on the project. Around late March or early April 2013, Mr Damien Milano – Mr Mark Milano’s brother – called him from the site and said: ‘The issue is spreading further, the organiser from the CFMEU has told me that we cannot use Boral on the site.’ After this incident, Mr Milano decided to change Oceania’s concrete supplier. He engaged Holcim (Australia), one of Boral’s competitors, as he thought continuing with Boral may cause delays and, as a result, have an impact on project productivity.

CFMEU ban in operation from 18 February 2013: Church Street, Richmond⁴⁰

33. In about March 2013 Oceania started work on a project in Church Street, Richmond. Mr Humphrey advised Mr Milano that the same rumours relating to using Boral applied to this site. To begin with, Mr Milano engaged Boral to supply concrete through either Hanson, another of Boral’s competitors, or Holcim (Australia). However, this became too onerous for Oceania. As Mr Milano did not want delays to the project to be caused by using Boral, he changed to Holcim (Australia) for the supply of concrete for the rest of this Project.

³⁹ Mark Milano, witness statement, 18/9/14, paras 14–16.

⁴⁰ Mark Milano, witness statement, 18/9/14, paras 20–22.

CFMEU ban in operation from 18 February 2013: Equiset

34. Equiset was made up of people who had been long-term customers of Boral.⁴¹

35. Mr Steven Richardson, formerly of Equiset, gave evidence in relation to the origin of the black ban as follows:

In February 2013, there was a buzz in the construction industry and on site in relation to a threatened ban by the CFMEU of Boral on construction sites in Melbourne. The feedback coming from sites was that there had been a meeting that the CFMEU shop stewards had attended at which the CFMEU organisers had discussed Boral.⁴²

36. At this time Equiset was engaged as the head contractor on six projects in Melbourne. Alsafe was supplying concrete to three of these projects: 82 Flinders Street, 27 Little Collins Street and Lionsville Retirement Village in Essendon.

37. Mr Richardson first heard of the CFMEU's intention to impose a ban on Boral Concrete when he received a call on 15 February 2013 from one of Equiset's site managers. He was advised that the CFMEU shop steward employed by Equiset had said words to the effect of 'the CFMEU would not allow Boral on site.' Mr Richardson was also advised that the ban would extend to Alsafe.⁴³

38. Mr Richardson decided to delay a pour at 27 Little Collins Street until more information could be obtained regarding the CFMEU ban. On

⁴¹ Peter Head, 9/7/14, T:31.24–26.

⁴² Steven Richardson, witness statement, 18/9/14, para 3.

⁴³ Steven Richardson, witness statement, 18/9/14, para 6.

Tuesday 19 February 2012 Mr Richardson had a phone conversation with Mr Elias Spervovasilis, a CFMEU organiser. Mr Spervovasilis neither confirmed nor denied the rumours that the CFMEU did not want Boral or Alsaf on Equiset sites. When Mr Richardson stressed that he was using Alsaf on the projects, and that the concrete mix was critical to the projects, Mr Spervovasilis said words to the effect of: 'you will be right.'⁴⁴

39. The next day, Mr Richardson attended a concrete pour at the 82 Flinders Street project. The CFMEU shop steward said to him, 'Alsaf are not allowed by the CFMEU on site.' Mr Richardson responded that he was going to go ahead with the pour.⁴⁵ Equiset continued to use Alsaf on the projects. Both projects at 27 Little Collins and 82 Flinders Street required the concrete mixes to be of a consistent colour and strength over the 12 month period.

CFMEU ban in operation from 18 February 2013: Drive Projects

40. Drive Projects was a long-term established customer of Boral, and was placing regular orders for concrete up until 15 February 2013.⁴⁶
41. Mr Anthony Simpson, Managing Director of Drive Projects, gave evidence that in about July 2012 Drive Projects commenced work on a construction project at Swinburne University in Hawthorn. Boral was

⁴⁴ Steven Richardson, witness statement, 18/9/14, para 10.

⁴⁵ Steven Richardson, witness statement, 18/9/14, para 12.

⁴⁶ Peter Head, witness statement, 9/7/14, para 9.

engaged to supply concrete for the project. The project involved approximately \$1.4 million worth of concrete.⁴⁷

42. In around February 2013 Mr Glen Kirkwood (a project manager with Drive Projects) stated to Mr Simpson that ‘there are problems with Boral and the CFMEU.’⁴⁸ Similar evidence was provided by Mr Steven Richardson, who at the time was acting as a consultant to Drive Projects in relation to the Swinburne University site. Mr Richardson’s evidence was that he had attended a meeting with Mr Simpson and Mr Kirkwood in relation to using Boral at the site, and at this meeting Mr Kirkwood said that he had been told by Mr Phil Filado, the CFMEU shop steward, ‘Don’t use Boral on site’.⁴⁹

43. Mr Simpson’s evidence was that: ‘The project had been handed over late to Drive Projects and the project could not afford any additional delays due to the Boral issue.’⁵⁰ Further, he stated:

We then switched to Alsafe concrete in the period immediately after we found out that there was an issue with Boral. However, the message that we received from site was that the issues in relation to Boral would not be resolved in the short term and that Alsafe was not a viable alternative to avoid the issues.⁵¹

44. Mr Simpson was informed by site personnel that ‘the CFMEU would make life difficult for us on the Project if we used Boral’. For these reasons Drive Projects decided not to take the risk of using Boral and

⁴⁷ Anthony Simpson, witness statement, 18/9/14, para 4.

⁴⁸ Anthony Simpson, witness statement, 18/9/14, para 5.

⁴⁹ Steven Richardson, witness statement, 18/9/14, paras 13–15.

⁵⁰ Anthony Simpson, witness statement, 18/9/14, para 7.

⁵¹ Anthony Simpson, witness statement, 18/9/14, para 8.

looked for an alternate concrete supplier and/or solution.’⁵² This evidence was corroborated by Mr Richardson.⁵³

CFMEU ban in operation from 18 February 2013: Anglo Italian Concrete

45. Anglo Italian Concrete (**Anglo Italian**) purchases concrete from various concrete suppliers in Victoria.
46. Around July 2012 Anglo Italian was engaged as a subcontractor on the construction of a data centre at Radnor Drive, Derrimut.⁵⁴ Anglo Italian engaged Boral to supply concrete on the project as they required ‘envirocrete’. Envirocrete is Boral’s speciality and they had been engaged to supply concrete for the project on this basis.
47. In February 2013 Mr Michael Newitt, the site supervisor for the project, had a conversation with the CFMEU delegate, known as ‘Herbie’. Herbie approached Mr Newitt to say that the union did not want Boral to supply the concrete and to ask whether Anglo Italian could use someone else.⁵⁵
48. The evidence of Brett Young (General Manager of Anglo Italian) was that Mr Newitt rang him to advise that ‘Boral trucks will not be allowed on site.’ Mr Young said that Mr Newitt advised that he had

⁵² Anthony Simpson, witness statement, 18/9/14, para 9.

⁵³ Steven Richardson, witness statement, 18/9/14, para 18.

⁵⁴ Brett Young, witness statement, 18/9/14, para 4.

⁵⁵ Michael Newitt, witness statement, 18/9/14, paras 5–6.

been told this by 'Herb' who was passing on the instructions from his superiors at the CFMEU.⁵⁶

49. Mr Young telephoned Mr Lane, his contact at Boral, to confirm whether Boral trucks would be allowed onto the project. A significant pour for a roof slab was due to occur on 21 February 2013 and confirmation was needed before this could go ahead.⁵⁷ Mr Lane was unable to confirm whether the Boral trucks would be stopped at the site. Accordingly, Mr Young was unwilling to risk the possibility of the pour being interrupted or stopped and so decided to use Hanson to provide the concrete instead.⁵⁸ Mr Lane's evidence corroborated Mr Young's account.⁵⁹
50. Around 4 or 5 March 2013, Mr Lane contacted Mr Young to advise that Boral could again supply concrete to the site. Boral supplied the fourth and final pour for the roof slab on 6 March 2013.⁶⁰
51. Around 24 April 2013, Mr Newitt was advised that the CFMEU did not want Boral delivering to the site. Herbie said words to the effect, 'I have spoken to my office and they said they are still not happy for us to

⁵⁶ Brett Young, witness statement, 18/9/14, para 7.

⁵⁷ Brett Young, witness statement, 18/9/14, paras 8-9.

⁵⁸ Brett Young, witness statement, 18/9/14, para 10.

⁵⁹ Richard Lane, witness statement, 9/7/14, paras 7-10.

⁶⁰ Brett Young, witness statement, 18/9/14, para 11.

use Boral.’⁶¹ Accordingly, Anglo Italian completed the project using Hanson as its concrete supplier.⁶²

CFMEU ban in operation from 18 February 2013: Kosta Concreting

52. Mr Darren Dudley was a manager for Kosta Concreting. Mr Jaromir Misztak was a foreman for Kosta Concreting.

53. Their evidence was that in early 2013 Kosta Concreting was engaged on a job in Elizabeth Street, Melbourne which involved the construction of a nine storey apartment building. Kosta Concreting had engaged Boral to supply the concrete for the project.

54. Mr Misztak’s evidence was that in about February or March 2013 Lou, the CFMEU shop steward on the project, had said to him words to the effect of ‘No Boral on site’.⁶³

55. Mr Dudley’s evidence was that in early April 2013 he was told by his boss Sam that Lou had told Sam words to the effect of ‘You can’t use Boral on site.’⁶⁴ Shortly after this, in a conversation Mr Dudley had with Lou, he discussed using Boral on site. Lou said to Mr Dudley words to the effect, ‘use Boral if you like, but it will take you all day to unload one truck.’⁶⁵

⁶¹ Michael Newitt, witness statement, 18/9/14, para 10.

⁶² Brett Young, witness statement, 18/9/14, para 12.

⁶³ Jaromir Misztak, witness statement, 18/9/14, paras 9.

⁶⁴ Darren Dudley, witness statement, 18/9/14, para 8.

⁶⁵ Darren Dudley, witness statement, 18/9/14, para 9.

56. As Kosta Concreting was not willing to risk the possibility of trucks being turned away or stopped by the CFMEU or any delays to the Elizabeth Street Project, Kosta Concreting had to find an alternative concrete supplier.⁶⁶ This led Kosta Concreting to set up an account with HyTec, to whom they paid \$8 more per cubic metre for concrete than they had paid to Boral.⁶⁷

CFMEU ban in operation from 18 February 2013: Squadron Concrete

57. Mr Fabrizio Ubaldi was a manager for Squadron Concrete. He testified that in early 2013 Squadron Concrete was engaged as a landscaping subcontractor on the Tower 8 Project at Lorrimer Street, Port Melbourne. The project was an apartment building being built by Mirvac. Alsafe was engaged by Squadron Concrete to supply concrete.⁶⁸
58. Towards the end of Squadron Concrete's work on the project, in around February 2013, the CFMEU shop steward on the project said to Mr Ubaldi 'there is an issue with companies associated with Boral Concrete and you shouldn't use them on site.' Mr Ubaldi's evidence was that:

As I did not want any issues on site and did not want the CFMEU to cause any unnecessary delays to Squadron Concrete's works on site I decided to change to a different concrete supplier for [the] balance of Squadron Concrete's work on the Tower 8 Project. I did not want to take the risk that using Alsafe would cause issues with the CFMEU. I changed to

⁶⁶Darren Dudley, witness statement, 18/9/14, para 10; Jaromir Misztak, witness statement, 18/9/14, para 10.

⁶⁷Darren Dudley, witness statement, 18/9/14, para 14.

⁶⁸Fabrizio Ubaldi, witness statement, 18/9/14, para 3.

Pronto for the following two orders of the remaining work of the Tower 8 Project.⁶⁹

CFMEU ban in operation from 18 February 2013: S & A Paving

59. Mr Santi Mangano, Director of S & A Paving, gave the following evidence. Around 2013 S & A Paving engaged Alsafe to supply concrete on the Hawthorn Aquatic Centre Project. The CFMEU delegate said to Mr Mangano words to the effect: ‘if you use Boral on site, we are going to check up on the trucks.’⁷⁰ Mr Mangano’s evidence was that as he could not afford any delays on site, or to stop and start concrete pours, he changed suppliers for the remainder of the project.⁷¹

The events of late March 2013: CFMEU’s ban expands beyond Boral Concrete

60. In late March 2013 the CFMEU’s black ban of Boral Concrete in Melbourne widened to Boral more generally.
61. Mr Iain Weinzierl was Account Manager for Boral Quarries and Boral Recycling in Melbourne. He gave the following evidence.⁷²
62. At approximately 7.50 am on 27 March 2013, Mr Weinzierl was informed by Mr Robert Gillespie (Sales Service Centre Manager, Boral Concrete and Quarries) that two truckloads of crushed rock had been

⁶⁹ Fabrizio Ubaldi, witness statement, 18/9/14, para 5.

⁷⁰ Santi Mangano, witness statement, 18/9/14, para 3.

⁷¹ Santi Mangano, witness statement, 18/9/14, para 5.

⁷² Ian Weinzierl, witness statement, 9/7/14, paras 3–8.

turned away at the Costco shopping centre at Market Street, Ringwood (**Costco Project**) due to the CFMEU ban. Boral had been engaged by CDL Constructions Pty Ltd (**CDL**) to supply crushed rock to the project. Following this incident, Mr Weinzierl became concerned that there may have been similar incidents affecting other customers and so decided to contact Civi Works, a major customer of Boral Quarries and Boral Concrete. At approximately 9.30 am on 27 March 2013, Mr Weinzierl contacted Mr Jay Wilks, Senior Foreman at Civi Works to discuss what he had heard about the CFMEU bans of Boral. Mr Wilks advised that the CFMEU shop steward on a project which Civi Works was starting work on in Richmond for Kane Constructions had told Civi Works not to use Boral Asphalt or Boral Concrete. Mr Wilks said that the ban was a complete ban of Boral:

It is a complete ban – the shop steward from Kane told me that the CFMEU will apply maximum force to black ban all Boral products on site – Boral Building Products, Quarries, Concrete and Asphalt. We have to use alternative suppliers.

63. Mr Weinzierl was concerned about the exchange and arranged to meet Mr Wilks the next day. The conversation included the following exchange:

Wilks: My understanding is that the CFMEU shop stewards have said to all the larger civil contractors in Melbourne and the major commercial builders in Melbourne to stay away from all Boral products on CFMEU sites and to cancel all supply agreements with Boral. Boral's name is mud with the CFMEU at the moment. It is all in relation to the Grocon saga.

Weinzierl: What do you understand that to mean – we thought the issue was limited to Boral Concrete?

Wilks: No, it relates to all of Boral – Boral Quarries, Concrete, Asphalt and Plasterboard. Anything that is delivered in a Boral truck and is identified as a Boral product.

64. Mr Weinzierl's evidence concerning the Costco Project was corroborated by Mr Ben Cifali, a site engineer for CDL at the Costco Project. His evidence was that in late March 2013 CDL ordered two truckloads of crushed rock from Boral for delivery the following morning. That morning, Mr Cifali witnessed the Boral trucks being refused entry to the site by the CFMEU shop steward. He spoke to the shop steward who stated: 'No Boral trucks onsite.' From this point on, CDL ordered crushed rock from a different supplier.⁷³

26 February-5 April 2013: Boral commences legal proceedings⁷⁴

65. On 26 February 2013, shortly after the ban came into effect, Boral Concrete and Alsafe commenced proceedings in the Supreme Court of Victoria against the CFMEU seeking damages and final injunctions (**Supreme Court Proceeding**).
66. By summons filed the same day, Boral sought interlocutory injunctions. One was an injunction which would restrain the CFMEU from procuring or advising any person employed or engaged to perform concreting work at specified construction sites not to perform that work or to perform it otherwise than in the manner in which it would customarily be performed. The specified construction sites included:

⁷³ Ben Cifali, witness statement, 18/9/14, paras 2–7.

⁷⁴ See generally Boral MFI-I, Vol 1

- (a) the Craigieburn Shopping project site being carried on by Meridian;
- (b) the 27 Little Collins, 82 Flinders Lane and 'Lyonsville' [sic Lionsville] Retirement Village project sites being carried on by Equiset;
- (c) the Tower 8 project site being carried on by Squadron Concrete;
- (d) the Swinburne University project site being carried on by Drive Projects;
- (e) the Radnor Drive, Derrimut project site being carried on by Anglo Italian; and
- (f) the Cardinia Shire Offices and Ferntree Gully Road project sites being carried on by Oceania.

- 67. On 28 February 2013, Hollingworth J granted the interlocutory relief sought. The CFMEU had been served. But it chose not to appear.
- 68. On 7 March 2013, Hollingworth J confirmed and extended the injunction beyond the specified construction sites to any location in Victoria. Again the CMFEU was served. But again it did not appear.
- 69. On 5 April 2013, Hollingworth J made orders joining a number of related Boral entities to the proceeding. She granted Boral leave to amend its Statement of Claim. Her Honour also granted a further

extension of the injunction by expanding its reach beyond concrete. The effect was to restrain the CFMEU from carrying on a black ban in Victoria of any of Boral products. Once again, the CFMEU did not appear.

70. Following the grant of the injunctions, Mr Dalton sent a letter on 11 April 2013 to Boral's customers in the Victorian region informing customers of the court's orders.⁷⁵ Mr Dalton received a number of replies. One of the substantive replies from a Boral customer included the following:

Unfortunately with the way the Union plays their game, we are still left in a crappy position regardless of court orders or decisions.

We have specifically been told by Union Shop Stewards on two projects that we cannot use Boral.

... We may have written protection from the courts but the final power still belongs to the Union.⁷⁶

71. There was other evidence to show that notwithstanding the court's order, the CFMEU continued its ban at this time. For example, an email from Ms Maney to Mr Dalton on 15 March 2013 recounted: 'We have had two instances today of Shop Stewards telling customers that "Boral are banned". In one case (Civiworks) 1m3 of concrete was cancelled on-route by the customer (the customers instructed us to dump the load and that he will pay for the concrete).'⁷⁷ The evidence

⁷⁵ Paul Dalton, witness statement, 9/7/14, p 46.

⁷⁶ Paul Dalton, witness statement, 9/7/14, p 52.

⁷⁷ Paul Dalton, witness statement, 9/7/14, p 45.

provided by the Anglo Italian witnesses⁷⁸ and the Kosta Concreting witnesses⁷⁹ is to the same effect.

Boral's meeting with the CFMEU on 23 April 2013

72. In April 2013, Mr Head discussed with Mr Dalton the possibility of speaking to CFMEU officials to resolve the situation which had arisen.
73. On 22 April 2013 Mr Head had lunch with Mr Vin Sammartino, a director of Hacer Group Pty Ltd (**Hacer**), and a person with many contacts in the construction industry. Mr Head raised the difficulties which black ban was causing Boral.⁸⁰
74. During the lunch, Mr Sammartino phoned Mr Reardon, Assistant State Secretary of the CFMEU. After the call ended, Mr Head stated that Mr Sammartino said:

the CFMEU's issue is with Daniel Grollo and John Van Camp of Grocon...it's now personal between Grollo, Van Camp and Setka.⁸¹

75. Mr Sammartino suggested that Mr Head provide this information to Mr Dalton. He said that he would arrange for Mr Setka and Mr Dalton to have a discussion. Mr Sammartino phoned Mr Head later that day, advising that the CFMEU were keen to talk off the record.⁸²

⁷⁸ See paras 45 - 51 above.

⁷⁹ See paras 52 - 56 above.

⁸⁰ Peter Head, witness statement, 9/7/14, para 21-22.

⁸¹ Peter Head, witness statement, 9/7/14, para 25.

⁸² Peter Head, witness statement, 9/7/14, paras 27-28.

76. On 23 April 2013 Mr Dalton and Mr Head met Mr Reardon and Mr Setka to discuss these issues. The meeting lasted for around 45 minutes.⁸³
77. Mr Reardon and Mr Setka said that the discussion was off the record. No-one stated at any stage that the conversation was without prejudice.⁸⁴ However, Mr Head's evidence was that at one stage Mr Reardon said 'I would be happy if the legal stuff stopped but Setka does not give a stuff'.⁸⁵ Mr Setka also made an indirect reference to the proceedings by Boral against the CFMEU by saying that Boral's lawyers in the proceedings were 'no good'.⁸⁶
78. Mr Setka did most of the talking at the meeting. Mr Setka mentioned the CFMEU's planned day of action for 30 April, which was being held to protest about fatalities on Grocon sites.⁸⁷
79. Mr Setka also stated that there was a deep feeling in the CFMEU against Mr Daniel Grollo, then Chief Executive of Grocon and Mr John Van Camp, then head of Grocon's Safety, Systems and Industrial Relations Divisions.⁸⁸
80. Mr Dalton stated that Mr Setka said:

⁸³ Paul Dalton, witness statement, 9/7/14, para 44.

⁸⁴ Paul Dalton, witness statement, 9/7/14, para 29; Peter Head, witness statement, 9/7/14, para 38.

⁸⁵ Peter Head, witness statement, 9/7/14, para 38.

⁸⁶ Paul Dalton, witness statement, 9/7/14, para 29.

⁸⁷ Paul Dalton, witness statement, 9/7/14, para 31.

⁸⁸ Paul Dalton, witness statement, 9/7/14, para 33.

Concrete supply is like an intravenous drug. Builders can't survive without it.

We're at war with Grocon and in a war you cut the supply lines.

Boral Concrete is a supply line to Grocon.⁸⁹

81. Similarly, Mr Head stated that Mr Setka said words to the effect of 'the CFMEU is at war with Grocon' and 'if you want to starve the enemy you cut their supply lines ... we have not started'.⁹⁰

82. Mr Dalton also recalls Mr Setka stating:

The CFMEU has limited resources so we will focus on "the Green and Gold".

We will impact you more and more. Truck emissions testing will be the next phase of the action the CFMEU will take against Boral.

We've been fighting with one arm behind our back and we're willing to significantly ramp up our campaign.⁹¹

83. Mr Dalton stated that he understood Mr Setka's reference to the 'Green and Gold' to refer to Boral: these are Boral's corporate colours and the company is commonly referred to in the industry by this name.⁹²

84. Mr Setka then said that if Boral did not cooperate with the CFMEU, they would target membership of its concrete batchers. Concrete batchers are employed at Boral's plants and are responsible for mixing the raw materials for the various grades of concrete that Boral supplies.

⁸⁹ Paul Dalton, witness statement, 9/7/14, para 35.

⁹⁰ Peter Head, witness statement, 9/7/14, para 42.

⁹¹ Paul Dalton, witness statement, 9/7/14, para 36.

⁹² Paul Dalton, witness statement, 9/7/14, para 37.

Boral's concrete batchers are generally covered by the Australian Workers' Union.⁹³

85. Mr Head's evidence was that during the meeting Mr Setka said words to the following effect:⁹⁴

Just stop supplying Grocon for two weeks and this will go away.

How about we all have a bit of fun and just stop the Grocon trucks at the plant and let the other trucks through?

86. Mr Dalton's evidence was similar. He stated that, during the meeting, Mr Setka said words to the following effect:⁹⁵

All you [Boral] have to do is stop supply to Grocon for a couple of weeks.

We can facilitate this by blockading your concrete plants and stopping supplies for Grocon directly. No one would have to know that you have stopped supply.

87. Mr Dalton's evidence was that he advised Mr Setka that Boral would not be doing any deals with the CFMEU and would continue to support Grocon.⁹⁶ Mr Setka advised that:

All wars end and once peace is established the CFMEU will be at the table to divide up the spoils. The CFMEU will decide who gets what and what market share Boral will get.⁹⁷

⁹³ Paul Dalton, witness statement, 9/7/14, para 39.

⁹⁴ Peter Head, witness statement, 9/7/14, para 43.

⁹⁵ Paul Dalton, witness statement, 9/7/14, para 40.

⁹⁶ Paul Dalton, witness statement, 9/7/14, para 41.

⁹⁷ Paul Dalton, witness statement, 9/7/14, para 42.

88. Mr Head's evidence about what Mr Setka said was similar: 'At the end we will be divvying up the spoils and we'll decide who supplies who. Grocon won't give a shit about Boral at that point.'⁹⁸
89. Immediately after the meeting, both Mr Dalton and Mr Head took notes of the meeting. Those notes were in evidence before the Commission.
90. Mr Mike Kane, CEO of Boral Ltd, reacted to the meeting as follows:

I was asked as to what would our position be, because we were being asked to stop supplying Grocon by this union, and I informed the management of the Victorian operations that we do not take orders from anyone as to who our customers are and that if we were going to have this union tell us who our customers were we should give them the keys of the operation and let them run the business. But we weren't doing that, so the answer was no, you supply your customers, you stick with your commitments and that was the way we proceeded.⁹⁹

Further steps taken by Boral in response to the ban:¹⁰⁰ Supreme Court Proceeding

91. On 20 May 2013, Boral obtained default judgment on its Amended Statement of Claim with the CFMEU to pay damages to be assessed. The Amended Statement of Claim pleaded causes of action for the torts of intimidation and conspiracy.
92. On 22 August 2013, Boral filed a summons in the Supreme Court Proceeding seeking orders that the CFMEU be punished for contempt.

⁹⁸ Peter Head, witness statement, 9/7/14, para 45.

⁹⁹ Mike Kane, 9/7/14, T:57.15-24.

¹⁰⁰ See generally Boral MFI-1, Vol 1.

The statement of charges alleged that on 16 May 2013 Mr Joseph Myles had engaged in a blockade of a Regional Rail Link construction site at Joseph Street, Footscray, in contravention of the injunction granted on 5 April 2013. It was further alleged that the CFMEU was in contempt by failing to publish a statement on the CFMEU's webpage setting out certain matters required by Hollingworth J's orders.

93. On 9 September 2013, the CFMEU filed a Notice of Appearance in the Supreme Court Proceeding, more than six months after the proceeding was commenced.
94. On 14 October 2013, Boral filed a summons for assessment of damages. This was based on the view that Boral was in a position to quantify its loss in relation to projects affected by the black bans in early to mid-2013.
95. On 8 November 2013, the CFMEU made an application to set aside the default judgment which had been entered on 20 May 2013. The CFMEU's application to set aside default judgment was heard by Derham AsJ in the Supreme Court of Victoria on 30 January 2014. On 10 September 2014 the Court dismissed the CFMEU's application to set aside the default judgment.¹⁰¹
96. On 23 September 2014 the CFMEU filed a Notice of Appeal appealing against Derham AsJ's decision to the Trial Division of the Supreme Court.¹⁰² Only two grounds of appeal were stated. The first is a novel

¹⁰¹ See *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] VSC 429.

¹⁰² Boral MFI-2, Tab 3.

ground that, despite copious contrary authority, the tort of intimidation does not exist in Australian law. The second ground is that Derham AsJ, in refusing to set aside the default judgment, erred in the exercise of his discretion. Only the first ground is now being pressed.¹⁰³

97. In relation to the summons seeking relief for contempt the following events took place:

- (a) On 4 September 2013, the Attorney-General for Victoria applied to be joined or to intervene in relation to the contempt summons. That application was heard by Digby J on 19 September 2013. On 28 October 2013 Digby J granted leave to the Attorney-General to be joined as a party.¹⁰⁴ On 11 November 2013, the CFMEU sought leave to appeal from Digby J's order. On 13 December 2013, the Victorian Court of Appeal heard and dismissed the CFMEU's application for leave to appeal.¹⁰⁵
- (b) On 2 October 2013, the Boral parties applied for discovery against the CFMEU. On 23 October 2013, Daly AsJ refused orders for discovery. On 1 November 2013, the Boral parties appealed against Daly AsJ's decision. That appeal was heard by Digby J on 29 January 2014 and allowed on 25 March

¹⁰³ Boral MFI-4, tab 1 (Letter dated 29 October 2014 from Slater & Gordon to Herbert Smith Freehills, responding to letter dated 28 October 2014 from Herbert Smith Freehills to Slater & Gordon).

¹⁰⁴ *Boral Resources (Vic) Pty Ltd v CFMEU* [2013] VSC 572.

¹⁰⁵ *CFMEU v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378.

2014.¹⁰⁶ On 8 April 2014, the CFMEU applied for leave to appeal Digby J's decision ordering discovery. On 24 October 2014, the Victorian Court of Appeal delivered judgment refusing the CFMEU leave to appeal.¹⁰⁷

Further steps taken by Boral in response to the ban: involvement of regulators

98. In April 2013 Boral brought the CFMEU's conduct to the attention of the Australian Competition and Consumer Commission (ACCC). Mr Kane's evidence to the Commission was that as at 7 July 2014 the ACCC was conducting a formal investigation into these issues.¹⁰⁸
99. In connection with that investigation, on 27 June 2013 the ACCC issued the CFMEU with a notice under s 155(1)(c) of the *Competition and Consumer Act 2010* (Cth) requiring it to produce certain documents in relation to possible contraventions of s 45D of that Act. The ACCC subsequently issued notices to the CFMEU and its proper officer, Yorick Piper, alleging that the CFMEU knowingly furnished false or misleading information to the ACCC.
100. In June 2013, Boral brought the CFMEU's conduct to Fair Work Building and Construction's attention. Mr Kane gave evidence that as

¹⁰⁶ *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] VSC 120.

¹⁰⁷ *CFMEU v Boral Resources (Vic) Pty Ltd* [2014] VSCA 261.

¹⁰⁸ Mike Kane, Letter to Royal Commission, 9/7/14, p 6.

at 7 July 2014 Fair Work Building and Construction was conducting a formal investigation into these issues.¹⁰⁹

101. On 21 May 2014, the Director of the Fair Work Building Industry Inspectorate commenced a proceeding in the Federal Court against the CFMEU and Mr Joseph Myles for pecuniary penalties for alleged contraventions of the *Fair Work Act 2009* (Cth) (**Federal Court Proceeding**). The contraventions are said to arise from the alleged blockade of the Regional Rail Link construction site at Joseph Street, Footscray on 16 May 2013. The CFMEU and Mr Myles have applied to stay the Federal Court Proceeding.

Continuation of the CFMEU ban

102. Notwithstanding the injunctions obtained by Boral in the Supreme Court Proceeding, the CFMEU ban has largely continued.

Continuation of the CFMEU ban: Oceania – Williams Landing

103. In early February 2014, Boral successfully quoted for a job to supply concrete to Oceania at the Williams Landing Shopping Centre Project. Hacer was the builder on the project.
104. Mr Lane gave evidence that at some stage after Boral was awarded the job, Mr Mark Milano spoke to him, saying:

I have met with Guy, the CFMEU Shop Steward on the site. He said to me that Boral is banned from the job. I pushed back and told him that Boral gives me the best commercial outcomes as I have based my pricing

¹⁰⁹ Mike Kane, Letter to Royal Commission, 9/7/14, p 6.

for the job on your offer to me based on our long term trading arrangements. Guy said he'd check with the CFMEU organiser, Drew McDonald. He later came back to me and told me that McDonald said there is no way Boral is allowed on this site.¹¹⁰

Mr Lane gave an account of this conversation to Ms Maney, who sent an email to Mr Dalton on 5 March 2014 summarising Mr Lane's account at that time. The account in that email is consistent with Mr Lane's evidence.¹¹¹

105. Boral decided to offer an incentive to Oceania of approximately \$20,000 worth of building material if Oceania could convince Hacer to allow Boral to supply Oceania at the Williams Landing Shopping Centre.¹¹² Mr Sammartino of Hacer told Mr Milano that he needed to speak with Mr Reardon of the CFMEU.¹¹³
106. Ultimately, Mr Milano attended a meeting with Mr Reardon on 4 March 2014 at which Mr Milano put his position to Mr Reardon and Mr Reardon said words to the effect 'ok, let me think about it'. Mr Lane's evidence, which is supported by Ms Maney's email of 5 March 2014, is that Mr Milano reported that at that meeting Mr Reardon said words to the effect of:

Boral will go down. By going legal, Boral has put the spotlight on the Union, costing us money. Boral will pay for this.

Leave it with me. I'll be back to you before Thursday.¹¹⁴

¹¹⁰ Richard Lane, witness statement, 9/7/14, para 29.

¹¹¹ Linda Maney, witness statement, 9/7/14, p 12.

¹¹² Richard Lane, witness statement, 9/7/14, para 30.

¹¹³ Richard Lane, witness statement, 9/7/14, para 31; Mark Milano, witness statement, 18/9/14, para 27.

¹¹⁴ Richard Lane, witness statement, 9/7/14, para 32.

107. Mr Reardon later confirmed that it was permissible for Oceania to use Boral on the Williams Landing job.

Continuation of the CFMEU ban: BRC Piling – Olympic Park

108. Mr Dalton gave evidence that on 1 April 2014 he was advised that BRC Piling (**BRC**) had cancelled an order of concrete at Olympic Park ‘because of union issues.’¹¹⁵ He instructed Mr Lane to initiate the same process that Boral had adopted for Williams Landing to try to avoid the CFMEU’s black ban.¹¹⁶ BRC had been a customer of Boral’s for around 15 years. The relationship had developed over the period from around January 2013 to a point where BRC bought approximately 90% of its concrete from Boral.¹¹⁷

109. However, after further consideration, Boral calculated that it was not feasible to offer a discounted rate of \$136 per cubic metre to BRC, given the low volume of the job.¹¹⁸ BRC engaged Boral’s competitor, Holcim, for the Olympic Park project.

Continuation of the CFMEU ban: BRC Piling – Werribee Plaza

110. Around one week later, the same issue arose again with BRC on the Werribee Plaza project.¹¹⁹ BRC had won the retention pile contract at

¹¹⁵ Paul Dalton, witness statement, 9/7/14, para 56.

¹¹⁶ Paul Dalton, witness statement, 9/7/14, para 57.

¹¹⁷ Richard Lane, witness statement, 9/7/14, para 35.

¹¹⁸ Paul Dalton, witness statement, 9/7/14, para 63.

¹¹⁹ Paul Dalton, witness statement, 9/7/14, para 65.

the project.¹²⁰ Mr Dalton gave evidence that Mr Craig Boam, the Director of BRC, said to him: ‘If you give us that special rate for the Werribee Plaza project, we’ll do our best to keep Boral on site there.’¹²¹ Given BRC’s support, Boral decided to offer the discounted rate of \$136 per cubic metre to BRC for this project in order to win the work.¹²²

111. On 9 April 2014, BRC advised Boral that it had won the job to supply concrete for the project.¹²³
112. However, Mr Lane and Ms Maney gave evidence of conversations they each had with Mr Boam on 15, 16 and 17 April 2014 to the effect that the CFMEU and Straightline Excavations (BRC’s customer) had applied pressure on Mr Boam to discontinue Boral’s services.¹²⁴
113. On 17 April 2014 Mr Boam ordered six cubic metres of concrete to be delivered at 2 pm the same day. The concrete was delivered and poured apparently without incident.¹²⁵
114. On 23 April 2014 Mr Lane and Ms Maney met with Mr Boam and asked about the issues on the Werribee Plaza site.¹²⁶ Mr Boam advised

¹²⁰ Richard Lane, witness statement, 9/7/14, para 36.

¹²¹ Paul Dalton, witness statement, 9/7/14, para 65.

¹²² Paul Dalton, witness statement, 9/7/14, para 66.

¹²³ Paul Dalton, witness statement, 9/7/14, para 67.

¹²⁴ Linda Maney, witness statement, 9/7/14, paras 28–44; Richard Lane, witness statement, 9/7/14, paras 50–53. See also Linda Maney, witness statement, 9/7/14, p 16 (email from Linda Maney to Paul Dalton and others).

¹²⁵ Linda Maney, witness statement, 9/7/14, para 46; Richard Lane, witness statement, 9/7/14, para 58.

that Mr Tarkan Gulenc, a director of Straightline, had told him to source another supplier by Monday. Despite their requests that he push back against the CFMEU's demands, Mr Boam stated that his company could not afford the backlash or adverse effects from the CFMEU. During the meeting, Mr Boam said:

Straightline is my client and they've told us to find another supplier straight after Easter because the union has put that much pressure on them.
...

[Drew] MacDonald has been on site and has instructed us not to use Boral. He's one of the union organisers and the boss of the Probuild shop steward on the project.¹²⁷

As an alternative, the Boral representatives recommended that BRC consider using Alsafe as a substitute supplier.

115. Mr Boam telephoned Mr Lane later that day, advising that Straightline had agreed to allow Alsafe on site. He placed a to-be-confirmed order for 2 pm on Monday 28 April 2014.¹²⁸
116. On 28 April 2014 Mr Lane phoned Mr Boam several times, attempting to confirm the job which was due to go ahead that afternoon.¹²⁹ At 2.10 pm, Mr David McKerrell from BRC Piling called Mr Lane and said words to the effect of:

¹²⁶ Linda Maney, witness statement, 9/7/14, paras 47–62; Richard Lane, witness statement, 9/7/14, paras 60–68.

¹²⁷ Richard Lane, witness statement, 9/7/14, paras 64, 66.

¹²⁸ Linda Maney, witness statement, 9/7/14, para 63; Richard Lane, witness statement, 9/7/14, paras 68–69.

¹²⁹ Richard Lane, witness statement, 9/7/14, paras 73–74.

It's all off. They won't allow Alsafe here either and we've got to now find another supplier. You've given us an excellent rate here, it's going to be hard for us to get that rate anywhere else.¹³⁰

Continuation of the CFMEU ban: Town & Country – Werribee Plaza

117. Town & Country, a Ballarat-based concreting company, has a longstanding relationship with Boral.¹³¹ Town & Country had won the basement structural concrete contract for the Werribee Plaza project.

118. At the beginning of March 2014, Town & Country contacted Boral and requested a quote for 4000m³ of concrete for the Werribee Plaza project. On 14 April 2014, Mr Neil Phillips, Boral's sales representative for Town & Country, had a conversation with Mr Liam Kinniburgh, part owner of Town & Country, during which Mr Kinniburgh said:¹³²

I have an issue with the Probuild shop steward on site. He asked me what concrete we would be using and when I said Boral he said 'no way will Boral be on this site, they are suing us. If you push ahead with Boral expect trouble and hold ups on site'. I told him we would be using Boral.

119. On 1 May 2014 Mr Kinniburgh had a phone conversation in which he told Mr Phillips that Town & Country would not be ordering from Boral at the Werribee Plaza site:

Phillips: How is Werribee looking?

Kinniburgh: How do I put this, I have to be very careful what I say here, well, good for me but not for your guys.

Phillips: Why?

¹³⁰ Richard Lane, witness statement, 9/7/14, para 77.

¹³¹ Paul Dalton, witness statement, 9/7/14, para 76.

¹³² Neil Phillips, witness statement, 9/7/14, para 14.

Kinniburgh: Well the obvious, the same reason why the piling mob can't use you guys.¹³³

120. The following day, they met for lunch to discuss the situation. A subsequent email sent from Mr Phillips to Ms Maney outlines the conversation. In it, Mr Phillips notes that Mr Kinniburgh said to him words to the effect: 'there were witnesses to the Union telling Liam that Boral is not to be on the site, but Liam does not want to be involved in any way with this matter.'¹³⁴

Effect of the ban on Boral

121. Mr Kane's evidence was that since the start of the secondary boycott, Boral has suffered an estimated loss in earnings (before interest and tax) and in legal costs totalling approximately \$8 million to \$10 million to the end of June 2014.¹³⁵ His evidence was that as at 30 June 2014, there were 80 CFMEU controlled construction projects underway in Melbourne. Boral was only supplying concrete to five projects.
122. Further, in relation to construction projects in Melbourne exceeding \$50 million in value, there had been a decline in Boral's market share from around 35–40% in the 2011–2013 financial years to 9% in the 2014 financial year. There had been a decline in requests for quotes from around 70–80% in the 2011–2013 financial years to 27% in the 2014 financial year.¹³⁶

¹³³ Neil Phillips, witness statement, 9/7/14, para 33 and p 34 (email from Neil Phillips to Lind Maney dated 1 May 2014).

¹³⁴ Neil Phillips, witness statement, 9/7/14, p 34.

¹³⁵ Mike Kane, Letter to Royal Commission, 9/7/14, p 3.

¹³⁶ Mike Kane, Letter to Royal Commission, 9/7/14, p 15.

123. In addition, Boral's Melbourne concrete plant had experienced a 35% reduction in capacity over the period of the ban and Boral's lorry owner drivers had experienced an average 18.4% reduction in earnings for the three half year periods between 1 January 2013 and 30 June 2014 compared to the preceding half year period.¹³⁷

124. Mr Kane summarised the impact of the CFMEU's black ban on Boral thus. He said the CFMEU had:

the ability to stop us, not only from delivering immediately onto many of these sites, an unheard of thing in the concrete world, that you could stop mid project and switch out concrete suppliers. But then once they were able to effect that result, they were able to intimidate our customer base to the point where we were no longer being solicited to bid on projects in this CBD context and high rise crane construction projects.¹³⁸

125. In addition, he stated that in his 41 or 42 years' experience in the construction markets and building products and materials industry:

I've never seen a situation where you win work, you book it, you plan for it, you're ready to proceed, and then you're told by your supplier that they can't use you, not because there's a quality issue or anything with our work or our products, it's because a third party has told them that they're no longer allowed to use us. It's unheard of.¹³⁹

126. In early June 2014 Ms Maney and the sales team prepared a spreadsheet noting the status of each of Boral's key customers.¹⁴⁰

127. The sales team made phone calls to each of the customers with whom they had a regular relationship. The spreadsheet records a number of

¹³⁷ Mike Kane, Letter to Royal Commission, 9/7/14, pp 4–5.

¹³⁸ Mike Kane, 9/7/14, T:58.32-39.

¹³⁹ Mike Kane, 9/7/14, T:60.38-44.

¹⁴⁰ Paul Dalton, witness statement, 9/7/14, para 86.

comments regarding customers' reluctance to use Boral due to the CFMEU situation. These include: 'Will use Boral on Non Union sites. Will try on Union Jobs'; 'Will not use Boral as Pronto do not have the Union checking their trucks'; 'Nervous about the Union issue and will not use Boral on Union sites.'¹⁴¹

C – FINDINGS ON EVIDENCE

Relevance of evidence being uncontradicted and procedural issues

128. The CFMEU decided not to cross-examine the Boral witnesses or the Boral customer witnesses. It also decided not to supply contradictory evidence to counsel assisting with a view to his tendering it. These decisions mean that the evidence of all of the witnesses is uncontradicted.
129. In civil proceedings, the unexplained failure by a party who could, and would be expected, to give evidence, call witnesses or tender documents may properly allow a Court more easily to accept, and draw inferences from, the evidence before the Court. The justification is that the unexplained failure suggests that the party feared to adduce the evidence because it would not have assisted. It is 'plain commonsense'.¹⁴²
130. Although the proceedings of the Commission are not adversarial, a principle akin to that in *Jones v Dunkel* can apply. An unexplained failure by a person who would be expected to proffer testimony or

¹⁴¹ Paul Dalton, witness statement, 9/7/14, para 87.

¹⁴² *Jones v Dunkel* (1959) 101 CLR 298 at 321 per Windeyer J.

documents contradicting other evidence before the Commission so that it might be tendered by counsel assisting may properly allow the more easy acceptance of the evidence, and may properly permit the inferences to be drawn from it to be drawn more strongly.

131. The evidence squarely raises the possibility of contraventions of various laws by the CFMEU and certain of its officers. The evidence would be expected to be controverted by the CFMEU and its officers.

132. On 18 September 2014 senior counsel appearing for the CFMEU (who also appeared for Mr Setka and Mr Reardon) advanced an explanation for the CFMEU's decision. It is the only explanation advanced. He said he:

would not propose to cross-examine the Boral witnesses on the basis of the outstanding litigation where we and some of our members are defendants, and for that reason we have not put on statements from those members and we have not sought to deal with Boral in these proceedings, reserving our position in the curial proceedings.¹⁴³

133. The reference to 'the outstanding litigation' would appear to be to the Supreme Court Proceeding and the Federal Court Proceeding. So far as the Commission is aware, as at 18 September 2014 they were the only proceedings involving Boral and the CFMEU.

134. For a number of reasons, this is not a cogent explanation.

135. *First*, insofar as the Federal Court Proceeding and the charges of contempt in the Supreme Court Proceeding are concerned, those proceedings centre on specific allegations of conduct by Mr Joseph

¹⁴³ Mr Agius, 18/9/2014, T:76.44-77.3.

Myles on 16 May 2013. The Commission has no evidence before it in relation to those matters. Accordingly, the existence of those proceedings can provide no explanation for the CFMEU not seeking to controvert the evidence before the Commission which concerns other matters.

136. *Secondly*, insofar as the tort claims brought by Boral against the CFMEU in the Supreme Court Proceeding are concerned it is difficult to see how the giving of oral evidence by relevant officers and members of the CFMEU to the Commission would affect that proceeding, and cause prejudice to the CMFEU by giving Boral an unfair advantage or otherwise create substantial injustice.

- (a) At present, Boral has been completely successful. It has obtained judgment by default. Unless and until that judgment is set aside on appeal, there is no prospect of evidence on liability, as distinct from quantum, being given in the Supreme Court Proceeding.
- (b) If the CFMEU's appeal, which was heard by the Victorian Court of Appeal on 10 December 2014, fails, then the judgment stands and the Supreme Court Proceeding is concluded (save for the assessment of damages). In that event the Supreme Court Proceeding could not give rise to any substantial injustice of a kind which would preclude the expression in this Interim Report of concluded views in respect of the Boral case study.

- (c) If the CFMEU's appeal succeeds on the only ground now pressed, that the tort of intimidation does not exist in Australian law, then the Court of Appeal will have determined that Boral's amended statement of claim discloses no cause of action. The cause of action pleaded in conspiracy would collapse with the cause of action in intimidation because it is dependent on it. If the Court of Appeal reaches that conclusion, the amended statement of claim in the Supreme Court Proceeding will be dismissed. In that event, again, the Supreme Court Proceeding could not give rise to any substantial injustice which would prevent the expression of concluded views in the Interim Report in respect of the Boral case study.
- (d) Boral has not indicated that, if the appeal succeeds, the Supreme Court Proceeding could continue on radically amended pleadings alleging new causes of action. But even if that course were theoretically possible, what prejudice would the CFMEU suffer in the Supreme Court Proceeding if certain of its officers had given evidence to the Commission? That evidence could not sensibly be said to give Boral an unfair advantage by opening up otherwise undiscovered lines of inquiry. The availability of orders for discovery and interrogatories, subpoenas, notices to produce and the preparation of affidavits or outlines of evidence all serve to ensure that both parties will be able to render themselves aware of the case to be met before trial in the Supreme Court and will be able to prepare for that trial.

137. *Thirdly*, insofar as the CFMEU has documentary evidence which is capable of controverting the evidence before the Commission, there is no explanation why that evidence could not have been adduced.

138. *Fourthly*, at the first day of public hearings concerning the CFMEU on 7 July 2014, in response to certain press reports about the CFMEU's conduct regarding Boral, senior counsel for the CFMEU requested the Commission to 'make it plain' that no conclusions adverse to the interests of the CFMEU should be drawn until the CFMEU or those adversely affected have had an opportunity to test and contradict the evidence adverse to them.¹⁴⁴ Senior counsel for the CFMEU declared:

the CFMEU, and in particular those individuals who may be adversely affected by the evidence, have a concern that their reputation will be trashed and that the press and the media will not reflect the fact that no adverse conclusions will be drawn until the union and/or those adversely concerned have had an opportunity to meet that evidence.¹⁴⁵

139. This request and this declaration made by senior counsel appeared to suggest that the CFMEU was very keen to bring forward any evidence which would explain or contradict evidence adverse to its interests and those of its officials and members, but felt aggrieved about the consequences of not being able to do so in the week of 7 July. In fact they have not done so. That suggests either that (a) their protestations to the Commission on 7 July 2014 were confected – a view only to be reached with extreme reluctance – and the CFMEU did not really want an opportunity to contradict the evidence, presumably because there was nothing exculpatory that could be said in response or (b) although

¹⁴⁴ Mr Agius, 7/7/2014, T:6.27–34.

¹⁴⁵ Mr Agius, 7/7/2014, T:7.10–16

their protestations were genuine, again, there was nothing exculpatory that could be said in response. Whichever is the correct conclusion, it does not assist the CFMEU.

140. On 28 November 2014 senior counsel for the CFMEU endeavoured to explain away the 7 July 2014 statement as follows:¹⁴⁶

The CFMEU raised a complaint concerning denial of procedural fairness in that it did not have an opportunity to meet any allegations that may be made against it in a timely way. Counsel Assisting has treated this statement ... as an indication that the CFMEU would volunteer evidence in the case study. This goes too far. On 7 July, the CFMEU had no way of knowing what would be the totality of the evidence that Counsel Assisting would call in the case study. They had no way of knowing, for example, that the hearsay letter from Mr [Kane] would, months later, be supplemented. A great deal of the evidence available at that time was hearsay. Much of it could never have been used in curial proceedings.

Direct evidence was only called months later when that supplementary evidence was put on. In those circumstances, nothing said on 7 July in those proceedings could properly be taken to be an indication that the CFMEU proposed to volunteer statements from witnesses in answer to the Boral allegations.

141. The so-called 'direct' evidence was in fact all put on just over two months later. The submission that the 7 July statement could not have been taken as an indication that the CFMEU would volunteer statements in answer to the Boral allegations because on 7 July the evidence relating to Boral was weaker than it later became is hard to follow. Ordinarily where only weak evidence backs an allegation there is less need to reply to it than when stronger evidence is put on.
142. The only response which the CFMEU has made to the Boral evidence has been in the form of publicity, not proof. Mr Setka published the following material on the CFMEU website:

¹⁴⁶ Mr Agius, 28/11/14, T:29.17-36.

US citizen Kane

Mike Kane, an American citizen who is paid \$36,400 a week in his role as Boral CEO was allowed to deliver a political speech where he lectured everyone on how Australian laws need to be more like those in the US. He complained that industry was suffering as a result of the union's power. What suffering? Last time I looked, the major construction companies were making massive profits.¹⁴⁷

143. The only argument this contains is an assertion that the industry in general (and presumably Boral in particular) had not suffered from union power: yet Boral's claims to have suffered, up to 30 June 2014, to the extent of \$8–10 million, does not seem implausible. Mr Setka's other points are merely ad hominem attacks. They command no intellectual assent. They do not even seek to appeal to the intellect. Their assembling of appeals to xenophobia, envy and political hatred suggest that they can point to no substantive considerations. And the evidence which Mr Setka complained about was not objected to by his counsel: there was not a single objection to the letter in which some of Mr Kane's evidence was given, or to any question he was asked, or to any answer he gave.
144. The CFMEU (together with Messrs Setka and Reardon) advanced two other submissions which were put separately but have some interlinking.
145. One was that the processes adopted in relation to the Boral study did not give the CFMEU a fair time to consider and respond to the allegations.¹⁴⁸ The submission is based on the service of various statements by Boral customers in the three weeks before the Boral

¹⁴⁷ Boral MFI-3, tab 1.

¹⁴⁸ CFMEU submissions, 14/11/14, Pt 8.2, para 8.

hearing resumed on 18 September 2014 to continue the first hearing on 7 July 2014.¹⁴⁹ That may explain a difficulty in cross-examining the customers on 18 September 2014. It does not explain why no CFMEU evidence was offered to counsel assisting with a view to the Boral-related evidence being answered. No application was made for the fixing of further hearing days on which to cross-examine or have further evidence received. Instead the CFMEU publicly indicated that it would not challenge or respond to the statements from Boral's customers because of the litigation it was involved in with Boral.¹⁵⁰ The CFMEU had previously adopted a contrary position on 7 July 2014, to the effect that it did want to respond to and challenge the evidence. The CFMEU did not suggest on 18 September 2014 or at any time prior to putting on its written submissions on 14 November 2014 that it wanted more time to put on responsive statements or needed more time to investigate. The statements from Boral's customers were in respect of incidents which had already been dealt with extensively in the statements of Boral witnesses in July 2014. The Boral customers described the view from the Boral side, the customers described the view from their side. The CFMEU has been in a position to investigate and deal with those matters for over four months.

146. The other CFMEU submission was that the rule in *Jones v Dunkel* could not be applied because it was counsel assisting who had failed to call witnesses and that there was no obligation on the CFMEU to

¹⁴⁹ CFMEU submissions, 14/11/14, Pt 8.2, paras 7-8.

¹⁵⁰ Mr Agius, 18/9/14, T:76.43-77.3.

volunteer evidence.¹⁵¹ In consequence it was said that no findings should be made against Messrs Setka and Reardon.¹⁵² Of course there is no obligation on the CFMEU to volunteer evidence. The question is what flows from its failure to take up an opportunity to do so. The initial hearings on the Boral issue were in Melbourne in the week beginning 7 July 2014. The hearings were regulated by Practice Direction 1. Practice Direction 1 contemplated that following a witness giving evidence, if any person wished to advance material bearing on the accuracy of the evidence given by that witness, a second witness could prepare a statement setting out the evidence that the second witness would give if called. This procedure, which has been used in previous Royal Commissions, balanced on the one hand the need for a person affected by the evidence given by a witness to have the opportunity to reply to it, and, on the other hand, the need to identify and isolate the area of factual contest with a view to the hearing proceeding more expeditiously.

147. Practice Direction 1, para 3, stated:

Where the Commissioner thinks it appropriate, he may dispense with or vary these practices and procedures, and any other practices or procedures that are subsequently published or adopted.

148. The CFMEU, Mr Setka and Mr Reardon made no application for a variation to Practice Direction 1. Instead, senior counsel for the CFMEU, Mr Setka and Mr Reardon made his declaration at the start of the proceedings on 7 July about the CFMEU's concern for the

¹⁵¹ CFMEU submissions, 14/11/14, Pt 1, paras 29-36.

¹⁵² CFMEU submissions, 14/11/14, Pt 8.2, paras 9-15.

reputations of individuals who may be adversely affected by the evidence, which was quoted above.¹⁵³

149. The individuals to whom senior counsel referred must have included Mr Setka and Mr Reardon. They were persons ‘who may be adversely affected by the evidence’. The only reasonable conclusion to be drawn from the quoted statement was that Mr Setka and Mr Reardon were proposing to supply statements to counsel assisting in the ordinary course. Had either of them done so, he would have been called by counsel assisting to give that evidence.
150. At some point the CFMEU radically changed its strategy. The CFMEU, Mr Setka and Mr Reardon chose not to contest any of the evidence. Having made that tactical decision, and having chosen in their own interests not to go into evidence, they cannot contend that there should be no findings against them in the Interim Report. Nor can they prevent any reliance on a principle analogous to *Jones v Dunkel*.
151. The reasoning involved in that principle does not depend on using inferences as a substitute for evidence. There is direct and unchallenged evidence from the witnesses from Boral and Boral’s customers. Because it is uncontradicted, it may more readily be accepted. And where inferences can be drawn from it, there is no good reason why those inferences should not be drawn more strongly. No good reason was advanced to explain their decision not to challenge that evidence. Further, in the CFMEU application for authorisation to

¹⁵³ See paras 138-139 above.

be represented it was said that its appearance would assist the Commission in ‘enabling it to consider all relevant matters’. There is no reason to doubt the bona fides of that assurance. In that event, if Mr Setka or Mr Reardon had something relevant to contribute, they would have done so. That they have not done so indicates that they cannot contradict the Boral evidence and the evidence of the Boral customers.

152. The CFMEU submitted that the reasoning which led counsel assisting to urge a delay in considering Katherine Jackson’s position pending the outcome of civil litigation brought against her by a branch of the HSU ought to produce the same consequence in relation to the litigation brought by Boral against the CFMEU.¹⁵⁴ This submission proceeds on the incorrect premise that the two case studies are the same. A few examples of the many differences may be selected. With Boral there is a discrete body of uncontested factual material capable of assessment, the CFMEU has judgment against it, and even if that judgment were reversed, the suit against the CFMEU would be dismissed and the proceedings would no longer exist. In the case of Katherine Jackson, there is no judgment, the litigation appears destined to continue, there is no discrete body of uncontested factual material capable of ready assessment, and the opposing parties to the civil suit appeared before the Commission and advanced contrary positions about the materials in such a way as to make it more (rather than less) difficult for a concluded view to be taken about them. In addition, the parties to the HSU-Jackson civil case have each expressly concurred with the course proposed by counsel assisting.

¹⁵⁴ CFMEU submissions, 14/11/14, Pt 8.2, paras 33-36.

The ACCC Federal Court Proceeding

153. An important event has taken place since the delivery of the CFMEU's written submissions on 14 November 2014. Since 7 October 2014 it has been widely known that this Commission's Interim Report will be presented on 15 December 2014. The ACCC commenced Federal Court proceedings against the CFMEU, Mr Setka and Mr Reardon on 20 November 2014. As the late Joseph Vissarionovich Stalin used to say, this is no coincidence.
154. In those proceedings the ACCC seeks among things pecuniary penalty orders and publication orders. The proceedings are civil in nature.¹⁵⁵ The factual matters pleaded in the ACCC statement of claim are similar to the factual matters recounted above. The ACCC has alleged that the respondents engaged in conduct that involved a contravention of s 45D of the *Competition and Consumer Act* 2010 (Cth) and an attempt to induce Boral to contravene s 45E of that Act. The ACCC does not allege the existence of a cartel between the CFMEU and the Boral customers. That may be on the basis that it views the conduct of the Boral customers as being independent, not concerted. In passing, an argument that it is not necessary to establish the existence of communications between all of the participants to a cartel arrangement or understanding may be foreshadowed.¹⁵⁶
155. The ACCC Federal Court proceeding is at a very early stage. It is reasonable to expect that it will be some time before there is a trial. The first directions hearing is listed for 12 December 2014. It is not

¹⁵⁵ *CEPU v ACCC* (2007) 162 FCR 466.

¹⁵⁶ See below paras 219 - 221.

clear what factual and legal issues are in dispute. No doubt that will become clearer when and if the CFMEU puts on a defence. At present, however, it is unclear whether any of the factual matters alleged will be in serious contest.

156. Even assuming that there turns out to be some factual issues, the ACCC Federal Court proceeding will be heard by a judge. The court which hears the matter will decide it on the basis of the particular body of evidence tendered, having seen that evidence tested through cross-examination, and having heard detailed argument from the parties as to what facts should be found on the basis of the evidence and as to how the law is to be applied to those facts.
157. In those circumstances it is difficult to see, as a matter of ‘practical reality’ as opposed to ‘theoretical tendency’,¹⁵⁷ what risk any expression of views in the Interim Report poses to the course of justice in the Federal Court. This is not a case where the Commission has attempted to summons a person who is the subject of a criminal charge to give evidence, thereby impinging upon that person’s right to silence at the criminal trial and thereby affecting the person’s defence.¹⁵⁸ Attempts to compel Messrs Setka and Reardon to give evidence before the Commission about matters which are in contest in the Federal Court might cause issues of that kind to arise. But no attempt is being made. Further, since this is not a case where the proceedings in question will be determined by a jury, there can be no rational fear that

¹⁵⁷ *Hammond v Commonwealth of Australia* (1982) 152 CLR 188 per Gibbs CJ.

¹⁵⁸ *Hammond v Commonwealth of Australia* (1982) 152 CLR 188.

the Interim Report and publicity about it would influence the outcome of the proceedings.¹⁵⁹

158. No real risk to justice has been identified by the CFMEU, even though it raised the ACCC investigation as a basis for contending that this Commission should not express conclusions. It is that investigation which has led to the Federal Court Proceeding. In written submissions dated 25 November 2014, counsel assisting invited the CFMEU to make a further submission on this discrete subject if it wished. The CFMEU did not apply for leave to deliver any further written submission. In oral argument on 28 November 2014, it submitted only that the Interim Report should not make findings of contraventions against the respondents to the ACCC Federal Court proceeding. That submission is acceded to for reasons discussed in Chapter 1. No finding of a contravention of the Act has been stated. All that is said is that certain behaviour may constitute a contravention.

Evidence of the Boral customer witnesses considered in its own right

159. In any event and irrespective of any analogy with *Jones v Dunkel*, the evidence of the Boral customer witnesses is truthful and generally reliable.
- (a) None of the Boral customer witnesses have any motive falsely to implicate the CFMEU, its members or officers. To the contrary, they have a great material and financial interest in exculpating and pacifying the CFMEU. Their evidence

¹⁵⁹ *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25; *Hammond v Commonwealth of Australia* (1982) 152 CLR 188.

against the CFMEU is strongly against the industrial and financial interests of the businesses they work for. They know that the CFMEU has a long memory. They know it has an instinct for punishment. To adapt Mr Reardon's words to Mr Milano on 4 March 2014, like Boral, they 'will pay for this'.¹⁶⁰

- (b) To a very large extent the evidence of the witnesses is direct evidence of what they saw at relevant construction sites, evidence of what they were told by CFMEU shop stewards at those construction sites, or evidence corroborating the evidence of other witnesses who attest to what they were told by CFMEU shop stewards.
- (c) The reliability of the evidence given by the Boral customer witnesses in relation to the CFMEU's ban of Boral is reinforced by the striking similarity of the CFMEU conduct reported at the various construction sites.

Evidence of the Boral witnesses considered in its own right

160. Again, irrespective of any analogy with *Jones v Dunkel*, the evidence of the Boral witnesses is truthful and reliable. They have no apparent motive to lie. Where relevant contemporaneous documents exist their evidence is consistent with those documents. Their evidence is consistent with the general pattern of evidence given by the Boral customer witnesses. In some cases it is directly corroborated by evidence of the Boral customer witnesses. Those of the Boral

¹⁶⁰ See para 106.

witnesses who gave oral evidence were entirely satisfactory in demeanour. They gave the strong impression of being very competent and professional executives concerned only to ensure that their employer could carry on its business with customers who never complained about the quality of Boral products or service. They showed no spite or animus against the CFMEU.

161. For obvious reasons, some of the evidence given by the Boral witnesses is hearsay, consisting of reports made to them (or others) by Boral customers about what was said to them by CFMEU officials on site. Although the Commission is not bound by the rules of evidence, it may of course have regard to those rules when assessing the reliability of evidence. Even under the rules of evidence, and ignoring the many exceptions to the hearsay rule as now applying under the *Evidence Act 2008* (Vic), the evidence of the Boral witnesses about what customers reported to them is admissible to prove the fact of the report of a CFMEU ban by the customer. The existence of numerous reports of a CFMEU ban from a variety of sources over an extended period is relevant to demonstrating, and is in fact very good evidence of, the fact of the CFMEU ban.

162. In particular, the evidence of Mr Dalton and Mr Head concerning what occurred and was said at the 23 April 2013 meeting was truthful and reliable. Both men hold senior positions in Boral. Their accounts are consistent. Thus they corroborate each other. Mr Kane's evidence plainly shows that the evidence was not of recent invention. Their accounts are also confirmed by independently made contemporaneous notes of the meeting. There is nothing inherently improbable or

implausible in their evidence. Their accounts may be accepted in their entirety.

The effect of the default judgment

163. It is safe to act on the evidence of both the Boral witnesses and the Boral customer witnesses for another reason.

164. On 5 April 2013, Hollingworth J directed the CFMEU to file and serve a defence by 4pm on Friday 17 May 2013. The CFMEU did not comply with that direction. Her Honour gave judgment in default of defence on 20 May 2013. Those events meant that the CFMEU was taken to admit all the allegations of material fact in the amended statement of claim. Among those allegations of material fact are those made in paragraphs 4-11.¹⁶¹

4. It is and, at all material times, was the practice of the CFMEU to appoint, at each Victorian Construction Project site, a person or persons to fulfil the role of, or otherwise to act as, its “delegate”, “shop steward” or “job representative” for that site.
5. Each of the persons who, at times material to this statement of claim, was appointed as described in paragraph 4 above (each of whom is referred to, hereafter, as a “**Delegate**”) was authorised by the CFMEU to, amongst other things:
 - (a) liaise, on behalf of the CFMEU, with management representatives at the Victorian Construction Project site in connection with which they were so appointed; and
 - (b) communicate, implement and enforce – on behalf of the CFMEU and in howsoever a manner that they considered appropriate – the policies of the CFMEU at that Victorian Construction Project site.

¹⁶¹ Boral MFI-1, Vol 1, tabs 8, 9.

6. On or about Thursday, 14 February 2013, the CFMEU adopted a policy, or otherwise resolved, to the effect that the entities, businesses and individuals that manage or perform work in connection with Victorian Construction Projects (hereafter, **“Victorian Construction Principals and Subcontractors”**) ought not to, in connection with such management or the performance of such work, receive, use or work with concrete supplied by either of Boral or Alsafe.

165. The particulars to paragraph 6 defined the expression ‘the Ban Against Boral and Alsafe’ as the conduct described in paragraph 6. The pleading continued:

...

- 6A. On or about – or, in any event, prior to – Wednesday, 27 March 2013, the CFMEU adopted a policy, or otherwise resolved, to the effect that Victorian Construction Principals and Subcontractors ought not to, in connection with the management of, or the performance of work in connection with, Victorian Construction Projects, receive, use or work with any products supplied by any of the plaintiffs.

166. The particulars to paragraph 6A defined the expression ‘The Ban Against All Boral Products’ as the conduct described in paragraph 6A. The pleading continued:

7. Since Thursday, 14 February 2013, the CFMEU has communicated to Victorian Construction Principals and Subcontractors the following, namely:
 - (a) the existence of the Ban Against Boral and Alsafe; and
 - (b) its intention to enforce – or, otherwise, to support – that ban by procuring or encouraging individuals who are employed or otherwise engaged to work at Victorian Construction Project sites and whose work includes, or would normally or otherwise include, receiving, using or working with concrete (hereafter, **“Concrete Workers”**), to refuse or fail insofar as involves concrete supplied by either of Boral or Alsafe, to perform that work as, if or when directed or required, by any person, to do so (which refusals or failures are referred to

hereafter as, “**Refusals by Concrete Workers to Work With Boral and Alsafe Concrete**”).

...

7A. Since Wednesday, 27 March 2013, the CFMEU has communicated to Victorian Construction Principals and Subcontractors the following, namely:

- (a) the existence of the Ban Against All Boral Products; and
- (b) its intention to enforce – or, otherwise, to support – that ban by procuring or encouraging individuals who are employed or otherwise engaged to perform construction work at Victorian Construction Project sites (hereafter, “**Construction Workers**”), to refuse or fail, insofar as involves building products supplied by any of the plaintiffs, to perform that work as, if or when directed or required, by any person, to do so (which refusals or failures are referred to hereafter as, “**Refusals by Construction Workers to Work With Boral Products**”).

...

8. Each of the Concrete Workers is and/or, at all material times, was party to a contract pursuant to which he is and/or was employed – or, alternatively, engaged – to perform work at a Victorian Construction Project site.

...

8A. Each of the Construction Workers is and/or, at all material times, was party to a contract pursuant to which he is and/or was employed – or, alternatively, engaged – to perform work at a Victorian Construction Project site.

...

9. There are and, at all material times, were items of each of the contracts referred to at paragraphs 8 and 8A above, relevantly including that the individual Concrete Worker or Construction Worker who is and/or was party to each such contract will and/or would, at the Victorian Construction Project site at which he is and/or was employed or engaged – and in such manner as he is and/or was reasonably directed or required to by his employer or its nominee – perform tasks associated with the receipt or use of,

and otherwise work with, products supplied by any of the plaintiffs (hereafter, “**the Lawful Direction Clause**”).

10. The procuring or encouraging of either or both of:

(aa) Refusals by Concrete Workers to Work With Boral and Alsafe Concrete; and

(ab) Refusals by Construction Workers to Work With Boral Products,

if carried out at or in connection with individual Victorian Construction Project sites, would involve, or would have involved, the CFMEU, by its Delegate or Delegates at each such site (or howsoever otherwise) – or, alternatively the Delegate or Delegates at each such site, in concert with the CFMEU:

(a) intentionally procuring the breach, by individual Concrete Workers or Construction Workers employed or engaged (as the case may be) to perform work at that site, of the Lawful Direction Clause of the contract pursuant to which each such worker was so employed or engaged; and

(b) hindering or preventing, contrary to sec. 45D of the *Competition and Consumer Act 2010* (Cth), the acquisition, by Victorian Construction Principals and Subcontractors employed or engaged at that site, of (respectively):

(i) concrete from Boral and Alsafe (or one or other of them); and

(ii) building products from any one or more of the plaintiffs,

in each case for the purpose, and with the likely effect, of causing the plaintiffs’ businesses (or the business of one or more of the plaintiffs) substantial loss or damage.

11. Alternatively to paragraph 7 above:

(a) on or about Thursday, 14 February 2013 – and with the intention of causing each of Boral and Alsafe loss or damage – the CFMEU and Delegates from Victorian Construction Project sites conspired to communicate to Victorian Construction Principals and Subcontractors (or some of them) as follows, namely:

- (i) the existence of the Ban Against Boral and Alsafe; and
- (ii) the intention of the CFMEU and/or the Delegates to enforce – or, otherwise, to support – that ban by procuring or encouraging Refusals by Concrete Workers to Work With Boral and Alsafe Concrete,

(hereafter, the “**Concrete Ban Communications**”); and

- (b) since Thursday, 14 February 2013 – and pursuant to the conspiracy pleaded at subparagraph (a) above – the Delegates (or some of them) have effected each of the Concrete Ban Communications.

...

11A. Alternatively to paragraph 7A above:

- (a) on or about Wednesday, 27 March 2013 – and with the intention of causing each of the plaintiffs loss or damage – the CFMEU and Delegates from Victorian Construction Project sites conspired to communicate to Victorian Construction Principals and Subcontractors (or some of them) as follows, namely:

- (i) the existence of the Ban Against All Boral Products; and
- (ii) the intention of the CFMEU and/or the Delegates to enforce – or, otherwise, to support – that ban by procuring or encouraging Refusals by Construction Workers to Work With Boral Products,

(hereafter, the “**Boral-wide Ban Communications**”); and

- (b) since Wednesday, 27 March 2013 – and pursuant to the conspiracy pleaded at subparagraph (a) above – the Delegates (or some of them) have effected each of the Boral-wide Ban Communications.

...

167. Those material facts, now admitted by the CFMEU, are consistent with and supportive of the evidence of the Boral witnesses and the Boral customer witnesses.

D – LEGAL ISSUES

168. The evidence gives rise to the potential contravention of a number of legislative provisions.

Secondary boycott provisions: *Competition and Consumer Act 2010* (Cth), section 45D

169. Section 45D of the *Competition and Consumer Act 2010* (**the Act**) prohibits secondary boycotts. The section provides:

- (1) In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:
 - (a) that hinders or prevents:
 - (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
 - (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and
 - (iii) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.
- (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

(3) Subsection (1) applies if the fourth person is a corporation.

(4) Subsection (1) also applies if:

(a) The third person is a corporation and the fourth person is not a corporation; and

(b) The conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.

170. Contravention of s 45D is not a criminal offence. Instead, a person who contravenes s 45D is liable to a pecuniary penalty: the Act, s 76(1). The maximum penalty payable is \$750,000 in respect of a body corporate and \$500,000 in respect of a person who is not a body corporate: the Act, ss 76(1A)(a), (1B)(b). In addition, a person who suffers loss or damage by reason of conduct in contravention of s 45D may recover the amount of the loss or damage: the Act, s 82. Section 87 also grants a power to order monetary relief. And s 80 creates a power to grant injunctive relief.

171. The scope of s 45D is affected by s 45DC. That section provides that where two or more persons, each of whom is a member or officer of the same 'organisation of employees', engage in conduct in concert with each other then, unless the organisation can prove otherwise, the organisation is taken to have engaged in concert with those persons and for the same purposes. 'Organisation of employees' means an organisation that exists or is carried on for the purpose, or for purposes that include the purpose, of furthering the interests of its members in relation to their employment eg a trade union. The section creates a rebuttable presumption that a trade union has engaged in conduct

proscribed by s 45D if two or more of the participants in the conduct are members or officers of the union.¹⁶²

172. Section 45DD creates a number of defences to s 45D. Most relevantly, s 45DD(2) provides that if an employee, or two or more employees employed by the same employer, engage in conduct in concert with an organisation of employees and the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the employee, or any of the employees engaging in the conduct, then relevantly the organisation of employees does not contravene s 45D.

173. On the evidence before the Commission, the CFMEU's conduct from 14 February 2013 onwards was conduct, which in concert with a number of CFMEU shop stewards and senior officers:

- (a) hindered or prevented a number of customers of Boral from acquiring goods from Boral, with the purpose and effect, or likely effect, of causing substantial loss or damage to Boral's business; and
- (b) hindered Boral from supplying goods to Grocon with the purpose and likely effect of causing substantial loss or damage to Grocon's business.

174. 'Acting in concert' involves 'knowing conduct, the result of communications between the parties and not simply simultaneous

¹⁶² *ANL Container Line Pty Ltd v Maritime Union of Australia* [2000] ATPR 41-769 at 41,079–41,080 per Lee J.

actions occurring spontaneously'.¹⁶³ Acting in concert can be inferred from the conduct of the parties, as where there is such a concurrence of time, character, direction and result as to lead to the inference that apparently separate acts were the outcome of pre-concert.¹⁶⁴

175. There is no direct evidence before the Commission of communication between the various CFMEU shop stewards who implemented the black ban at the various construction sites in Melbourne, The inference is that their actions against Boral were part of a deliberate and orchestrated course of conduct originating from the CFMEU. The deliberate and orchestrated nature of the conduct is evident from the widespread operation of the ban involving a number of Boral customers at numerous construction sites over a lengthy period. It is confirmed by the evidence as to what was said by Mr Setka at the 23 April 2013 meeting, in particular his reference to the CFMEU being 'willing to significantly ramp up our campaign'.¹⁶⁵ The evidence from all of the Boral witnesses and Boral customer witnesses is to the effect that the CFMEU, as an organisation, black banned Boral. The concept of an organisation-wide ban, being carried on as a campaign, is the very essence of conduct in concert.

176. 'Hinder' in s 45D 'has received a broad construction, as in any way affecting to an appreciable extent the ease of the usual way of supplying or acquiring goods or services'.¹⁶⁶ The conduct preventing

¹⁶³ *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 373 per Bowen CJ.

¹⁶⁴ *R v Associated Northern Collieries* (1911) 14 CLR 387 at 400 per Isaacs J.

¹⁶⁵ Paul Dalton, witness statement, 9/7/14, para 36.

¹⁶⁶ *Australian Wool Innovation v Newkirk* (2005) ATPR 42-053; [2005] FCA 290 at [34] per Hely J.

or hindering supply or acquisition need not be physical interference but can consist of threat and intimidation.¹⁶⁷

177. In some cases, the CFMEU's conduct actually prevented the acquisition of goods by Boral's customers.¹⁶⁸ In other cases, the implicit or explicit threat was made by CFMEU shop stewards that if the customer acquired concrete or other products from Boral, the trucks would be stopped and the customer would experience delays in unloading the goods, with consequent delays in construction.¹⁶⁹ The threatening and intimidatory conduct in question made it more difficult for Boral's customers to acquire goods from Boral, thereby hindering the acquisition of goods from Boral.
178. Further, the ban also had the effect of making it more difficult for Boral to supply concrete to Grocon. By targeting Boral's customers, the effect of the ban was to cause substantial economic loss to Boral.¹⁷⁰ The suffering of that loss hindered, in the sense of restricted and impaired, Boral's ability to supply Grocon.
179. Section 45D(2) contemplates that a secondary boycott may be engaged in for a number of purposes. It is sufficient if one of the purposes of engaging in the relevant conduct is a proscribed purpose: s 45D(2).

¹⁶⁷ *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228 at 251 per Deane J, the other members of the Court agreeing on this point; *Australian Builders' Labourers' Federated Union of Workers – Western Australian Branch v J-Corp Pty Ltd* (1993) 42 FCR 452 at 459–460 per Lockhart and Gummow JJ.

¹⁶⁸ See above paras 62–64.

¹⁶⁹ See above, eg, paras 44, 55, 58, 59.

¹⁷⁰ See paras 121–127 above.

180. In the present case, the CFMEU had two purposes in engaging in the ban of Boral. One was to cause substantial damage to Boral so as to intimidate it into stopping supply to Grocon. The second was, by intimidating Boral into ceasing supply to Grocon, to cause substantial damage to Grocon. The existence of those purposes is evidenced by Mr Dalton's and Mr Head's account of the 23 April 2013 meeting.¹⁷¹ The existence of the first purpose is supported by the ban against Boral, its prolonged nature and its extension beyond Boral Concrete to all Boral's products. Additional evidence of the second purpose includes Mr Setka's initial call to Mr Dalton in late 2012.¹⁷²
181. The proscribed purposes must be to cause *substantial* loss or damage to the target corporation. To satisfy this requirement it is not necessary to establish that the loss or damage would be a major blow to the target's business. It is sufficient to show that the loss or damage would be 'real or of substance and not insubstantial or nominal'.¹⁷³ Being prevented from carrying out a contract for reward is 'substantial' in the requisite sense.¹⁷⁴
182. Plainly, the actual loss suffered by Boral from the CFMEU's conduct may be substantial. Boral estimates it has suffered loss of between \$8–\$10 million to the end of June 2014.¹⁷⁵ It has clearly lost many orders of concrete. A purpose of causing substantial damage can be inferred

¹⁷¹ See above paras 72-89.

¹⁷² See above para 13.

¹⁷³ *Building Workers' Industrial Union of Australia v ODCO Pty Ltd* (1991) 29 FCR 104 at 140 per Wilcox, Burchett and Ryan JJ.

¹⁷⁴ *A&L Silvestri Pty Ltd v CFMEU* (2007) 165 IR 94; [2007] FCA 1047 at [78] per Gyles J.

¹⁷⁵ See above para 121.

from the amount of damage caused. In any event, the purpose of the CFMEU's ban was to inflict a substantial loss so as to intimidate Boral into ceasing supply to Grocon. Anything less than a substantial loss to Boral would be ineffective in achieving the CFMEU's ultimate goal of damaging Grocon.

183. The purpose of the CFMEU's ban was to cause *substantial* damage to Grocon. Adapting Mr Setka's words, the CFMEU's war against Grocon was to be won by cutting the major supply line to Grocon, which was concrete, because without it Grocon could not 'survive'.¹⁷⁶ Ms Maney's evidence was that without concrete supplied by Boral, Grocon would not be able to operate 'without a lot of difficulty'.¹⁷⁷
184. In addition to possessing the proscribed purpose, the conduct must be conduct which 'would have or be likely to have the effect, of causing substantial loss or damage' to the target. The language of the section is clearly 'forward looking': the enquiry is not whether substantial loss or damage is actually suffered.¹⁷⁸ Accordingly, if the phrase 'be likely to have' is to be given any work to do, it must mean something other than on the balance of probabilities. The better view is that conduct will 'be likely to have the effect of causing substantial loss or damage' to the target if there is having regard to the circumstances 'a real chance or possibility that [the conduct] will, if pursued, cause such loss or damage'.¹⁷⁹ Whether conduct is likely in that sense 'is a question to be

¹⁷⁶ See above para 80.

¹⁷⁷ See also para 12.

¹⁷⁸ *Building Workers' Industrial Union of Australia v ODCO Pty Ltd* (1991) 29 FCR 104 at 139 per Wilcox, Burchett and Ryan JJ.

¹⁷⁹ *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 381–382 per Deane J (FC).

determined by reference to well-established standards of what could reasonably be expected to be the consequence of the relevant conduct in the circumstances', relevant to which is the purpose for which the conduct was engaged in.¹⁸⁰

185. The argument above¹⁸¹ supports the view that the CMFEU's conduct satisfies this requirement of the section.
186. In relation to the effect or likely effect on Grocon, because Boral did not succumb to the CFMEU's pressure and intimidation and continued to supply Grocon, there is no evidence before the Commission of any specific loss suffered by Grocon as a result of the CFMEU's conduct. But that does not matter. The CFMEU's purpose was to cause loss. It could reasonably have been expected that Boral would succumb to the CFMEU's intimidation and pressure, as Boral's customers did. Plainly the CFMEU thought that Boral would succumb, since that is why they started the ban in the first place. In that event, there would inevitably have been substantial loss to Grocon.¹⁸²
187. The defendant has the onus of establishing any defence under s 45DD of the Act.¹⁸³

¹⁸⁰ *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 382 per Deane J.

¹⁸¹ See para 182.

¹⁸² See para 12 above.

¹⁸³ *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union* (1985) ATPR 40-598 at 46,841; *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* (2008) 169 FCR 583 at [40]–[42] (FC).

188. Given that none of the CFMEU shop stewards was employed by Boral and the CFMEU has no coverage of Boral Southern Region employees¹⁸⁴ there is no prospect of any of the defences in s 45DD applying to the secondary boycott of Boral.
189. In relation to the secondary boycott of Grocon, the persons who implemented the black ban of Boral were CFMEU shop stewards employed at sites other than Grocon sites. Accordingly, even if (as might be asserted) the dominant purpose of the secondary boycott related to safety on Grocon sites, the defence in s 45DD(2) could not apply as that defence only relates to the working conditions of employees engaged in the conduct constituting the secondary boycott.
190. Hence each of the CFMEU, and the various CFMEU shop stewards, organisers and officers who implemented the ban (including Messrs Setka and Reardon) may have contravened s 45D of the Act. Since the ACCC has already commenced proceedings for contraventions of s 45D, the Interim Report does not include a separate recommendation on this point.

Arrangements affecting the supply or acquisition of goods: *Competition and Consumer Act 2010 (Cth)*, section 45E

191. Section 45E of the Act deals with conduct that indirectly leads to a secondary boycott. There are two possibilities which are here relevant: the prohibition in a supply situation (s 45E(2)) and the prohibition in an acquisition situation (s 45E(3)). In summary, those subsections relevantly provide that:

¹⁸⁴ See Paul Dalton, witness statement, 9/7/14, para 2.

- (a) a person (the first person) who has been accustomed, or is under an obligation, to supply goods or services to, or acquire goods or services from, another person (the second person),
- (b) must not, provided at least one of the first and second persons is a corporation,
- (c) make a contract or arrangement, or arrive at an understanding, with an organisation of employees (eg the CFMEU),
- (d) if the proposed contract arrangement or understanding contains a provision included for the purpose (or for purposes including the purpose) of preventing or hindering the first person from supplying or continuing to supply such goods or services to, or acquiring or continuing to acquire such goods or services from, the second person.

192. The relevant legal principles are uncontroversial and were conveniently summarised by Finn J in *ACCC v CFMEU* as follows (omitting reference to the authorities):

First, for an ‘arrangement or understanding’ to be found, there must be a ‘meeting of the minds’ of the parties under which one or both of them committed to a particular course of action ... Secondly, a mere expectation, as a matter of fact, or a hope that something might be done or happen or that a party will act in a particular way, is not of itself sufficient to found an arrangement or understanding ... Thirdly, the necessary consensus or meeting of minds need not involve, though it commonly will in fact embody, a reciprocity of obligation ... Fourthly, as to the requirement that the provision be included in the arrangement or understanding for the proscribed purpose or for purposes which include that purpose, the test of purpose is a subjective one and the proscribed subjective purpose is to be had by each party to the arrangement or understanding ... Fifthly, the purpose of conduct for present purposes is the end sought to be accomplished by the conduct and is to be

distinguished from the motive for such conduct which is the reason for seeking that end ... Sixthly, the term 'hindering' in s 45E(3) has been given a broad construction and encompasses conduct which in any way affects to an appreciable extent the ease of the usual way of supplying or acquiring an article or service.¹⁸⁵

193. Like s 45D, s 45E is a penalty provision: the Act, s 76(1). Monetary remedies lie under s 82 and s 87. Injunctive relief is available under s 80. The primary liability for a contravention of s 45E rests with the person who has made the contract, arrangement or understanding with the organisation of employees.
194. However, paragraphs (c) – (f) of s 76(1) of the Act create accessorial liability in a trade union.¹⁸⁶ In particular, a trade union that attempts to induce (whether by threats or promises or otherwise), is knowingly concerned, or party to, a contravention of s 45E by another person is liable to a pecuniary penalty. The maximum penalty is \$750,000: the Act, s 76(1A)(a).
195. Where it is said that a person has attempted to induce a contravention it is necessary to prove an intention to bring about the conduct which constitutes the relevant contravention.¹⁸⁷ Where it is said that a person is knowingly concerned in or is party to a contravention it must be shown that that person had knowledge of the essential elements

¹⁸⁵ *ACCC v CFMEU* [2008] FCA 678 at [10].

¹⁸⁶ *CEPU v ACCC* (2007) 162 FCR 466, [188] at [191] per Weinberg, Bennett and Rares JJ. Section 76(2) prevents an officer of a trade union being an accessory to a contravention of s 45E.

¹⁸⁷ *Trade Practices Commission v Service Station Association Ltd* (1992) 109 ALR 465 at 487–488 per Heerey J.

making up the primary contravention, although that person need not know that the conduct was a contravention.¹⁸⁸

196. The application of the law to the evidence before the Commission supports the following conclusions.

(a) The CFMEU, through Mr Setka and Mr Reardon, attempted to induce Boral (the first person) to enter into an agreement or understanding with the CFMEU which would contain a provision the purpose of which was to hinder or prevent Boral from supplying concrete to Grocon (the second person). Accordingly, the CFMEU may have been liable pursuant to s 76(1)(d) of the Act.

(b) Further:

(i) Boral's customers (the first persons), arrived at an agreement or understanding with the CFMEU which contained a provision the purpose of which was to hinder or prevent the customer from acquiring concrete from Boral or its relevant subsidiary (the second person). That conclusion would support a finding that the relevant Boral customers may have contravened s 45E.

(ii) The CFMEU may have been knowingly concerned in, and party to, the contraventions of each of the relevant Boral customers, thereby rendering the

¹⁸⁸ *Yorke v Lucas* (1985) 158 CLR 661.

CFMEU liable pursuant to s 76(1)(f) of the Act in relation to each of the contraventions.

197. On the evidence before the Commission, at the 23 April 2013 meeting, Mr Setka and Mr Reardon, on behalf of the CFMEU, attempted to induce Mr Dalton and Mr Head, on behalf of Boral, to enter into an arrangement or understanding with the CFMEU whereby Boral would cease supplying concrete to Grocon. The inducement for Boral to enter into the arrangement or understanding were threats that if Boral did not agree (1) the CFMEU would continue its existing ban, (2) the CFMEU would intensify its campaign, and (3) the CFMEU would ensure that Boral's market share was diminished. The sole purpose of the proposed arrangement or understanding was to prevent Boral's supply of concrete to Grocon. Further, as a key supplier, Boral was plainly a person 'accustomed, or under an obligation' to supply to Grocon.
198. For the purposes of s 76(1)(d) the fact that Boral did not agree to enter into the arrangement or understanding, and thereby did not itself contravene s 45E, is irrelevant. The person who attempts to induce is like the inciter at common law. Given the attempt by the State Secretary and Assistant State Secretary to induce Boral's entry into an arrangement or understanding with the CFMEU, the CFMEU may have had the relevant intention so as to render it liable under s 76(1)(d) of the Act.
199. It is necessary now to turn to possible contraventions by Boral customers. The reference to a 'person who has been accustomed to acquire' goods or services from a second person includes:

- (a) a regular acquirer of such goods or services;
- (b) a person who, when last acquiring goods or services, acquired them from the second person; and
- (c) a person who at any time during the immediately preceding 3 months, acquired such goods or services from the second person: the Act, s 45E(7).

200. Boral or one of its subsidiaries was a regular supplier to each of Meridian, Oceania, Drive Projects, BRC and Town & Country.¹⁸⁹ In relation to Equiset, Anglo Italian, Kosta Concreting, Squadron and S & A Paving, the evidence supports the conclusion that they had each acquired goods from Boral within the immediately preceding three months¹⁹⁰ and were hence within the definition of a person who has been accustomed to acquire goods.

201. There is no direct evidence of an express contract, arrangement or understanding having been made. However, an inference of such an express arrangement may be drawn where the parties' conduct exhibits 'a concurrence of time, character, direction and result'.¹⁹¹

202. As a result of the threats and pressure from officers and shop stewards of the CFMEU described earlier, the Boral customers agreed to the demand or request made by the CFMEU (through its officers and shop

¹⁸⁹ See paras 21, 25, 34, 40, 108, 117 above.

¹⁹⁰ See paras 34, 46, 53, 57, 59 above.

¹⁹¹ *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446 at 468 per Fisher J. See also *Norcast S AR L v Bradken Limited (No 2)* (2013) 219 FCR 14 at [263] per Gordon J.

stewards) not to acquire goods from Boral without first obtaining the CFMEU's permission. That at least satisfies the requirements of 'an arrangement or understanding'.¹⁹² The Boral customers may not have been happy with the arrangement or understanding reached but they arrived at it nonetheless. The fact that the customers succumbed to the union's pressure and intimidation is not a reason to conclude that there was no arrangement or understanding.¹⁹³ If the CFMEU did not threaten and pressure the Boral customers, the conclusion that there was an arrangement or understanding contrary to s 45E is even stronger.

203. In summary, on the evidence before the Commission, the CFMEU and each of the Boral customers may have made an arrangement or understanding pursuant to which the customer would not acquire goods from Boral for use at a CFMEU-controlled site unless the CFMEU gave its permission, and in return the CFMEU would allow and not delay construction at the construction site. For the reasons developed below,¹⁹⁴ the relevant arrangement or understanding was not a series of separate understandings between the CFMEU and the Boral customers, but may have been a single understanding to which the CFMEU and each of the Boral customers was a party, containing a separate provision in relation to each Boral customer.

¹⁹² See para 192 above.

¹⁹³ *Gibbins v Australasian Meat Industry Employees' Union* (1986) 12 FCR 450, 470 (Smithers J).

¹⁹⁴ See paras 219-221.

204. In the case of each Boral customer, the subjective purpose of the provision concerning the Boral customer may have been to prevent the Boral customer acquiring goods from Boral.
205. Again, there can be little doubt that if there were contraventions of s 45E of the Act by the Boral customers as a result of entry into an arrangement or understanding with the CFMEU, then the CFMEU would have been a party to the contraventions. The CFMEU would have been a party to the making of the arrangement or understanding and would have had knowledge of the essential facts making up the contravention.

Cartel provisions of *Competition and Consumer Act 2010* (Cth)

206. Sections 44ZZRF and 44ZZRG of the Act respectively make it an offence for a corporation to make, or give effect to, a contract, arrangement or understanding which contains a cartel provision within the meaning of s 44ZZRD.
207. Both offences are punishable on conviction by a fine not exceeding the greater of: (a) \$10 million, (b) three times the value of any benefits obtained which are reasonably attributable to the commission of the offence (where those benefits can be determined) or (c) where the value of the benefits obtained cannot be determined, 10% of the corporation's annual turnover during the preceding 12 month period: ss 44ZZRF(3), 44ZZRG(3).
208. It is sufficient to establish that a contract, arrangement or understanding contains a cartel provision if:

- (a) the provision has the purpose of directly or indirectly allocating between any or all of the parties to the contract, arrangement or understanding the persons or classes of persons who have supplied, or are likely to supply goods or services to any or all of the parties to the contract, arrangement or understanding (s 44ZZRD(3)(b)(ii)); and
- (b) at least two of the parties to the contract, arrangement or understanding are, or are likely to be, in competition with each other in relation to the supply of those goods or services (by the supplier) (s 44ZZRD(4)(c)).

209. Sections 44ZZRF and 44ZZRG only apply to a ‘corporation’ (relevantly defined in s 4 of the Act to be a body corporate which is a foreign, trading or financial corporations). However, the Act contains, as Schedule 1, what is known as the ‘Schedule version of Part IV’ which contains versions of ss 44ZZRF and 44ZZRG that apply more broadly to ‘persons’. Section 5 of the *Competition Policy Reform (Victoria) Act 1995* (Vic), read with ss 3(3) and 4 of that act and also s 17 of the *Interpretation of Legislation Act 1984* (Vic), applies the ‘Schedule version of Part IV’ as a law of Victoria. The provisions apply to and in relation to persons with a connection with Victoria: *Competition Policy Reform (Victoria) Act 1995*, s 5.

210. The Schedule versions of ss 44ZZRF and 44ZZRG are relevantly identical to ss 44ZZRF and 44ZZRG except that the reference to a ‘corporation’ is replaced with a reference to a ‘person’. A body corporate which commits an offence against those sections is subject to the same maximum penalty as a corporation which commits an offence

against the non-Schedule versions of the sections. An offence committed against those provisions by a person who is not a body corporate is punishable by 10 years' imprisonment or a maximum fine of \$340,000 or both: ss 44ZZRF(4), 44ZZRG(4).

211. Section 79 of the Act also imposes criminal liability on persons who are accessories to a contravention of ss 44ZZRF or 44ZZRG. The maximum penalty for a person who is not a body corporate is 10 years' imprisonment or a maximum fine of \$340,000 or both: s 79(1)(e). Where the person is a body corporate, the penalty is the same as for a corporation.
212. The provisions of the *Criminal Code* (Cth) apply to the offences under ss 44ZZRF and 44ZZRG, and also to the offences created by the *Competition Policy Reform (Victoria) Act* 1995 (see s 25 of that act). Under the *Criminal Code* (Cth), Commonwealth offences consist of physical elements and fault elements: *Criminal Code* (Cth), s 3.1(1). For each physical element it is necessary to prove the existence of a fault element.
213. Section 44ZZRF has two physical elements: (a) the making of the contract or arrangement or the arriving at an understanding and (b) the circumstance that the contract, arrangement or understanding contains a cartel provision. The fault element for the first physical element is intention: *Criminal Code*, s 5.6(1). The fault element for the second physical element is knowledge or belief: s 44ZZRF(2). Thus to establish a contravention of s 44ZZRF it must be shown that the alleged offender intended to make the contract etc, and had knowledge

or belief that the contract etc contained a provision which is a cartel provision. A similar analysis applies in relation to s 44ZZRG.

214. Sections 44ZZRJ and 44ZZRK of the Act create pecuniary penalty provisions which mirror ss 44ZRF and 44ZRG respectively. There are also Schedule versions of those sections which apply to persons.
215. The ACCC may apply under s 77 of the Act for pecuniary penalties under s 76. The maximum penalty for contravention of those sections by a body corporate is the same as for a corporation under ss 44ZZRF or 44ZZRG: s 76(1A)(aa). The maximum penalty for a contravention by a person who is not a body corporate is \$500,000: s 76(1B)(b).
216. To establish a contravention of the pecuniary penalty cartel provisions in the present case three elements would need to be established:
 - (a) The existence of a contract, arrangement or understanding between the CFMEU and Boral customers;
 - (b) The contract, arrangement or understanding must contain a provision which has a purpose of directly or indirectly allocating between the Boral customers the class of CFMEU approved concrete suppliers; and
 - (c) Two or more parties to the contract, arrangement or understanding must be in competition.
217. In addition, to establish criminal liability under the *Criminal Code* (Cth), it must be shown that the alleged contravener intended to make

the contract, arrangement or understanding and must have known or believed that the contract, arrangement or understanding contained a cartel provision.

218. There is little law concerning the operation of the cartel provisions. In *Norcast S AR L v Bradken Ltd*,¹⁹⁵ Gordon J stated that the first three of Finn J's propositions quoted above¹⁹⁶ applied also to the requirement of an arrangement or understanding under ss 44ZZRJ and 44ZZRK. In particular, her Honour stated that for an arrangement or understanding to exist it was necessary for there to be 'evidence of a consensus or meeting of the minds of the parties under which one party or both of them must assume an obligation or give an assurance or undertaking that it will act in a certain way which may not be enforceable at law'.¹⁹⁷

219. Her Honour did not consider the question whether in establishing the necessary consensus in the case of a multi-party arrangement or understanding it is necessary that all of the parties to the arrangement or understanding communicated with each other or whether it is sufficient to establish that (a) each party communicated with at least one other party to the arrangement or understanding and (b) through those communications each of the parties arrived at a common understanding (ie a consensus). In the context of provisions designed to stop cartel activity, there is no reason why it should be necessary to establish communication between all of the parties to the cartel, provided the necessary consensus can be established. This was

¹⁹⁵ (2013) 219 FCR 14.

¹⁹⁶ See para 192.

¹⁹⁷ *Norcast S AR L v Bradken Ltd* (2013) 219 FCR 14 at [263].

accepted by Gray J in *Australasian Meat Industry Employees Union v Meat & Allied Trades Federation of Australia*¹⁹⁸ in the context of s 45E:

It is clearly possible for an arrangement or understanding to be constituted when the only communication between the various parties is via a single intermediary. If that intermediary communicates to various persons an intention that each of them should act in a particular way with respect to a particular transaction or situation, and each thereafter acts in that particular way in the hope or belief that the other persons will act similarly, an arrangement or understanding will exist. It is necessary to be careful, however, in distinguishing that situation from one in which the intermediary enters into separate arrangements or understandings which each of the persons.

220. In the present case, on the evidence before the Commission, each of the Boral customers may have come to a common understanding with the CFMEU that they would cease to acquire Boral's products. Although there is no evidence of communication between the customers, the whole concept of a ban depends on collective action. The natural inference to be drawn from the circumstances is that each of the Boral customers may have come to an understanding with the CFMEU in the belief that their competitors had a similar understanding with the CFMEU. In that context this is sufficient to establish that there was an understanding between the CFMEU and the Boral customers by which each customer undertook not to acquire goods from Boral on CFMEU-controlled construction sites.
221. The understanding identified in the previous paragraph, by seeking to exclude non-CFMEU approved concrete suppliers (eg Boral) from the market, had the purpose of allocating between the Boral customers the class of CFMEU approved concrete suppliers.

¹⁹⁸ (1991) 32 FCR 318 at 330.

222. There is a question whether the required purpose must be ‘subjective’ or ‘objective’. *Dicta* in relation to the now-repealed s 45A, which concerned price-fixing arrangements, and therefore has some similarity with the cartel provisions, suggested that the required purpose of price-fixing in relation to s 45A was a subjective one.¹⁹⁹ However, s 44ZZRD(3) is not directed at price-fixing and the words ‘has the purpose of *directly or indirectly*’ suggest that an objective purpose is sufficient. Further, having regard to the mischief to which the cartel provisions are directed there is no reason why the requirement of purpose should be construed as limited to ‘subjective purpose’.
223. The Boral customers are in competition for the supply of concrete laying services and would appear to be in competition for the acquisition of concrete from concrete suppliers, such as Boral.
224. In relation to the mental elements required under the *Criminal Code*, there is insufficient evidence before the Commission to determine whether the Boral customers had a sufficient intention to enter into the relevant understanding with the CFMEU. However, the evidence of the 23 April 2013 meeting supports a conclusion that the CFMEU had the relevant intention and knowledge to render it criminally liable under s 44ZZRF or s 44ZRG of the *Competition Policy Reform (Victoria) Act 1995* (Vic).
225. Accordingly, the CFMEU (assuming that it is a body corporate which is not a corporation) may have contravened s 44ZZRF or s 44ZZRG of the *Competition Policy Reform (Victoria) Act 1995* (Vic).

¹⁹⁹ *ACCC v Australian Medical Association Western Australian Branch Inc* (2003) 199 ALR 423 at [243]-[247].

226. It is recommended that this Interim Report be referred to the Commonwealth Director of Public Prosecutions in order that consideration may be given to whether the CFMEU should be charged with and prosecuted for cartel conduct contrary to ss 44ZZRF and 44ZZRG of the *Competition Policy Reform (Victoria) Act 1995* (Vic).

Blackmail: *Crimes Act 1958* (Vic), section 87

227. Section 87 of the *Crimes Act 1958* (Vic) makes it an offence for a person to blackmail another person. The maximum penalty is 15 years' imprisonment. Section 87 relevantly provides:

- (1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—
 - (a) that he has reasonable grounds for making the demand; and
 - (b) that the use of the menaces is proper means of reinforcing the demand.
- (2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand.

228. There are relevantly four elements to the offence. There must be (1) a demand (2) made with intent to cause loss to another (3) with menaces (4) which is unwarranted.

229. Section 323 of the *Crimes Act 1958* (Vic) provides that a person who aids, abets, counsels or procures the commission of an indictable offence may be tried or indicted and punished as a principal offender.

230. Mr Setka, by making a demand with menaces at the 23 April 2013 meeting with the intention of causing loss to Grocon, may have committed the offence of blackmail. In addition, Mr Reardon either may have committed the offence of blackmail, or may be liable as an accessory pursuant to s 323 of the *Crimes Act 1958* (Vic).
231. On Mr Head's account of the 23 April 2013 meeting, Mr Reardon said in relation to the CFMEU's targeting of Boral trucks 'this is easy. Just stop supplying Grocon for two weeks'.²⁰⁰ His evidence was that Mr Setka made a similar statement: 'Just stop supplying Grocon for two weeks and this will go away'.²⁰¹ Mr Dalton's evidence of what Mr Setka said was similar: 'All you [Boral] have to do is stop supply to Grocon for a couple of weeks'.²⁰²
232. This evidence supports the conclusion that an express demand was made by Mr Setka and Mr Reardon for Boral to stop supply of concrete to Grocon. However, even if it were concluded that there was no express demand, it may be that an implicit demand was being made to Mr Dalton and Mr Head for Boral to cease supply to Grocon. As a matter of law it is well established that for the purposes of the section a demand need not be express, but can be implicit from the circumstances.²⁰³

²⁰⁰ Peter Head, witness statement, 9/7/14, para 41.

²⁰¹ Peter Head, witness statement, 9/7/14, para 43.

²⁰² Paul Dalton, witness statement, 9/7/14, para 40.

²⁰³ *R v Collister* (1955) 39 Cr App R 100 at 105 per Hilbery J; *R v Clear* [1968] 1 QB 670 (CA) at 675; *R v Lambert* [2010] 1 Cr App R 21 (CA) at [8].

233. On the evidence before the Commission, the demand by Mr Setka for Boral to cease supply to Grocon was made with an intention to cause loss to Grocon. Mr Head remembered the words: ‘the CFMEU is at war with Grocon and that if you want to starve the enemy you cut off their supply’.²⁰⁴ Mr Dalton remembered the words: ‘We’re at war with Grocon and in a war you cut the supply lines. Boral Concrete is a supply line to Grocon’.²⁰⁵ That is consistent with the other evidence concerning the ongoing dispute between the CFMEU and Grocon.²⁰⁶ The inference is open that he may have had the same intention as his superior at the CFMEU.
234. The word ‘menaces’ is to be ‘liberally construed and not as limited to threats of violence but as including threats of any action detrimental to or unpleasant to the person addressed. It may also include a warning that in certain events such action is intended.’²⁰⁷ Menaces may be established by a threat to property²⁰⁸ or to take action adversely affecting a company’s share price.²⁰⁹
235. The evidence from Mr Dalton and Mr Head²¹⁰ supports a conclusion that Mr Setka’s demand was coupled with three threats: (1) a threat that the CFMEU black ban of Boral would continue (2) a threat that

²⁰⁴ Peter Head, witness statement, 9/7/14, para 40.

²⁰⁵ Paul Dalton, witness statement, 9/7/14, para 35.

²⁰⁶ See paras 11-12 above.

²⁰⁷ *Thorne v Motor Trade Association* [1937] AC 797 at 817 per Lord Wright. See *Jessen v R* [1997] 2 Qd R 213 at 219 per Thomas J, White J agreeing.

²⁰⁸ *Director of Public Prosecutions v Kuo* (1999) 49 NSWLR 226; *DPP v Curby* [2000] NSWSC 745 at [5].

²⁰⁹ *R v Boyle* [1914] 3 KB 339 at 343.

²¹⁰ See Paul Dalton, witness statement, 9/7/14, paras 35-39, 42-43; Peter Head, witness statement, 9/7/14, paras 42, 44-45.

there would be intensification of the CFMEU's campaign against Boral, and (3) a threat that the CFMEU would ensure that Boral's market share was diminished. Each of these threats may have constituted menace within the meaning of the section.

236. As provided by the section, every demand with menaces is unwarranted unless the person making the demand 'does so in the belief — (a) that he has reasonable grounds for making the demand; and (b) that the use of the menaces is a proper means of reinforcing the demand.' The accused has the evidentiary onus of raising one or both of these matters. Once that onus is discharged, the prosecution must negative at least one of the requirements.
237. It is not clear on the evidence how Mr Setka could have believed that he had reasonable grounds for making the demand to Boral. It may be Mr Setka had concerns about the safety of workers at the Grocon site and believed that demanding Boral cease supply to Grocon was a reasonable way of ensuring that Grocon addressed those concerns. However, the connection between the two is remote.
238. In any event, on the available evidence, Mr Setka could not have believed the menaces (ie the threats made) were a 'proper means of reinforcing the demand.' Proper means must, at a minimum, be lawful.²¹¹
239. As at 23 April 2013, the Supreme Court of Victoria had issued injunctions restraining the CFMEU from any interference with the supply or possible supply of goods or services by Boral at any

²¹¹ *R v Harvey* (1981) 72 Cr App R 139 at 142.

construction site in Victoria. Plainly then, Mr Setka's threats to continue his black ban and to intensify it may have been unlawful. The strong inference from the evidence is that Mr Setka may have been aware of the injunctions, and therefore aware of the illegality of his threats:

- (a) Mr Setka referred to Boral's lawyers in proceedings.²¹² Mr Reardon referred to Mr Setka not giving 'a stuff' about 'the legal stuff'.²¹³ Those proceedings could only have been the proceedings in which Boral was seeking an injunction;
- (b) As State Secretary of the CFMEU he may have been aware of those orders which had been served on the CFMEU.²¹⁴

240. Further, it is not possible to see how the threat to ensure the Boral's market share was diminished may have been a proper means of reinforcing the demand. The evidence supports a conclusion that Mr Setka believed his threats to be unlawful, or at the least not 'proper means of reinforcing the demand.'

241. Mr Reardon also made a demand. It was made with the same intention as Mr Setka ie to cause loss to Grocon. He threatened that the CFMEU 'will target Boral trucks'.²¹⁵ The analysis above in relation to Mr

²¹² Paul Dalton, witness statement, 9/7/14, para 29.

²¹³ Peter Head, witness statement, 9/7/14, para 38.

²¹⁴ Before Derham AsJ, the CFMEU conceded the effective service of the Supreme Court's orders: see *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] VSC 429 at [15]. See also Boral MFI-2, Tabs 4, Plaintiff's Outline of Submissions dated 23 December 2013, [58]–[59] and Defendant's Outline of Submissions in Reply dated 23 January 2014, [41].

²¹⁵ Peter Head, witness statement, 9/7/14, para 41.

Setka would support a possible finding of blackmail by Mr Reardon also. In the alternative, Mr Reardon may have aided and abetted Mr Setka: he was present at the commission of the offence and may have intentionally participated and assisted Mr Setka in his threats. Accordingly, if not himself separately liable for blackmail he may be liable as an accessory under s 323 of the *Crimes Act* 1958 (Vic). It is recommended that this Interim Report be referred to the Director of Public Prosecutions of Victoria for consideration of whether Mr Setka and Mr Reardon should be prosecuted for those offences.

Possible contempts of court

242. The evidence concerning the conduct of the CFMEU shop stewards in April 2013 at the Anglo Italian project site at Radnor Drive, Derrimut²¹⁶ and at the Kosta Concreting project site at Elizabeth Street, Melbourne²¹⁷ and the CFMEU's later conduct in 2014²¹⁸ suggest that there may have been a continuing and flagrant contempt of Hollingworth J's orders by an organisation which treats itself as above the law. Plainly court orders seem to count for little or nothing so far as the CFMEU is concerned.

243. In his letter to the Commission, Mr Kane made this statement:

Mr Setka has been quoted acknowledging openly that the CFMEU's tactics involve breaking the law. Following the finding against the CFMEU for breaching court orders in relation to the blockage of the Myer Emporium site in 2013, Setka is reported to have said "*It's not the first time or the last time a union is found guilty of contempt*", "*We don't set*

²¹⁶ See para 51 above.

²¹⁷ See paras 55-56 above.

²¹⁸ See paras 103-120 above.

*out deliberately to break the law, but unfortunately sometimes it's going to happen ... Our members have been seasoned to expect that. They want us to maintain a militant union".*²¹⁹

244. The CFMEU's approach raises important questions about the enforceability of court orders.

E – RECOMMENDATIONS FOR REFORM

245. Given the extension of the Commission's final reporting deadline, it is premature to make recommendations for reform.

246. However, the CFMEU's conduct in relation to Boral suggests that there may be a number of deficiencies with the existing legal and regulatory framework in relation to secondary boycotts, the enforcement of court orders, the regulation of trade unions generally and the regulation of, and the duties owed by, trade union officers.

247. In particular, the conduct suggests the existence of the following possible problems:

- (a) The ineffectiveness of the current secondary boycott provisions in ss 45D and 45E of the *Competition and Consumer Act 2010* (Cth) to deter illegal secondary boycotts by trade unions.

²¹⁹ Mike Kane, Letter to Royal Commission, 9/7/14, p 7.

- (b) The absence of specific provisions making it unlawful for the competitors of the target of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target.
- (c) An inability or unwillingness by the regulatory authorities to investigate and prosecute breaches of the secondary boycott provisions by trade unions speedily. There may be a number of root causes for this problem: difficulties in obtaining documentary evidence, lack of co-operation of witnesses who may fear repercussions from giving evidence, the potential overlap between the roles of a number of regulators and difficulties in ensuring compliance with court orders made in relation to secondary boycott conduct.²²⁰
- (d) The absence of any speedy and effective method by which injunctions granted by a court restraining a trade union from engaging in an illegal secondary boycott can be enforced. The Byzantine complexity of the law of contempt, and its ineffectiveness to deter secondary boycott conduct by a trade union, is amply demonstrated by the contempt proceedings commenced by Grocon and Boral in the Victorian Supreme Court.²²¹

²²⁰ See the public submission by the ACCC, *Supplementary submission to the Competition Policy Review*, 15 August 2014 (http://competitionpolicyreview.gov.au/files/2014/08/ACCC_3.pdf) at pp 6–7.

²²¹ See, eg, *CFMEU v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261.

- (e) The absence of a single statutory regulator dedicated to the regulation of trade unions with sufficient legal power to investigate and prosecute breaches of the secondary boycott provisions.
 - (f) The absence of appropriate legal duties owed by the officers of trade unions to their members, and the absence of appropriate mechanisms by which such officers can be held accountable to their members.
248. It is also necessary to consider possible improvements in relation to the administration of the law by both regulators and courts.
249. The course of the Supreme Court Proceeding²²² demonstrates rather extraordinary delay after the initial orders made by Hollingworth J in February to April 2013. Both the parties and the Court have a duty to seek to facilitate the just, efficient, timely and cost-effective resolution of the issues in dispute: *Civil Procedure Act* 2010 (Vic), ss 7, 10. Having regard to the conduct alleged by Boral, the alleged contempts by the CFMEU, and the amount of damage that may have been caused both to Boral and the wider economy, the proceedings ought to have been resolved very speedily.
250. The CFMEU, which Boral alleges is in contempt of court, have criticised Boral for not doing more than instituting one contempt application to enforce the injunctions against the CFMEU, and for prosecuting that slowly.²²³ The CFMEU also submitted that Boral had

²²² See paras 76-71, 91-97 above.

²²³ CFMEU submissions, 14/11/14, Pt 8.2, paras 20-26.

not displayed any energy in seeking expedition of the non-contempt aspect of the Supreme Court Proceeding.²²⁴ There is a little force in this criticism. If a plaintiff claims to be the victim of a black ban, it is incumbent on that plaintiff to react as ruthlessly and as speedily as possible. But these paradoxical CFMEU submissions do not assist the CFMEU. For the criticisms which the CFMEU makes of Boral can be put a hundred times more strongly against the CFMEU.

251. The CFMEU has in numerous respects engaged in conduct which has had the effect of delaying the proceedings. In relation to the contempt application, it opposed the joinder of the Attorney-General and sought leave to appeal against Digby J's order joining the Attorney-General as a party. It sought leave to appeal against Digby J's order ordering discovery of documents which could have been obtained by subpoena. Both applications for leave were unsurprisingly refused. In relation to the main part of the proceeding, the CFMEU did not appear until 9 September 2013, more than 6 months after it was on notice that proceedings had been commenced. Even then, it did not seek to set aside the default judgment entered against it on 20 May 2013 until 8 November 2013. The fear of having to pay money by way of damages seemed a sharper stimulus to the CFMEU than the fear of punishment for acting in contempt of Hollingworth J's three injunctions and other orders. Mr Kane called the CFMEU's failure to appear in the proceedings a contempt of court.²²⁵ Strictly speaking it was not a contempt of court, but it is scarcely the way an organisation of the

²²⁴ CFMEU submissions, 14/11/14, Pt 8.2, para 28.

²²⁵ Michael Joseph Kane, 9/7/14, T:58.41-59.1.

CFMEU's size, power and status should behave. It is more typical of recalcitrant debtors of the least meritorious kind.

252. The CFMEU's application by summons to have the default judgment set aside was filed as long as two months after it had filed its notice of appearance. On 27 November 2013, instead of dealing with the application instantly, Derham AsJ directed the filing of written submissions and fixed 30 January 2014 as the date for the hearing of the CFMEU's summons.

253. The summons relied on three grounds.²²⁶ The second ground was: 'No affidavit proving the alleged default was filed, in breach of Rule 21.02(2)'. This was a captious point, since the Supreme Court of Victoria could see for itself from its own file that no defence had been filed. It was a ground which proved too ridiculous even for the CFMEU, since that second ground was not pressed in its Outline of Submissions dated 13 December 2013.

254. The first ground, which was pressed, was that the CFMEU 'was not required to file a defence because it had not filed its appearance'. As Derham AsJ said in his judgment of 10 September 2014, that point 'involves the proposition that compliance with an order of the Court is optional. That is to say, the order need only be complied with if the defendant chooses to enter an appearance'.²²⁷ The learned Associate Justice correctly rejected that absurd proposition. But it is a proposition that is entirely characteristic of the whole of the CFMEU's

²²⁶ Boral MFI-1, Vol 1, tab 26.

²²⁷ *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] VSC 429 at [31].

attitude to the substantive law and to the legal system which is supposed to enforce it. The CFMEU appears to treat compliance with both rules of law and court orders as optional.

255. The third ground on which the CFMEU relied was that Boral's amended statement of claim did not disclose a cause of action. In part that ground contended that even if there were available causes of action, they had been poorly pleaded. If that contention were sound, the deficiencies were curable, and speedily. But the ground also contended that in Australian law there is no tort of interference with business by unlawful means and no variant of it known as the tort of intimidation. That was an argument that a tort recognised by numerous courts in Australia, by the House of Lords, by leading academic writers, with a history tracing back to the early 17th century, should be held not to exist. The argument rested on the illogical proposition that because Australian courts have *not yet* accepted the broader tort of interference with trade by unlawful means which has been recognised in England, of which it has been said that intimidation is a species, the Australian cases actually recognising the tort of intimidation must not be followed. *Why* the tort should not exist was not explained. Obviously it can operate adversely to union interests.

256. With respect, the CFMEU's submission ought not to have been put to the learned Associate Justice, other than formally. That is because there are ample indications in the High Court and other appellate courts, to which the learned Associate Justice referred, that the tort exists. The judges who have held that view include such distinguished lawyers as Mason CJ and Jacobs J. With respect, it would not be right for any court below the High Court of Australia to overturn the

assumption almost all Australian lawyers have operated on since *Rookes v Barnard* was decided in 1964²²⁸ that there is a tort of intimidation.

257. Apart from the delays by the CFMEU, the time taken by Derham AsJ to deliver judgment refusing to set the default judgment aside was more than seven months.²²⁹ There is doubtless some good reason why judgment was not delivered on the day of the CFMEU's application or shortly thereafter. However, in the ordinary course it might be expected that an application to set aside default judgment would be dealt with speedily. In particular, it ought to have been dealt with as soon as it was made. The problem with the orders, then, is not only that it took so long for them to be made, but that it took so long for the question to be considered by the court. When a major black ban is proceeding unimpeded by the grant of injunctions, and the defendant fails to enter an appearance for over six months, an application to set aside a default judgment should be dealt with very differently. The CFMEU had formulated three reasons why the default judgment should be set aside. One was abandoned even before the hearing before Derham AsJ. Another was abandoned on 29 October 2014.²³⁰ The third – that the tort of intimidation is not known to Australian law – is, with respect, a very ambitious point. The defendant had apparently not complied with at least the court's procedural orders. If it had a case for the default judgment to be set aside, it was a case which should have been dealt with *brevi manu* – on the spot, no

²²⁸ [1964] AC 1129.

²²⁹ Boral MFI-1, Tab 37.

²³⁰ Boral MFI-4, tab 2 (Letter from Slater & Gordon to Herbert Smith Freehills, 29 October 2014).

timetables, no written submissions, no arcane day-long argument, and no reservation. There should not have been the slightest tardiness in either speedily affirming the status quo of the default judgment or, if the CFMEU could make out its extraordinarily unconvincing case, speedily setting the default judgment aside.

258. More recently the pace has quickened, over the opposition of the CFMEU. At a directions hearing on 16 October 2014, the CFMEU submitted that no steps should be taken in relation to the assessment of damages until an appeal to a single judge against the Associate Justice's refusal to set aside the default judgment as concluded. The Associate Justice did not accede to that submission. He made directions about particulars being given by 5 December 2014 and subpoenas being issued by 31 October 2014. Further, Forrest J, who had carriage of the CFMEU appeal against Derham AsJ's unsurprising refusal to set aside the default judgment, has expressed concern about the delays. He indicated on 23 October 2014, over the CFMEU's opposition, that there would be a hearing in November and that the whole process in the Supreme Court (including any appeal to the Court of Appeal) would be completed by Easter 2015. The matter was listed for hearing on 24 November 2014 before Bell J. Then on 3 November 2014, Boral moved for an order that the appeal to a single judge be reserved for the consideration of the Court of Appeal. However, the CFMEU opposed that order, in the course of lengthy argument on 6 November 2014. Despite that, Bell J made the order on 7 November 2014. But on 28 November 2014 the CFMEU indicated that it would oppose the grant of leave by the Court of Appeal for it to

was no compelling reason, such as urgency, to bypass the Trial Division. Does not the passing of nearly two years generate a little urgency?

259. In relation to the activities of Fair Work Building and Construction, there is little material before the Commission apart from that summarised above²³¹ to explain what has been occurring. It is worth noting that nearly two years have passed since the black ban began. However, it is clear that public regulators are likely to have grave difficulties in obtaining evidence where witnesses are reluctant to speak against parties to illegal conduct in view of the risk of retaliation.
260. A legal system which does not provide swift protection against the type of conduct which Boral alleges it has suffered at the hands of the CFMEU, and which does not have a mechanism for the swift enforcement of court orders, is fundamentally defective. The defects are so great as to make it easy for those whose goal is to defy the rule of law. The defects reveal a huge problem for the Australian state and its numerous federal, State and Territory emanations. The defying of the Victorian Supreme Court's injunctions for nearly two years, and the procedural history outlined above, will make the Australian legal system an international laughing stock. A new form of 'sovereign risk' is emerging – for investors will not invest in countries where their legal rights receive no protection in practice. At least so far as the courts are concerned, it may be appropriate for consideration to be given to procedures which ensure the swift determination of contempt

²³¹ See paras 100-101.

applications, complemented where necessary by appropriate court rules and legislation.

CHAPTER 8.3

CBUS LEAK TO THE CFMEU

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A – OVERVIEW

1. This chapter deals with the wrongful disclosure by Cbus of the private information of its members to Mr Brian Parker, the Secretary of the New South Wales Branch of the Construction

and General Division of the CFMEU (**NSW Branch**) in July 2013.

2. The Cbus employees involved in the matter were senior ones – Ms Lisa Zanatta (Senior Adviser – Member Relationships, Workplace Distribution) and Ms Maria Butera (Executive Manager). The principal CFMEU officer in question is Mr Parker.
3. The factual issues in this Chapter, unlike many Chapters, were highly controversial. However, the submissions of counsel assisting were, despite the attacks of the CFMEU and various of its officers, Mr Parker, Cbus and (to some extent) Ms Butera, substantially correct. The findings set out below are based on their submissions.
4. Ms Zanatta has publicly admitted giving evidence to the Commission, which she knew to be false at the time she gave it. Appropriate recommendations will be made in respect of this aspect of Ms Zanatta's evidence in due course. In addition, it appears likely at this stage that recommendations may be made in relation to others, such as Ms Butera. While these are important questions, it is possible that the Commission will receive in the future further evidence concerning or in relation to the matters the subject of this Chapter. These questions should not be resolved until all relevant evidence has been received. Accordingly, the Commission will not in this Interim Report make any recommendations concerning whether criminal or other breaches of the law may have occurred. Resolution of these

issues, the making of any recommendations and the terms of those recommendations will be deferred to a future report. For present purposes, the conclusions are as follows.

- (a) Cbus is a superannuation fund over which the CFMEU exercises considerable influence. CFMEU officers are on the board of United Super Pty Ltd, the trustee for Cbus. Some Cbus employees once worked for or came from a CFMEU background. This has led to serious cultural problems within Cbus, under which the interests of the CFMEU are put before those of Cbus and its members.
- (b) In mid-2013, the CFMEU was engaged in an aggressive national campaign against Lis-Con Concrete Constructions Pty Ltd and Lis-Con Services Pty Ltd (together, **Lis-Con**). One of the elements in the dispute between Lis-Con and the CFMEU is that the latter considered that the former was persistently late in making superannuation payments to Cbus. They disagreed on when the payments should have been made. It should be stressed at the outset that punctual payments by employers of superannuation contributions is essential. The CFMEU is entirely right in insisting on this. But that insistence cannot extend to the use of illegal means.
- (c) Mr Parker knew that Cbus held the personal contact details of the Lis-Con employees. As part of that

campaign, Mr Parker wished to obtain the personal contact details of Lis-Con employees so that union staff could contact those employees and encourage them to harass Lis-Con over unpaid entitlements. He wanted action of this kind to be taken because of the national campaign that was then underway. In his view, upsetting Lis-Con employees would have the maximum adverse effect on Lis-Con. In the ordinary course, the matter of delay in payment was for Cbus to deal with through the usual debt recovery processes it had in place.

- (d) Mr Parker endeavoured to obtain the personal contact details of the Lis-Con employees with the assistance of two senior Cbus employees, Ms Zanatta and Ms Butera. He did so knowing that he was asking them to act improperly.
- (e) Ms Zanatta and Ms Butera complied with Mr Parker's request. They embarked upon a covert exercise to obtain the information and deliver it to Mr Parker, knowing that what they were doing was improper. The covert exercise involved, amongst other things, Ms Zanatta flying from Melbourne to Sydney on 29 July 2013 for the sole purpose of hand delivering the relevant documents, known as the 'Zanatta spreadsheets' to the CFMEU.

- (f) Once Mr Parker had the information, he provided it to Mr Fitzpatrick, a CFMEU organiser, and instructed him to use that information as planned. This involved Mr Fitzpatrick ringing a number of Lis-Con employees on 30 July 2013. He pretended to be a Cbus representative, and informed those employees that their employer had not paid their superannuation entitlements on time.
- (g) Mr Fitzpatrick admitted his part in these events to this Commission at an early stage. However, Ms Zanatta, Ms Butera and Mr Parker each gave false evidence to this Commission about their involvement. Ms Zanatta went so far as to create an entirely fictitious account of why she came to Sydney on 29 July 2013 and what she did while she was there. When those lies were exposed, she admitted she had committed perjury in order to protect Mr Parker and others. By giving this false evidence, Ms Zanatta, Ms Butera and Mr Parker have put the Commission and third parties to great inconvenience and expense.

B – RELEVANT FACTS

The business of Cbus

- 5. Cbus provides superannuation services to construction, building and allied industry workers and retirees, their families and employers. The trustee of the Cbus superannuation fund is United Super Pty Ltd. As at 31 March 2014, it managed

approximately \$26 billion of member funds. It publicises its activities very widely.

6. Superpartners Pty Ltd is retained by Cbus to act as the administrator of its member and employer records.
7. Cbus has close links to the trade union movement. Its board of directors includes representatives from a number of trade unions, particularly the CFMEU. Currently, three CFMEU officials sit on the Cbus board: Ms Rita Mallia, Mr Frank O'Grady and Mr David Noonan.

Relevant Cbus staff

8. Mr David Atkin is the chief executive officer of Cbus, and was so at the relevant time.
9. In July 2013, Ms Butera held the position of Executive Manager, Workplace Distribution with Cbus. She holds a Bachelor of Commerce degree, and commenced working for Cbus 17 years ago.¹ Before that she had been a development executive with the Construction Industry Development Agency between 1991 and 1995. Between 1995 and 1997, she was executive director of the Australian Construction Industry Council. Between 2004 and 2012, she sat on the board of the Royal Women's Hospital.²

¹ Maria Butera, 7/7/14, T:67.32ff.

² Submissions in Reply on behalf of Maria Butera, 21/11/14, para 7.

10. Ms Butera reported directly to Mr Atkin, and therefore sat at the second highest level of management in Cbus.³ Much of her time was spent working with the Building Industry Group in step with Mr Atkin.⁴
11. Ms Butera emphasised many times in her evidence that she did not have the role of dealing with operational matters, including dealing with employer arrears, on a day to day basis.⁵ But she did adopt that role in late July 2013 in relation to Mr Parker.
12. Ms Butera is an accountant by training and a senior manager of a financial services provider by profession. Members of the CFMEU do not commonly have this profile. Those callings have little to do with construction, forestry, mining and energy. Yet Ms Butera has been a member of the CFMEU since starting employment with Cbus. She joined the union as part of a ‘culture of collaboration’ that exists within Cbus. She wanted to show the CFMEU that she wished to work closely with it.⁶ Whether these explanations are displaced or supplemented by another consideration – the promotion of sponsorship by Cbus of the CFMEU – is a topic which has been proposed for future exploration by the Commission.⁷

³ Maria Butera, 23/10/14, T:934.11ff.

⁴ Submissions in Reply on behalf of Maria Butera, 21/11/14, para 6(c).

⁵ Maria Butera, 7/7/14, T:72.4ff, 73.3-4.

⁶ Maria Butera, 23/10/14, T:970-973.

⁷ O’Neill/Lis-Con submissions, 14/11/14, para 10.

13. In July 2013, Ms Zanatta held the position of Senior Adviser – Member Relationships, Workplace Distribution within Cbus.⁸ In that role she was responsible for overseeing the day to day activities of the National Coordinator Team.⁹
14. She reported to Ms Cath Noye (General Manager, Key Relationships), who in turn reported to Ms Butera. This put Ms Zanatta at the fourth highest management tier within Cbus.¹⁰ It was a senior advisory position.¹¹
15. Ms Zanatta has at all times been a member of the CFMEU,¹² even though her profile, as a manager working in the financial services sector, is unusual for the CFMEU.
16. Ms Zanatta began her employment at Cbus in 1998, and as such, by mid-2013, had been with the company for 15 years. She was a highly experienced Cbus employee. She, therefore, had an intimate knowledge of its workings and systems.
17. Initially, Ms Zanatta was employed by Cbus as a member co-ordinator, providing services and advice to employers and members,¹³ and interacting with the CFMEU regularly. Ms Zanatta was more than capable of handling an enquiry from a

⁸ Lisa Zanatta, 7/7/14, T:17.5-6.

⁹ Lisa Zanatta, 7/7/14, T:18.4-6.

¹⁰ Lisa Zanatta, 7/7/14, T:18.9ff.

¹¹ Lisa Zanatta, 7/7/14, T:19.6-8.

¹² Lisa Zanatta, 7/7/14, T:17.26-30.

¹³ Lisa Zanatta, 7/7/14, T:17-32-18.6.

union in relation to arrears. Indeed, it was her ‘bread and butter’.¹⁴

18. Ms Zanatta’s employment with Cbus has now been terminated as a result of the role she played in the matters described below.

Lis-Con

19. The Lis-Con companies are sub-contractors in the construction industry and operate across Australia, with a focus on formwork, concreting and steel fixing services.
20. On average, Lis-Con Concrete Constructions Pty Ltd employs approximately 40 workers. Lis-Con Services Pty Ltd employs approximately 300 workers. Most Lis-Con employees are not members of the CFMEU.
21. Mr Eoin O’Neill is the construction manager, tender manager and an authorised spokesperson for the Lis-Con companies.
22. Cbus was the default superannuation fund for Lis-Con from about 2003 to 2013.¹⁵ As a result of the matters the subject of this chapter of the submissions, Lis-Con workers voted to abolish Cbus as its default superannuation fund.¹⁶

¹⁴ Maria Butera, 23/10/14, T:936.8-14.

¹⁵ Eoin O’Neill, witness statement, 15/7/14, para 41.

¹⁶ Eoin O’Neill, 15/7/2014, T:58.6- 9.

The Gaske leak of June 2013

23. As at June 2013, issues had arisen in relation to the extent to which Lis-Con was paying workers' superannuation entitlements on time. Officers of the CFMEU had taken an interest in that matter.
24. To this end, on 18 June 2013, Mr Steve Gaske, who was both a Cbus employee and the honorary President of the Queensland Branch of the Construction and General Division of the CFMEU, sought and obtained from Superpartners certain information in relation to the extent of the arrears for the two Lis-Con companies.¹⁷
25. The information provided came in two forms. First, there were two emails from Ann-Marie Hughes from Superpartners setting out the aggregated arrears position of each particular Lis-Con company; that is, the total amounts owed by the company for particular months. Secondly, attached to each email was a schedule which identified the names of the Lis-Con employees, their Cbus membership number, their date of birth, and superannuation entitlements for each Lis-Con company. No personal contact details in the nature of email or home addresses or telephone numbers were disclosed.
26. Mr Gaske passed Ms Hughes' emails and their attachments on to Mr Toyer, a CFMEU organiser in Queensland, by email on 18

¹⁷ Zanatta MFI-1, 7/7/14, tabs 1 and 2.

June 2013.¹⁸ The first email to Mr Toyer read ‘Here ya go mate. Call if you need any clarification’. Mr Gaske signed off on those emails as a Cbus co-ordinator.

Cbus debt collection processes in June 2013

27. The debt collection activities of Cbus were managed by its appointed debt collection agent, Industry Funds Credit Control (IFCC).¹⁹
28. On 18 June 2013, solicitors retained by IFCC sent correspondence to Lis-Con in relation to its arrears position.²⁰
29. Mr O’Neill responded to that letter on 20 June 2013 advising that he had already paid the superannuation entitlements for February 2013 and would pay March 2013 by 27 June 2013. It was agreed by IFCC that Lis-Con would have until that date to make that payment.²¹
30. Some days later, however, on 25 June 2013, Mr Gaske contacted Ms Hughes and requested that Lis-Con’s files be ‘referred to legal’ – that is, referred to lawyers for action.²² Since Mr Gaske had recently been in communications with the CFMEU about Lis-Con and arrears, and since Mr Gaske was himself an

¹⁸ Zanatta MFI-1, 7/7/14, tab 1A, pp 1A-1H and tab 2, pp 7-9.

¹⁹ Lisa Zanatta, 7/7/14, T:19.46.

²⁰ Atkin MFI-1, 3/10/14, tab 5, p 5.

²¹ Atkin MFI-1, 3/10/14, tab 5, p 5.

²² Atkin MFI-1, 3/10/14, tab 5, p 5.

honorary official of the CFMEU, it may reasonably be inferred that the 'referral to legal' was the CFMEU's idea, and Mr Gaske was prepared to ensure that this action was taken.

31. Ms Hughes obliged. She asked Mr Andrew Grabski (an employee of IFCC) to arrange for the Lis-Con files to be 'referred to legal'.²³
32. Two days later, on 27 June 2013, Ms Zanatta met with IFCC. She asked to be advised of all payment terms on any future arrears, and that this had been requested because of ongoing issues the CFMEU was having with Lis-Con.²⁴
33. Later that same day she called IFCC and requested an email setting out the current arrears position, the estimated debt, and the implications of issuing proceedings or holding off.²⁵
34. While this was occurring on 27 June 2013, Mr O'Neill called Mr Grabski and advised that Lis-Con would not commit to monthly superannuation payments and that the payments for April 2013 and May 2013 would be paid by 27 June 2013 as per the guidelines from the Australian Tax Office.²⁶
35. That same day, in answer to Ms Zanatta's request described above, Mr Grabski sent an email to Ms Zanatta with the Lis-Con

²³ Zanatta MFI-1, 7/7/14, tab 3, p 10 and tab 4, p 18.

²⁴ Atkin MFI-1, 3/10/14, tab 5, p 4.

²⁵ Atkin MFI-1, 3/10/14, tab 5, p 4.

²⁶ Zanatta MFI-1, 7/7/14, tab 5, p 22-23.

arrears information. He also took the opportunity to advise her of the results of his conversation with Mr O'Neill.²⁷

36. Mr Grabski set out in this email the nature and extent of the arrears position for Lis-Con. He identified that one Lis-Con company was four months behind and the other was three months in arrears. Precisely calculated estimates were given in respect of the total amount owed by each company for those months.
37. The arrears information in this email was 'aggregated' information. It stated the total amounts owed by each company for particular months. It was not broken down by reference to individual employees of the company.
38. The following day, 28 June 2013, Ms Zanatta forwarded Mr Grabski's email to Mr Jade Ingham, the Assistant Secretary of the Queensland Branch of the Construction and General Division of the CFMEU.²⁸
39. Ms Zanatta's email to Mr Ingham read 'Jade please read update below regarding Lis Con. If you are available to chat now please call on [phone number]. Thanks lisa'. Ms Zanatta's evidence was that Mr Ingham had asked her for a current update on Lis-Con's arrears.²⁹

²⁷ Zanatta MFI-1, 7/7/14 tab 5, p 22.

²⁸ Zanatta MFI-1, 7/7/14, tab 5, p 22.

²⁹ Lisa Zanatta, 7/7/14, T:23.19-26.

40. Ms Zanatta had no qualms about sending quite detailed arrears information of this kind, not involving personal details, to the CFMEU. She was perfectly able to deal with an arrears query coming from a very senior official of the CFMEU. None of this called for any form of secret communications or subterfuge. Nothing had to be hand delivered. Ms Zanatta did not need to fly it to Brisbane to give to Mr Ingham. The information was simply sent by Ms Zanatta by email. This is how a request from a senior CFMEU official to Ms Zanatta for arrears information would be handled, and how she would be expected to handle it.
41. That same day, 28 June 2013, this email chain was then forwarded on by Mr Ingham to Mr Michael Ravbar, the Secretary of the Queensland Branch of the Construction and General Division of the CFMEU. Mr Ravbar in turn sent it to Mr Dave Noonan, the CFMEU's National Secretary.
42. After Mr Noonan received this email chain he sent it on to Mr Atkin. Mr Atkin said in his evidence that he must have spoken with Mr Noonan about the email, but that he could not recall what was said.³⁰
43. Mr Ravbar also had a conversation with Mr Atkin about it.³¹ In that conversation, Mr Ravbar said that he wanted further information from Cbus about the extent of the arrears. Mr Atkin

³⁰ David Atkin, 23/10/14, T:844.20-24.

³¹ Michael Ravbar, 23/9/14, T:253.44-46.

says that he subsequently gave Mr Ravbar aggregate arrears information during a trip to Brisbane.³²

44. Mr Atkin then sent this email chain of 28 June 2013 on to Ms Butera, with a request that she touch base with him about it.³³ These contacts at the highest executive levels of Cbus (Mr Atkin and Ms Butera) and at the highest levels of the CFMEU (Mr Noonan, Mr Ravbar and Mr Ingham) point towards a close cultural affinity between the two institutions.
45. Later that same day Ms Butera sent an email on to Ms Noye (a Cbus manager who sat in the management chain between Ms Zanatta and Ms Butera) and said ‘Cath – can you please follow up. M’.³⁴ This was at 11.29am.
46. At 11.33am, that is only several minutes later, Ms Zanatta sent an email to IFCC advising that the CFMEU in Queensland had ‘requested’ that Cbus ‘go ahead with legal proceedings ASAP’.³⁵ In a telephone call a few moments later, Ms Noye said to IFCC that ‘the union wanted files referred to legal asap’.³⁶ Proceedings were then commenced on 19 July 2013 in the District Court of New South Wales.³⁷

³² David Atkin, 23/10/14, T:844.38ff.

³³ Zanatta MFI-1, 7/7/14, tab 5, p 21.

³⁴ Zanatta MFI-1, 7/7/14, tab 5, p 21.

³⁵ Atkin MFI-2, 23/10/14; David Atkin, 23/10/14, T:891.28-40.

³⁶ Atkin MFI-7, 23/10/14, p 1.

³⁷ Atkin MFI-1, 3/10/14, tab 7.

47. It is plain that the CFMEU played a significant role in the decision that was made by Cbus to commence proceedings against Lis-Con. Indeed the evidence demonstrates that Cbus was, in substance, acting at the direction of the CFMEU. Counsel for the trustee of Cbus, United Super Pty Ltd, denied this. They pointed to the duty of the trustee to enforce the payment of debts due promptly, to the allegedly consistent lateness of Lis-Con in payments, to the size of the outstanding payments, and to the fact that the decision to institute proceedings depended on instructions from IFCC and on the work of Gregory Falk & Associates, solicitors, who had to certify pursuant to s 347 of the *Legal Profession Act* 2004 (NSW) that there were reasonable grounds for instituting proceedings.³⁸ Yet these propositions are not inconsistent with those of counsel assisting, and they do not constitute any reason not to accept them.

CFMEU ‘war’ on Lis-Con

48. At about the same time, on 25-27 June 2013, executives from the Construction and General Division of the CFMEU were participating in a Divisional Executive Meeting.
49. The meeting was attended by Mr Parker, Mr Ravbar, Mr Dave Noonan, Mr Tom Roberts (Senior National Legal Officer), Mr Fitzpatrick (an organiser from the NSW Branch) and a large number of other officials from around the country.

³⁸ Outline of submissions of United Super Pty Ltd as trustee for Cbus, 14/11/14, para 26.

50. The minutes of the meeting note that there were various discussions in relation to Lis-Con, that the union had received complaints of breaches of awards and statutory entitlements, and that the branches were requested to provide information of breaches to the National Office via Mr Roberts.³⁹
51. The minutes paint an overly cultivated picture of what was actually discussed and agreed at the meeting. What was agreed, in substance, was that the CFMEU would ‘go to war’ with Lis-Con.⁴⁰ Everyone who attended the meeting agreed with this course.⁴¹ The CFMEU submitted that there was no evidence of any ‘war’.⁴² It submitted that Mr Fitzpatrick had said it was only his ‘terminology’.⁴³ It pointed out that others denied or did not recall that the expression was used. But by their fruits shall ye know them. The use eventually made of the Zanatta spreadsheets was a tactic employed in what was in substance a war which Mr Parker hoped would be successful.

Instructions from Mr Parker to Mr Fitzpatrick

52. At the June 2013 National Executive Meeting, it was agreed that Mr Parker, with Mr Fitzpatrick’s assistance, would obtain certain

³⁹ Parker MFI-1, 3/10/14, p 76.

⁴⁰ Brian Fitzpatrick, witness statement, 15/7/14, para 97-98.

⁴¹ Brian Fitzpatrick, 15/7/14, T:40.26-46.

⁴² CFMEU submissions in reply to Lis-Con submissions, 21/11/14, paras 1-4.

⁴³ Brian Fitzpatrick, 15/7/14, T:40.34.

information in relation to Lis-Con and that this information would be passed onto the other States as part of this 'war'.⁴⁴

53. Mr Parker admitted that he told Mr Fitzpatrick that he wanted to find out information about Lis-Con's workers and use that information to try and attack Lis-Con.⁴⁵

54. Mr Fitzpatrick was told that the plan was to 'get contact details for Lis-Con employees off Cbus and then contact the employees and encourage them to stir up trouble with Lis-Con over unpaid entitlements'.⁴⁶ By 'contact details' it was meant personal information capable of being used to communicate with the employees.

⁴⁴ Brian Fitzpatrick, witness statement, 15/7/14, para 99.

⁴⁵ Brian Parker, 3/10/14, T:637.25-27.

⁴⁶ Brian Fitzpatrick, witness statement, 15/7/14, para 102.

The McWhinney table

55. In July 2013, after taking instructions from Mr Parker, Mr Fitzpatrick contacted Mr Bob McWhinney of Cbus and asked him what information he could provide to the CFMEU about Lis-Con. Mr McWhinney advised he could email Mr Fitzpatrick with the names and amount of the last payment for the Lis-Con employees.⁴⁷
56. On 12 July 2013, Mr McWhinney sent this information to Mr Fitzpatrick as an attachment to an email.⁴⁸ The attached documents (**McWhinney table**) were schedules which set out the name, Cbus number, date of birth and superannuation payment information in respect of particular Lis-Con employees for each Lis-Con company. The McWhinney table was a relatively short document, and did not contain any personal contact information for Lis-Con employees. It was radically different, in terms of appearance, length and content, from the documents that Mr Parker later obtained from Ms Zanatta. It was probably, however, in breach of cl 6.4 of the Cbus trust deed.⁴⁹
57. Upon receiving the McWhinney table, Mr Fitzpatrick reported back to Mr Parker. He noted that the information he was able to get did not include what Mr Parker had wanted in terms of details

⁴⁷ Brian Fitzpatrick, witness statement, 15/7/14, para 103.

⁴⁸ Zanatta MFI-1, 7/7/14, tab 10, p 38-45.

⁴⁹ So submitted by Mr O'Neill and the Lis-Con companies, 14/11/14, para 3(1), and accepted by Outline of Submissions of United Super Pty Ltd in Reply to the Submissions of Lis-Con, 21/11/14, paras 1(1) and 5(3).

capable of being used to contact Lis-Con employees. Mr Parker told Mr Fitzpatrick that he would talk to Mr McWhinney.⁵⁰

Mr Parker seeks and obtains the Zanatta spreadsheets: general

58. In the period from 18 to 29 July 2013, Mr Parker sought and obtained from Cbus the personal contact details of the Lis-Con employees. He did so by enlisting the help of Ms Zanatta and Ms Butera. The events which occurred are described below. Although occasional passing references are made in this section of this chapter to the false evidence given by Ms Butera, Ms Zanatta and Mr Parker, for the most part their false evidence is addressed in a separate section of this chapter.

18 July 2013

59. On the morning of 18 July 2013, at 8.35am, Mr Parker called Mr Atkin.⁵¹ Their conversation was a short one, during which Mr Parker asked Mr Atkin for assistance in terms of providing further information about Lis-Con's arrears history. Mr Atkin said he would see what Cbus could do to help the union where it could.⁵² According to Mr Atkin, Mr Parker did not tell Mr Atkin that he wanted detailed records to enable him to contact employees of Lis-Con.⁵³ Mr Parker submitted that there was

⁵⁰ Brian Fitzpatrick, witness statement, 15/7/14, para 105.

⁵¹ Parker MFI-1, 24/10/14, p 26.

⁵² David Atkin, 3/10/14, T:772.31-32; David Atkin, 23/10/14, T:868.26-33.

⁵³ David Atkin, 3/10/14, T:772. 21-24.

nothing improper in his request.⁵⁴ But on what lawful basis did he make the inquiry? He did not act on behalf of any CFMEU members. He had not contacted Lis-Con to complain on their behalf. His only purpose can be inferred from the use to which the personal contact details in the Zanatta spreadsheets were eventually put. That purpose was to advance the CFMEU campaign against Lis-Con by improper means. Later in Mr Parker's submissions there is an admission that the information requested, whether it was 'ordinary, or innocent, information', or 'confidential, personal information', was to 'be used in pursuing the CFMEU's interests in relation to Lis-Con'.⁵⁵ The CFMEU did not demonstrate that it had any interests in relation to CFMEU members employed by Lis-Con. Its interests in relation to Lis-Con were the effective waging of war.

60. Mr Atkin reported his conversation, whatever its content was, to Ms Butera, Ms Butera then spoke to Ms Zanatta about it. There is no direct evidence of what the content of the conversation between Ms Butera and Ms Zanatta was. In written submissions, Ms Butera has insinuated that Mr Parker said what Mr Atkin denied, and that Mr Atkin passed Mr Parker's request to Ms Butera and Ms Zanatta. That fits with the circumstantial probabilities.

⁵⁴ Submissions on behalf of Brian Parker, 19/11/14, para 13(c).

⁵⁵ Submissions on behalf of Brian Parker, 19/11/14, para 70 (read with para 17).

61. At 2.06pm the same day, Ms Zanatta called Mr Parker. They spoke for a little over seven minutes.⁵⁶ Ms Zanatta made no mention of this conversation with Parker when she gave evidence on 7 July 2014.
62. Within half an hour of the conclusion of that call, Ms Zanatta sent an email to Mr Walls of Superpartners asking him to run an enquiry for the accounts for Lis-Con for the past 12 months.⁵⁷
63. When Mr McWhinney had earlier sought and obtained the McWhinney table from Superpartners, he had been careful to set particular limits on the information that was to be provided by Superpartners to him.⁵⁸
64. Ms Zanatta's request of Mr Walls on 18 July 2013 contained no such limitation. She simply asked for a 'query' to be run. As Mr Walls explained in his evidence, the effect of this was to request Superpartners to conduct an automated trawl of its database that would result in the extraction of all of the information on that database in respect of Lis-Con employees.⁵⁹ It was obvious to someone of Ms Zanatta's vast experience within Cbus that the results of such a query would include the personal contact details of the employees in question.

⁵⁶ Zanatta MFI-2, 3/10/14, p 2.

⁵⁷ Zanatta MFI-1, 7/7/14, tab 11, p 46.

⁵⁸ Zanatta MFI-1, 7/7/14, tab 9, p 36.

⁵⁹ Anthony Walls, 7/7/14, T:108.

65. The query that Ms Zanatta caused Mr Walls to run was the only query run by Superpartners in relation to Lis-Con in the relevant period.⁶⁰ Although various less intrusive searches of the Superpartners' database were undertaken through the period, this was the only full query. Thus it was the only search that produced results which included the personal contact details of the Lis-Con employees.
66. The very fact of the 7 minute call from Ms Zanatta to Mr Parker referred to above (which immediately prompted Ms Zanatta to proceed to request the Superpartners' query soon after) was highly unusual. Mr Parker was the most senior CFMEU official in the whole of New South Wales. Ms Zanatta was in Cbus' management. Routine requests for arrears information about a company were not usually handled in this way.
67. The pre-18 July 2013 events, and the events which transpired after that date, make it probable that during this telephone call on 18 July 2013 Mr Parker told Ms Zanatta that he wanted to obtain a full set of Cbus's records in relation to Lis-Con, and that in particular he wanted to get hold of information that would enable the CFMEU to contact Lis-Con employees. Counsel for Mr Parker submitted that he only asked for details other than the personal contact details, but Ms Zanatta either misunderstood him or improperly failed to remove the personal contact information.⁶¹ So far as these are possibilities, they are remote

⁶⁰ Butera MFI-2, 23/10/14.

⁶¹ Submissions on behalf of Brian Parker, 19/11/14, para 44.

and theoretical only. They are inconsistent with the probabilities suggested by the circumstantial background. Mr Parker's submission assumes that Ms Zanatta passed on information to Mr Parker he did not request and did not want. But why would she do that unless he had asked for it? If he did not request it and did not want it, why did he not return it? The stealthy nature of later events suggests that both she and he knew the dealing was wrong. There was only one reason why it was wrong: it involved personal contact details which Cbus was obliged not to disclose.

68. Ms Zanatta subsequently told Ms Butera that this is what was being arranged. So much is obvious from the events of 24 July 2013 and following, as set out shortly.

22 July 2013

69. On 22 July 2013, Mr Walls sent Ms Zanatta an email with the results of the query she had requested on 18 July 2013. The email attached two large spreadsheets.⁶² Those documents contained information in respect of a large number of Lis-Con employees, including their names, email addresses, telephone and mobile numbers.

⁶² Zanatta MFI-1, 7/7/14, tab 14, p 51.

70. Those spreadsheets were excel documents, capable of manipulation in various ways, including the removal of columns.⁶³
71. Included in the evidence before the Commission are two original printed spreadsheets with handwriting upon them in blue and black ink.⁶⁴ They will be referred to below as the Zanatta spreadsheets. They are in identical form to the spreadsheets attached to Mr Walls' email of 22 July 2013 to Ms Zanatta, save that various columns have been removed so as to reduce the width of the document. The column containing the telephone numbers of the Lis-Con employees was *not* removed. That is a significant fact – telling in and of itself.
72. When Mr Walls sent his email of 18 July 2013 to Ms Zanatta, he copied Mr McWhinney into the email.⁶⁵
73. This caught Ms Zanatta by surprise, because when she had made the request of Mr Walls, she had been careful not to include any other person as an addressee. She did not want anyone else to know about it.
74. Upon receiving the information and becoming aware that it had also been copied to other people, Ms Zanatta emailed Mr

⁶³ Anthony Walls, 7/7/14, T:116.22-24.

⁶⁴ Fitzpatrick MFI-3, 24/9/14.

⁶⁵ Zanatta MFI-1, 7/7/14, tab 14, p 51.

McWhinney and stated 'Bob please don't pass this on at this stage. Thank you'. Mr McWhinney replied 'OK'.⁶⁶

75. Ms Zanatta also replied to Mr Walls stating 'Thank you Anthony **this request was private**. I would have appreciated if was okey [sic] before ccing others' (emphasis added).⁶⁷
76. It is plain from these communications that Ms Zanatta had intended that her request of Mr Walls be kept a secret. She did so because she understood, at the time, that it was wrong for her to be seeking and obtaining documents which contained personal contact details for the purpose of supplying it to Mr Parker to assist the CFMEU in its war with Lis-Con.
77. Mr Walls replied to Ms Zanatta's reprimand by way of a short email in which he said 'I'm so sorry about that. I thought Cc'ing Bob would be ok given that he asked for the same query 2 weeks ago but changed his mind. My apologies, I'll remember for next time'.⁶⁸ Ms Zanatta then replied stating 'No problem at all. I understand exactly why you did it. I have sorted it'.⁶⁹ Ms Zanatta's reference to having 'sorted it' was a reference to the fact that she had requested and obtained Mr McWhinney's assurance not to pass it on at that stage.⁷⁰

⁶⁶ Zanatta MFI-1, 7/7/14, tab 15, p 112.

⁶⁷ Zanatta MFI-1, 7/7/14, tab 16, p 113.

⁶⁸ Zanatta MFI-1, 7/7/14, tab 16, p 113.

⁶⁹ Zanatta MFI-1, 7/7/14, tab 16, p 113.

⁷⁰ Zanatta MFI-1, 7/7/14, tab 15, p 112.

24 and 25 July 2013

78. On 24 July 2013, Ms Zanatta emailed Ms Butera stating:⁷¹

We now have the data requested by Brian Parker.

I have spoken to Anthony for passing it on to others without consent.

How would you like to proceed with the information?

I'll catch up with you to discuss tomorrow if you are available.

Thank you

79. The email attached the 'query' results documents that Mr Walls had sent to Ms Zanatta on 22 July 2013. The reference in Ms Zanatta's email to Ms Butera to the 'data requested by Brian Parker' was that information.
80. Later that same day, Ms Butera emailed back requesting that they discuss the matter the following day. Ms Zanatta agreed.⁷²
81. The following day, 25 July 2013, Ms Butera and Ms Zanatta had the meeting as planned.
82. The fact and sequence of the above communications are important in a number of respects.

⁷¹ Zanatta MFI-1, 7/7/14, tab 18, p 119.

⁷² Zanatta MFI-1, 7/7/14, tab 19, p 173.

83. First, they make it clear that the data on the spreadsheets from Mr Walls was data that Mr Parker had requested. Both women knew that to be so. Ms Zanatta said so in terms in her email of 24 July 2013.
84. Secondly, the email of 24 July 2013 demonstrates that Ms Butera, who was senior to Ms Zanatta, was playing the lead role in this subterfuge. Ms Zanatta was reporting back to her, and her question to Ms Butera in the email of 24 July 2013 was ‘how would **you** like to proceed with the information?’ (emphasis added).
85. Thirdly, the communications demonstrate complicity between Ms Zanatta and Ms Butera in relation to the covert nature of Mr Parker’s request and Cbus’ response to it. Secrecy was the order of the day, to the point where meetings were being organised between two senior Cbus employees to discuss how to ‘proceed with the information’. The disclosure of arrears information would not be improper and would not call for secrecy. The wrongful disclosure of sensitive information would. The sensitive information held by Ms Zanatta in this case was the personal contact details of the Lis-Con workers.
86. The only reason why Ms Butera and Ms Zanatta needed to meet on 25 July 2013 was that they both knew that the information that Mr Parker had asked for was highly sensitive information which they were not supposed to be handing over and the possession of which in their hands had to be kept secret. A discussion about

how to get such information to Mr Parker could not take place via email or in casual office conversation.

87. It is probable that Ms Zanatta and Ms Butera met on 25 July 2013 in order to discuss how to convey that sensitive information to Mr Parker without getting caught. It is probable that they then agreed that Ms Zanatta would act as a courier and take it up to Mr Parker in Sydney. It is probable that they agreed it could not be emailed or couriered in the ordinary way, because to do so would leave a paper trail leading back to them. Counsel for Mr Parker submitted that these conclusions are speculative.⁷³ On the contrary, they are reasonable inferences from the circumstances.

26 July 2013

88. On Friday, 26 July 2013, Ms Zanatta was not in the Cbus office in Melbourne. She was travelling to and from Geelong.⁷⁴
89. At 2.30pm that afternoon, Ms Zanatta telephoned Mr Parker while she was on the road.⁷⁵ They spoke for four and a half minutes.
90. At 2.37pm, Ms Zanatta sent an iMessage to Ms Butera's mobile phone in the following terms:⁷⁶

⁷³ Submissions on behalf of Brian Parker, 19/11/14, para 51.

⁷⁴ Lisa Zanatta, 3/10/14, T:742.18-20.

⁷⁵ Zanatta MFI-3, 3/10/14, p 198/422, item 254.

⁷⁶ Butera MFI-3, 28/10/14, p 2, item 26.

I have made arrangement [sic] to drop off information to Brian Parkers PA . he is expecting a call from you . When you can .

91. That contemporaneous record, in the context in which it was written, reveals that during the 2.30pm phone call between Ms Zanatta and Mr Parker, arrangements were made for the Zanatta spreadsheets to be dropped off by Ms Zanatta to Mr Parker's personal assistant on 29 July 2013. Ms Zanatta was telling Mr Parker that she was planning to fly the documents to Sydney and deliver them to Mr Parker's assistant. The reason why Mr Parker's personal assistant needed to receive the documents was that Mr Parker was not going to be in the CFMEU NSW Branch Lidcombe office that day.
92. Ms Butera did not write back expressing any confusion as to the subject matter of the iMessage. She did not ask what information was being referred to.⁷⁷ She did not communicate back to Ms Zanatta asking her what she was supposed to say in the call to Mr Parker.⁷⁸ She knew exactly what was being planned, and what Ms Zanatta had been discussing with Mr Parker. The plan was for Ms Zanatta to take the Zanatta spreadsheets and drop them off at the NSW Branch office at Lidcombe with Mr Parker's personal assistant.
93. At 2.40pm, Ms Butera telephoned Mr Parker.⁷⁹ The call lasted for 2 minutes. There is no direct evidence of its contents. But it

⁷⁷ Maria Butera, 28/10/14, T:1136.34-39.

⁷⁸ Maria Butera, 28/10/14, T:1137.6-10.

⁷⁹ Butera MFI-1, 23/10/14, p 162/422, item 104.

is probable that she warned him of the need for secrecy and care in using the Zanatta spreadsheets. That inference follows from an iMessage at 2.43pm.

94. That 2.43pm iMessage was sent by Ms Butera to Ms Zanatta in response to her iMessage of 2.37pm referred to above. In that message Ms Butera said:⁸⁰

Done – he understands completely and is committed to using info very carefully. M

95. That iMessage records the substance of the phone conversation that Ms Butera had with Mr Parker at 2.40pm that day. It is clear that Ms Butera considered that the information that was being delivered to Mr Parker's personal assistant was very sensitive, and she wanted to ensure that Mr Parker would use that sensitive information very carefully. Mr Parker committed to doing so. Arrears information is not sensitive information. Arrears information does not need to be personally delivered by Ms Zanatta in order to avoid detection. The information that was sensitive was the personal contact details of the Lis-Con workers. That was the information that Ms Butera was so concerned about, and was what she discussed with Mr Parker. For her part, Ms Zanatta did not ask whatever it was that had been done, what it was that Mr Parker understood completely, what the information was, and why it had to be used very carefully. She knew the answers to all these questions.

⁸⁰ Butera MFI-3, 28/10/14, p 2, item 27.

96. While Ms Zanatta had been waiting for this response, and at 2.37pm on 26 July 2013, having just finished her conversation with Mr Parker, Ms Zanatta then called Jackie Heintz, Project Officer at Cbus.⁸¹
97. Within 20 minutes of that call, Ms Heintz had arranged flights for Ms Zanatta from Melbourne to Sydney (return) for the following Monday, 29 July 2013.⁸² The booking form described the purpose of the trip as a 'union meeting'. Ms Zanatta's electronic diary for 29 July 2013 records she had flights to and from Sydney that day.⁸³
98. At 2.56pm on 26 July 2013, Ms Zanatta made a further call to Ms Heintz.⁸⁴
99. About an hour later, at 3.57pm, an express courier service was booked by Cbus for the purpose of delivering a package from the Cbus office to Ms Zanatta's home address.⁸⁵ The package was collected at 4.40pm and was delivered at 5.20pm.
100. The package contained the Zanatta spreadsheets, which had been printed out at the Cbus office. Since Ms Zanatta was away from the office on the afternoon of 26 July 2013, arrangements had to be made for them to be delivered to her so that she could take

⁸¹ Zanatta MFI-3, 3/10/14, p 198/422, item 255.

⁸² Zanatta MFI-4, 3/10/14.

⁸³ Zanatta MFI-1, 3/10/14.

⁸⁴ Zanatta MFI-3, 3/10/14, p 198/422, item 258.

⁸⁵ Zanatta MFI-5, 3/10/14.

them to Sydney and deliver them to Mr Parker's office on the following Monday, 29 July 2013.

101. At 5.47pm that evening Ms Zanatta sent an iMessage to Mr Parker. It read as follows:⁸⁶

Hey Comrade just confirming that Jenny or is it Jennifer operates out of the Lidcombe office. Is that correct? In unity lisa cbus.

102. Mr Parker responded with an iMessage of his own at 6.10pm to Ms Zanatta, which read:⁸⁷

Jennifer comrade thank you

103. The name of Mr Parker's personal assistant was Jennifer Glass. Ms Zanatta's iMessage to Ms Butera of earlier in the day referred to the fact that she was going to deliver the information to Mr Parker's personal assistant. The reference to Jennifer in these messages between Mr Parker and Ms Zanatta is clearly a reference to Ms Glass.

104. Arrangements had to be made for someone other than Mr Parker to take receipt of the documents being delivered by Ms Zanatta on 29 July 2013 because he was going to be in Canberra that day.⁸⁸

105. Counsel for Mr Parker submitted that there was no objective evidence about the content of several of those calls, and that Mr

⁸⁶ Parker MFI-1, 28/10/14, item 1.

⁸⁷ Parker MFI-1, 28/10/14, item 2.

⁸⁸ Brian Parker, 24/10/14, T:996.40.

Parker could not recall them.⁸⁹ A more realistic proposition is that Mr Parker *said* he could not recall them. Either Mr Parker has a very bad memory or he was being untruthful. A man who rose to be State Secretary of the CFMEU, with the numerous cares and detailed tasks turning on the receipt of many telephone calls and the conducting of many meetings characteristic of that office, would need a very good memory. But, again, the probabilities support the conclusions stated above about what was said, whether or not Mr Parker genuinely could not remember.

Conversation between Mr Parker and Mr Fitzpatrick

106. It is convenient to interrupt the narrative to explain the place in it of some important evidence of Mr Fitzpatrick. Mr Fitzpatrick gave evidence that Mr Parker told Mr Fitzpatrick in July 2013 that he had arranged for two women at Cbus secretly to give him private information about Lis-Con's employees.

107. Mr Fitzpatrick's evidence was that Mr Parker said to him 'words to the effect "*We are getting what we want. I've spoken to her and she has agreed to give it to us on the quiet*"'.⁹⁰ Mr Fitzpatrick recollected that Mr Parker mentioned the first name of a woman in Cbus and that it was 'Liz'⁹¹ or 'Lisa'.⁹²

⁸⁹ Submissions on behalf of Brian Parker, 19/11/14, paras 53, 54 and 60.

⁹⁰ Brian Fitzpatrick, witness statement, 15/7/14, para 107.

⁹¹ Brian Fitzpatrick, witness statement, 15/7/14, para 107.

⁹² Brian Fitzpatrick, 15/7/14, T:44.16.

108. Mr Parker told Mr Fitzpatrick that one of the Cbus women involved was one of the bosses and that she had not told her own boss about what she was doing because it was illegal. Mr Parker said words to the effect of:

We have gotta be very careful we don't tell anyone about it. If this comes out I'm dead, the girls are dead and they'll be sacked and I'll be sacked.⁹³

109. Mr Fitzpatrick's evidence in relation to this conversation with Mr Parker has now been corroborated by the iMessages of 26 July 2013 referred to above (which neither Mr Fitzpatrick nor the Commission staff knew anything about when Mr Fitzpatrick gave his evidence). It is to be accepted. His prediction, too, has, unfortunately, come to pass in part – and the end game has not yet been played.

110. The initial thesis of the CFMEU and Mr Parker (at a time when they were represented by the same counsel) was one which it was assumed, without denial from counsel, was being propounded on instructions, though Mr Parker never provided an evidence statement.⁹⁴ The thesis was that Mr Fitzpatrick had obtained the Zanatta spreadsheets from Cbus himself and in order to protect his source and bring Mr Parker down, he had nominated Mr Parker as the person who gave them to him. The answer, given with impressive sincerity, was: 'I completely and utterly reject that as nonsense'.⁹⁵ A further element in the initial thesis of the

⁹³ Brian Fitzpatrick, witness statement, 15/7/14, para 107.

⁹⁴ Brian Fitzpatrick, 24/9/14, T:307.21-27.

⁹⁵ Brian Fitzpatrick, 24/9/14, T:299.24.

CFMEU and Mr Parker was that Mr Fitzpatrick had given the Zanatta spreadsheets to Mr Roberts, solicitor for the CFMEU, on 15 July 2013. Mr Fitzpatrick repeatedly denied this.⁹⁶

111. The truth of these denials by Mr Fitzpatrick is now clear in view of the revelations that took place during the evidence of Ms Zanatta and Ms Butera. In final address, Mr Parker, however, now separately represented, ran a line which seemed to defy these revelations. It was submitted:⁹⁷

It is not surprising that [Mr Fitzpatrick] would wish to minimise his role in the obtaining of the information, and in the deceitful use of that information. It is not surprising that he would seek to shift or distribute the blame to others (such as Parker). Fitzpatrick has a very strong incentive to implicate others – particularly those senior to him like Parker – in his wrongful and deceitful behaviour. In those circumstances, his evidence should be approached with considerable caution. It should not be relied upon (at least where there is no objective evidence to support what he alleges).

112. The first point is that now there is objective evidence to support what Mr Fitzpatrick said and to destroy what Mr Roberts said about being given the Zanatta spreadsheets by Mr Fitzpatrick on 15 July 2013. The second point is that it was Mr Fitzpatrick who drew attention to the Zanatta spreadsheets. But for that, his involvement in the Cbus scandal would never have come to light. To compare him to some criminal seeking to minimise his own role by blaming others is a quite false analogy. If he had remained silent, the Cbus scandal would never have been uncovered, and his own discreditable role in it would have

⁹⁶ Brian Fitzpatrick, 24/9/14, T:308.37-46, 320.43-45.

⁹⁷ Submissions on behalf of Brian Parker, 19/11/14, para 23.

remained secret as well. He broke the news not to shift the blame to others, but to seek to purify the CFMEU, even at the cost of his own reputation. Mr Fitzpatrick's counsel concluded his submissions on the Cbus affair thus:⁹⁸

Parker is no longer in the CFMEU camp or represented by their lawyers. Clearly Parker has been cast aside because the CFMEU knows that, in light of Zanatta's evidence, he has no chance of survival. Not though, according to Mr Parker's new legal team. It brings to mind the comedy of *Monty Python and the Holy Grail* where the Black Knight has had all his limbs cut off but continues to badger his attackers: "*it's just a flesh wound ... right I'll do you for that! ... Come here! ... I'm invincible!*"

113. That is unconventional advocacy. But it has considerable force.
114. The fact is that quite apart from the support which Mr Fitzpatrick's evidence in its substantive aspects receives from the course of events, his demeanour was excellent. On points of detail his memory was often revealed to be good. For example, Mr Fitzpatrick was cross-examined to suggest that he had said certain things to Mr Nicholas Fodor, a Cbus co-ordinator. The cross-examiner was relying on Mr Fodor's statement. Mr Fitzpatrick denied saying these things.⁹⁹ When Mr Fodor entered the witness box after Mr Fitzpatrick, he corrected the passages on which the cross-examiner had relied. He said he had given the corrections to his solicitor at 9.15am that day – *before* Mr Fitzpatrick had entered the witness box at 9.35am.¹⁰⁰ Though

⁹⁸ Submissions on behalf of Brian Fitzpatrick in reply to those made on behalf of the CFMEU and Brian Parker, 21/11/14, para 25.

⁹⁹ Brian Fitzpatrick, 24/9/14, T:330.34-331.30.

¹⁰⁰ Nicholas Fodor, 24/9/14, T:377.23-378.42.

differences remained between Mr Fitzpatrick and Mr Fodor, this evidence, albeit on a minor issue, was a significant pointer to Mr Fitzpatrick's general credibility.

29 July 2013

115. On the morning of 29 July 2013, Ms Zanatta caught her flight from Melbourne to Sydney, taking with her the Zanatta spreadsheets. She landed in Sydney at about 10.55am.¹⁰¹
116. As the taxi records demonstrate, through the GPS co-ordinates, Ms Zanatta travelled in the taxi from Sydney airport to the CFMEU's office at Lidcombe.¹⁰² The taxi arrived at 11.33am. It waited for her for 2 minutes, after which she returned to the taxi at 11.35am and was taken back to the airport for her flight home.
117. As Ms Zanatta ultimately admitted, she personally delivered documents to the CFMEU office at Lidcombe at 11.33am on 29 July 2013,¹⁰³ with a request that they be provided to Mr Parker.¹⁰⁴ When asked whether the documents were the Zanatta spreadsheets she said: 'I suspect so, yes'. By that stage, her admissions of earlier perjury had placed her in so great a state of belligerence and distress that by 'suspect' she meant 'knew'. She was not going to give a lying denial. She was not going to concede knowledge frankly. So she selected 'I suspect so, yes'.

¹⁰¹ Zanatta MFI-4, 3/10/14.

¹⁰² Zanatta MFI-7, 3/10/14.

¹⁰³ Lisa Zanatta, 3/10/14, T:754.22-25, 768.1-32.

¹⁰⁴ Lisa Zanatta, 3/10/14, T:754.35-41.

But she meant ‘knew’. She identified no other document that could have been delivered by her on that day. She positively rejected the suggestion raised by the CFMEU’s counsel that the documents she delivered could have been the totality of the attachment to the email of 22 July 2013 from Mr Walls.¹⁰⁵ It should be noted that Mr Parker’s submissions admit that he never denied that information may have been dropped off to his personal assistant on 29 July 2013.¹⁰⁶

118. At 11.46am that day, Ms Butera sent Ms Zanatta an iMessage. It read:¹⁰⁷

Everything ok? M

119. Ms Zanatta immediately responded to that message with her own iMessage, which read:¹⁰⁸

Yes thank you – done delivered.

120. This contemporaneous record demonstrates that Ms Butera knew that Ms Zanatta was in Sydney delivering the Zanatta spreadsheets to Mr Parker’s personal assistant.

121. Ms Zanatta caught her flight back to Melbourne on 29 July 2013 at about 2:00pm.¹⁰⁹

¹⁰⁵ Lisa Zanatta, 3/10/14, T:766-7.

¹⁰⁶ Submissions on behalf of Brian Parker, 19/11/14, para 53.

¹⁰⁷ Butera MFI-3, 28/10/14, p 2, item 32.

¹⁰⁸ Butera MFI-3, 28/10/14, p 2, item 31.

122. When she arrived home, at 4.53pm that day, she telephoned Mr Parker (who was out of the office that day) and they spoke for three and a half minutes.¹¹⁰ She was ringing Mr Parker to tell him that she had dropped off the documents to Ms Glass earlier that day.
123. The following morning, 30 July 2013, Mr Parker called Ms Zannatta, and they spoke for a further three minutes.¹¹¹ Mr Parker was now back in the CFMEU Lidcombe office, having not returned to the office the previous evening.¹¹² He had taken receipt of the documents Ms Zannatta had dropped off the previous day. He was ringing to let her know that he had received the documents.

Mr Parker's receipt and use of the documents

124. On 30 July 2013, Mr Parker provided Mr Fitzpatrick with the Zannatta spreadsheets.
125. Counsel for Mr Parker submitted: 'There is no evidence that Parker received the documents, other than Fitzpatrick's unreliable account'.¹¹³ But Mr Fitzpatrick was not unreliable. There is no reason to doubt that a bulky document delivered for

¹⁰⁹ Zannatta MFI-4, 3/10/14.

¹¹⁰ Zannatta MFI-3, 3/10/14, p 233/426, item 11.

¹¹¹ Parker MFI-1, 24/10/14, p 32.

¹¹² Brian Parker, 24/10/14, T:999.47-1000.16.

¹¹³ Submissions on behalf of Brian Parker, 19/11/14, para 65.

Mr Parker on 29 July 2013 would have been given to him when he returned to the office on 30 July 2013.

126. Mr Parker told Mr Fitzpatrick that he had received the lists from Cbus headquarters in Melbourne and told Mr Fitzpatrick to 'follow up on it'.¹¹⁴ This meant that Mr Fitzpatrick was to use the contact details in the documents provided to contact employees of Lis-Con and carry out the plan to attack Lis-Con.
127. On 30 July 2013, Mr Fitzpatrick made a number of telephone calls to employees of Lis-Con.¹¹⁵ The numbers he rang appear on the Zanatta spreadsheets. They do not appear on any other documents which were provided by Cbus to the CFMEU.
128. On those calls Mr Fitzpatrick advised the employees that Lis-Con was behind in paying their entitlements using words to the effect:¹¹⁶

I'm from Cbus. I'm letting you know that your Bus and ACIRT payments, I believe your ACIRT payments are the same, are well behind. You should do something about it.

129. The purpose of these calls was to get these employees to contact Mr O'Neill about outstanding superannuation payments.¹¹⁷ This was the tactic agreed between himself and Mr Parker in order to

¹¹⁴ Brian Fitzpatrick, witness statement, 15/7/14, para 111.

¹¹⁵ CFMEU MFI-7, 24/10/14, p 2.

¹¹⁶ Brian Fitzpatrick, 24/9/14, T:303.35-38.

¹¹⁷ Brian Fitzpatrick, witness statement, para 112.

achieve the ‘best and quickest response’.¹¹⁸ This conduct was not creditable to Mr Fitzpatrick, though his admission of it does enhance the credibility of his evidence.

130. Ms Zanatta and Mr Parker spoke again on the phone later on 30 July 2013 – at 4.42pm¹¹⁹ for one minute and again at 4.43pm for four minutes.¹²⁰ Counsel assisting submitted that Mr Parker was telling her that the plan they had discussed had been put into action, and the Zanatta spreadsheets had been very useful. Counsel for Mr Parker submitted that there was no evidence to support this.¹²¹ But the probabilities do support the conclusion that something like that was said.

The Gaske leak of 30 July 2013

131. On 30 July 2013, Mr Gaske sought and obtained further information from Ms Hughes of Superpartners in relation to Lis-Con arrears. Ms Hughes responded, providing Mr Gaske with an email of the same date listing the employees of Lis-Con Services by name and identifying amounts owed to them. The information did not include any of the personal contact details of the Lis-Con

¹¹⁸ Brian Fitzpatrick, 24/9/14, T:305.32-33.

¹¹⁹ Parker MFI-1, 24/10/14, p 32.

¹²⁰ Zanatta MFI-3, 3/10/14, p 224/426, item 31.

¹²¹ Submissions on behalf of Brian Parker, 19/11/14, para 66.

employees.¹²² But the disclosure of financial information was probably in breach of cl 6.4 of the Cbus trust deed.¹²³

132. Upon receipt of that email on 30 July 2013, Mr Gaske sent it on to Mr Gareth Baines, who was the construction manager at Civil, Mining and Construction Pty Ltd.¹²⁴ He stated in that email: ‘I think we have covered off on information you requested. If there is anything else don’t hesitate to call. Cheers’.

Complaint from Lis-Con and the reactions to that complaint

133. On 1 August 2013, Cleary Hoare, the solicitors for Lis-Con, wrote to Mr Noonan of the CFMEU and raised concerns that Mr Gaske had obtained confidential information in respect of Lis-Con and forwarded that information externally to Cbus.¹²⁵ In that correspondence, Cleary Hoare noted that a number of Lis-Con’s workers had been contacted from telephone numbers that originated in Bowen Hills (the suburb of Brisbane in which the Queensland Divisional Branch has its office), and that those workers had reported that they had been threatened by CFMEU officials.

¹²² Zannatta MFI-2, 7/7/14, tab 42, p 368.

¹²³ As submitted by Mr O’Neill and the Lis-Con companies, 14/11/14, para 3(3) and accepted in Outline of Submissions of United Super Pty Ltd as trustee for Cbus in Reply to the Submissions of Lis-Con, 21/11/14, paras 1(1) and 5(2).

¹²⁴ Zannatta MFI-2, 7/7/14, tab 42, p 367.

¹²⁵ Zannatta MFI-2, 7/7/14, tab 37, p 351.

134. On the same day, Cleary Hoare also sent correspondence of a similar kind to Mr Atkin at Cbus.¹²⁶ The letter to Mr Atkin attached a copy of Mr Gaske's email of 30 July 2013 to Mr Baines. Several days later Cleary Hoare also wrote to Mr Bracks, the Cbus chairman.¹²⁷
135. When Mr Atkin received the Cleary Hoare letter on 1 August 2013, he forwarded it on to Ms Butera. He said 'This has just come through this afternoon. Could we discuss how best to respond'.¹²⁸
136. Ms Butera then forwarded this email on to Ms Zanatta at 5.17pm. The text of her email to Ms Zanatta read: 'In-confidence. I need to speak to you about this. M'.¹²⁹
137. At 5.23pm, Ms Butera rang Ms Zanatta and they had a 5 minute telephone conversation.¹³⁰ There is no direct evidence of the content of the conversation. But it may be inferred that they discussed the Cleary Hoare complaint.
138. The next day, 2 August 2013, the following telephone calls took place:

¹²⁶ Zanatta MFI-2, 7/7/14, tab 42 p 365.

¹²⁷ Zanatta MFI-2, 7/7/14, tab 42 p 364.

¹²⁸ Zanatta MFI-1, 7/7/14, tab 28, p 219.

¹²⁹ Zanatta MFI-1, 7/7/14, tab 28, p 219.

¹³⁰ Butera MFI-1, 23/10/14, p 164/426, item 21.

7.29am Ms Zanatta rang Mr Parker (7 minutes 30 seconds);¹³¹

12.00pm Ms Butera rang Ms Zanatta (4 minutes);¹³²

3.21pm Mr Parker rang Ms Zanatta (6 minutes);¹³³

3.57pm Ms Butera rang Ms Zanatta (5 minutes).¹³⁴

139. This flurry of communication was quite out of the ordinary. Plainly Ms Butera and Ms Zanatta were afraid that they were going to be caught out, and that the Lis-Con complaint had really arisen because of the use that had been made of the Zanatta spreadsheets that Ms Zanatta had delivered on 29 July 2013. The complaint from Lis-Con had, however, directed attention to Mr Gaske, and they wanted things to stay that way. These conversations between the parties to this intrigue were about these matters.

140. While this was going on, and in response to the complaint from Lis-Con, Mr Atkin asked Ms Thurston, the Cbus Executive Manager of Governance and Risk, to undertake an investigation

¹³¹ Zanatta MFI-3, 3/10/14, p 224/426, item 50.

¹³² Butera MFI-1, 23/10/14, p 165/426, item 25.

¹³³ Parker MFI-1, 24/10/14, p 34.

¹³⁴ Butera MFI-1, 23/10/14, p 165/426, item 29.

into the matter.¹³⁵ Ms Butera and Ms Zanatta were called upon to assist in that process.¹³⁶

141. Following the completion of the brief internal investigation by Cbus into Mr Gaske's position, Cbus's lawyers (Holding Redlich) were instructed to send a letter to Cleary Hoare on 7 August 2013 noting that Cbus accepted it was inappropriate for Mr Gaske to have acted as he did, but indicating that Cbus was 'satisfied that this incident is an isolated occurrence'.¹³⁷ That letter was sent following a conference with Holding Redlich attended by Mr Atkin, Ms Butera, Ms Zanatta and Ms Thurstans.¹³⁸
142. The complaint about the leakage of Lis-Con workers' information to the CFMEU so shortly after their own escapade of late July 2013 had given Ms Butera and Ms Zanatta a fright. They were anxious to ensure that there would be no further complaints from Lis-Con that might result in a further investigation and a revelation of their own misconduct.
143. Records of activity on 8 August 2013 establish the following occurred:

¹³⁵ David Atkin, 3/10/14, T:783.10-16.

¹³⁶ David Atkin, 23/10/14, T:914.21-23.

¹³⁷ Zanatta MFI-2, 7/7/14, tab 47A, p 424D.

¹³⁸ Lisa Zanatta, 7/7/14, T:56.19; Maria Butera, 7/7/14, T:94.27-31; Maria Butera, 28/10/14, T:1128.8-13.

8.41am Ms Zanatta rang Mr Parker (1 minute 30 second call);¹³⁹

11.52am Ms Butera rang Ms Zanatta (30 second call);¹⁴⁰

11.53am iMessage from Ms Butera to Ms Zanatta:¹⁴¹

‘Lisa – did BP call you back? M’;

11.53am iMessage from Ms Zanatta to Ms Butera:¹⁴²

‘No ill call him now’;

11.54am Mr Parker rang Ms Zanatta (1 minute call);¹⁴³

11.55am Mr Parker rang Ms Zanatta (4 minute call);¹⁴⁴

11.59am iMessage from Ms Zanatta to Ms Butera:¹⁴⁵

‘Everything is still safe in his hands only’.

144. Counsel for Mr Parker submitted that his denial that he said this to Ms Zanatta¹⁴⁶ should be accepted.¹⁴⁷ But why should Mr

¹³⁹ Zanatta MFI-3, 3/10/14, p 225/426, item 128.

¹⁴⁰ Butera MFI-1, 23/10/14, p 165/426, item 52.

¹⁴¹ Butera MFI-3, 28/10/14, p 3, item 39.

¹⁴² Butera MFI-3, 28/10/14, p 3, item 38.

¹⁴³ Parker MFI-1, 24/10/14, p 36.

¹⁴⁴ Parker MFI-1, 24/10/14, p 36.

¹⁴⁵ Butera MFI-3, 28/10/14, p 3, item 40.

Parker's claimed recollection be preferred to Ms Zanatta's contemporary note, particularly in light of the events which preceded it as earlier discussed?

145. These records demonstrate that Ms Butera and Ms Zanatta were anxious, on 8 August 2013, to ensure that Mr Parker still had the Zanatta spreadsheets and that there would be no more activity that could result in their exposure. Mr Parker gave them that comfort, telling Ms Zanatta that everything was still safe and in his hands only.
146. The fact that Mr Gaske had been caught out was the source of some amusement for Mr Parker. Mr Parker told Mr Fitzpatrick that Mr O'Neill might mistakenly suspect that the trouble that Mr Fitzpatrick and Mr Parker were causing was caused by someone in the Queensland Branch of the CFMEU.¹⁴⁸ Mr Parker found this amusing at the time, and he had a chuckle with Mr Fitzpatrick about it.¹⁴⁹ But the broader significance of these numerous telephone calls between Ms Zanatta and Mr Parker on 2 and 8 August 2013 is that they tend to corroborate Mr Fitzpatrick's evidence.

¹⁴⁶ Brian Parker, 28/10/14, T:1188.36-1189.30.

¹⁴⁷ Submissions on behalf of Brian Parker, 19/11/14, para 68.

¹⁴⁸ Brain Fitzpatrick, witness statement, 15/7/14, para 114.

¹⁴⁹ Brain Fitzpatrick, witness statement, 15/7/14, para 114.

False evidence given by witnesses to the Commission

147. A striking feature about this case study has been the willingness displayed by a number of the witnesses who have been called to give false evidence. There was a lot of false evidence in very many areas of the present inquiry, but the scale of dishonesty in relation to this Cbus matter was exceptional and staggering.
148. The following witnesses gave false evidence – Ms Butera, Ms Zanatta and Mr Parker.
149. Why and in what way were the accounts of these witnesses false? The recitation of the key events in the chronology set out above did not deal with these questions in any detail. To do so would have disrupted the orderly flow of a section devoted to an identification of the facts. But that exposition having been given, it is now convenient to turn and address the evidence of these witnesses and why it should be treated as dishonest.

The fictional position adopted up to the mid-afternoon of 3 October 2014

150. Mr Parker, Ms Butera and Ms Zanatta presented a fictional account of the relevant events in the evidence given by each of them up to the mid-afternoon of 3 October 2014 when Ms Zanatta was recalled.
151. According to Ms Zanatta's evidence given on 7 July 2014, the sequence of events was that:

- (a) she had been asked by Ms Butera to ‘review the company’s arrears’ because Mr Atkin had received a call from Mr Parker raising serious concerns about Lis-Con’s arrears;¹⁵⁰
- (b) she was surprised by the volume of personal information contained in the spreadsheets sent to her by Mr Walls on 22 July 2013 and sought to take action to make sure it did not get leaked;¹⁵¹
- (c) she provided Ms Butera with an update on 25 July 2013 and told her that Lis-Con was four months in arrears and it was agreed that Ms Zanatta would call Mr Parker to tell him that;¹⁵²
- (d) she called Mr Parker and said ‘Lis-Con is four months in arrears’;¹⁵³
- (e) she was not personally involved in the provision by Cbus of any information concerning the employees of Lis-Con to the CFMEU.¹⁵⁴ She said she did not know what information had been released to the CFMEU, had never

¹⁵⁰ Lisa Zanatta, 7/7/14, T:28.42-29.41.

¹⁵¹ Lisa Zanatta, 7/7/14, T:35-36.

¹⁵² Lisa Zanatta, 7/7/14, T:38.45-46.

¹⁵³ Lisa Zanatta, 7/7/14, T:40.2-3.

¹⁵⁴ Lisa Zanatta, 7/7/14, T:21.7-9, 21.30-32.

seen the data that was released, and did not know who had released it.¹⁵⁵

152. Ms Butera's evidence on 7 July 2014 was that:

- (a) Mr Atkin told her that Mr Parker had spoken to him and expressed a concern about the arrears status of Lis-Con. The conversation was no more specific than that;¹⁵⁶
- (b) she asked Ms Zanatta to make enquiries in relation to the arrears status of Lis-Con.¹⁵⁷ The enquiry that Ms Zanatta was being asked to make was a routine enquiry,¹⁵⁸ and would involve Ms Zanatta collating the arrears information and ringing Mr Parker to tell him about the results, and this is what occurred;¹⁵⁹
- (c) the query and the response to it was 'unremarkable';¹⁶⁰
- (d) she did not know how the personal information of Lis-Con employees ended up with Mr Parker.¹⁶¹

¹⁵⁵ Lisa Zanatta, 7/7/14, T:35.3, 35.28.

¹⁵⁶ Maria Butera, 7/7/14, T:76.11-15.

¹⁵⁷ Maria Butera, 7/7/14, T:77.24-26.

¹⁵⁸ Maria Butera, 7/7/14, T:79.5.

¹⁵⁹ Maria Butera, 7/7/14, T:82.17-19, 83.44-46.

¹⁶⁰ Maria Butera, 7/7/14, T:83.41.

¹⁶¹ Maria Butera, 7/7/14, T:83.33-35.

153. Mr Parker's account of events, as given to the Commission on the morning of 3 October 2014, was that:

- (a) he rang Mr Atkin and asked him to 'provide documentation from Cbus that would assist' the CFMEU in its investigations into Lis-Con arrears;¹⁶²
- (b) he had a conversation with Ms Zanatta during which she told him that Lis-Con was four months in arrears, but by this stage he already knew that to be so from discussions with Mr Fitzpatrick.¹⁶³

154. Ms Zanatta and Ms Butera were later caught out by reference to documents not available to the Commission on 7 July. But independently of those documents, the sequence of events thus described by these witnesses beggared belief in light of the objective facts and circumstances.

155. First, Mr Fitzpatrick had given Mr Parker the McWhinney table of 12 July 2013. That set out the Lis-Con arrears position – indeed, it set it out in far greater detail than the usual aggregated position, by identifying what each individual worker was owed. That being so, Mr Parker had no reason at all to be ringing Mr Atkin on 18 July 2013 to ask for information about the Lis-Con arrears position. He already knew what it was. He wanted

¹⁶² Brian Parker, 3/10/14, T:639.5-8.

¹⁶³ Brian Parker, 3/10/14, T:640.3-9.

something more. He wanted private contact details of the Lis-Con employees.

156. Secondly, as at 18 July 2013, Ms Butera and Ms Zanatta already knew that Lis-Con was 4 months in arrears. They had both participated in the email traffic between the highest members of the CFMEU and Cbus executives in late June 2013. Ms Zanatta had thereafter been extensively involved in an examination of the precise Lis-Con position and, indeed, had only recently taken instructions directly from the CFMEU to commence legal proceedings against Lis-Con to recover those very arrears. There was no need for Ms Zanatta to run a full query through Superpartners for Mr Parker on 18 July 2013 in order to find out what the arrears position was. She already knew it, and so did Ms Butera. They could have told Mr Parker on 18 July 2013 that not only was Lis-Con four months in arrears (which, indeed, he already knew), but the CFMEU had already instructed Cbus to commence litigation against Lis-Con, and the matter had been referred to IFCC and its lawyers.
157. Thirdly, Ms Zanatta was a senior and highly experienced Cbus manager. The suggestion that she needed guidance or approval from Ms Butera on 25 July 2013 about how to tell Mr Parker that Lis-Con was 4 months in arrears is not believable. It was her 'bread and butter'.
158. Fourthly, if the communications between Ms Butera, Ms Zanatta and Mr Parker were so innocent, there would have been no need

for the secretive approach evident from the email of 24 July 2013 referred to above.

159. As to the third and fourth points just noted, the terms of the 24 July 2014 email from Ms Zanatta to Ms Butera make it clear that each of them were aware, as at that date, that the 'data Brian Parker had requested' was highly sensitive, and the two of them needed to meet face to face about how they were to 'proceed with the information'.

Ms Zanatta's evidence on 3 October 2014

160. As noted above, when Ms Zanatta gave evidence on 7 July 2014 she denied any involvement in or knowledge of the leak. She made no mention of a visit to Sydney on 29 July 2013. She made no mention of her telephone conversation with Mr Parker on 18 July 2013 in advance of the request of Mr Walls to run a query on Lis-Con. She made no mention of her telephone conversations with Mr Parker on 29 July 2013 and 30 July 2013, which immediately followed the delivery of the Zanatta spreadsheets. She made no mention of her five calls with Mr Parker in early August 2013 at the time of the Lis-Con complaint. She made no mention of her iMessages with Ms Butera on 26 July 2013, 29 July 2013 and 8 August 2013. She made no mention of her iMessages with Mr Parker on 26 July 2013. Indeed there are a number of these matters which she has never acknowledged.

161. When Ms Zanatta was recalled to give evidence on 3 October 2014, she was aware of the fact that the Commission had called for and reviewed her diary for 29 July 2013, her flight itinerary for the trip to Sydney and her telephone records.
162. She knew she needed to explain her visit to Sydney. In that knowledge, Ms Zanatta concocted a story as to why she had come to Sydney on that day. She told that story in her evidence to the Commission on 3 October 2014.
163. Ms Zanatta's story was that she had come to Sydney to attend an audit briefing Cbus Property and joint unions meeting in the Sydney city office of Cbus at 343 George Street, had been dropped off by a taxi at York Street because it could not drop her in George Street, had asked the taxi driver to wait while she checked where the meeting would be, had rung from a public phone (because her mobile phone was flat and the taxi driver would not lend her his for fear that she would steal it) for a few dollars, and discovered that the meeting had been cancelled without notice by Danny Gardiner from Cbus Property. She had then returned to the taxi and been driven back to the airport to catch her flight to Melbourne.¹⁶⁴
164. This entrancing tale was crammed with circumstantial detail. But as she spun the yarn, questions insistently welled up in the minds of those familiar with the splendours and miseries of modern Sydney life. When did any Sydney taxi driver worry about

¹⁶⁴ Lisa Zanatta, 3/10/14, T:732-735.

prohibitions on stopping to drop a passenger? When was there last a public telephone in York Street? Even if there was still one, what were the chances of it not having been vandalised? Even if it had not been vandalised, what were the chances of it being in working order? Why would a very short local call cost a few dollars? And there were gaps in the tale. The normal reaction of a business executive who had been brought from Melbourne to Sydney on a wild goose chase would have been fury, but Ms Zanatta did not seem to express any.

165. The York Street tale is, of course, a scandalous lie, like almost all of Ms Zanatta's evidence to that point.
166. When confronted with the evidence available to the Commission as to her movements on 29 July 2013 Ms Zanatta admitted that she had secretly delivered the documents to Sydney for the attention of Mr Parker. She admitted to having lied to the Commission on many occasions during the course of her evidence.¹⁶⁵ She said she had done so in order to protect a number of individuals, including Mr Parker.¹⁶⁶

¹⁶⁵ Lisa Zanatta, 3/10/14, T:750.31-38, 752.1-5.

¹⁶⁶ Lisa Zanatta, 3/10/14, T:750.43ff.

Disposing of what little remains of the fictional account

167. Almost nothing of the fictional account of Ms Zanatta, Ms Butera and Mr Parker remained in the aftermath of these admissions.
168. On 3 October 2014, Ms Zanatta attempted a fighting retreat. But it was to no avail. She tried to suggest that Mr Parker had not told her that he wanted to obtain records showing the personal contact details of Lis-Con employees,¹⁶⁷ and contended that Ms Butera was not one of the people she had been trying to protect.¹⁶⁸
169. When Mr Parker and Ms Butera were subsequently recalled after 3 October 2014, they too tried to suggest they knew nothing about any request or supply of information as to the private contact details of the Lis-Con workers by Ms Zanatta to the CFMEU office in Lidcombe.
170. Their evidence as to that matter beggared belief even before the discovery of the evidence which led to Ms Zanatta's further examination and admissions on 3 October 2014.
171. It had now become even more problematic.. The landscape had changed. Now, on top of all of the problems which bedevilled that evidence prior to 3 October 2014, there was direct evidence of a secret delivery of the Zanatta spreadsheets to the union's office for the attention of Mr Parker. There was no need for

¹⁶⁷ Lisa Zanatta, 3/10/14, T:756.24-26.

¹⁶⁸ Lisa Zanatta, 3/10/14, T:756.38-40.

covert behaviour of this kind if it was just routine arrears information that had been sought and provided. Mr Parker accepted that to be so.¹⁶⁹ Ms Zanatta would hardly take it upon herself to act in this clandestine, furtive and improper way in order to supply information that nobody had ever asked for.

172. These conclusions are reinforced by the further materials produced to the Commission on 24 October 2014, being the iMessages set out earlier in these submissions. They evidence a deeply held concern by each of Ms Butera, Ms Zanatta and Mr Parker in July and August 2013 that the information that the Cbus officers would be providing, and did provide, was highly sensitive and needed to be handled carefully. They also reveal the panic that set in when they became aware of Lis-Con's complaint that employees were being contacted by CFMEU officials, and Mr Parker's assurance that the information remained safe in his hands.

173. Ms Butera's and Mr Parker's involvement in the leak is obvious from the iMessage records now before the Commission. In order to demonstrate that fact, it is necessary to recall, if only summarily, some of the evidence already addressed.

174. In this regard, the important matters for consideration include the following:

¹⁶⁹ Brian Parker, 28/10/14, T:1175.25.

- (a) as previously explained, Mr Parker had no reason to ask Cbus for information about Lis-Con's arrears position on 18 July 2013. He already knew what that was. Mr Fitzpatrick had only just told him and given him the McWhinney table;¹⁷⁰
- (b) each of Ms Zanatta and Ms Butera knew that Lis-Con was four months in arrears as at July 2013. If that was all Mr Parker was asking for, they could have told him that on 18 July 2013 and that would have been the end of the matter;
- (c) Mr Parker told Mr Fitzpatrick that he was getting what he wanted from Cbus and they had agreed to give it to him 'on the quiet'.¹⁷¹ Arrears information would not have to be dealt with in this way. Only sensitive information would need to be given 'on the quiet';
- (d) on 24 July 2013, Ms Butera received a guarded email from Ms Zanatta about 'the data requested by Brian Parker', and calling for a meeting the next day in order to agree on how 'to proceed with the information', which meeting took place;¹⁷²

¹⁷⁰ Fitzpatrick MFI-1, 15/7/14, p 103-107.

¹⁷¹ Brian Parker, 24/10/14, T:992.37-41.

¹⁷² Zanatta MFI-1, 7/7/14, tab 18, p 119.

- (e) there was no need for these dealings between Ms Zanatta and Ms Butera if all Ms Zanatta had to do was pass on arrears information to Mr Parker;
- (f) the sensitive information which Ms Zanatta had at that time, which could not be dealt with in a routine way, and which would need to be dealt with 'on the quiet', was the personal contact details of the Lis-Con workers;
- (g) that sensitive information was actually attached to the email that Ms Zanatta sent Ms Butera on 24 July 2013;¹⁷³
- (h) Ms Zanatta sent Ms Butera an iMessage on 26 July 2013 telling her she had made arrangements to drop off the information to Brian Parker's personal assistant, and that Mr Parker was expecting a call from Ms Butera;¹⁷⁴
- (i) Ms Butera then rang Mr Parker,¹⁷⁵ and after doing so, sent an iMessage to Ms Zanatta that Mr Parker understood completely and was committed to using the information carefully;¹⁷⁶
- (j) on the very day Ms Zanatta was in Sydney dropping the Zanatta spreadsheets off to Mr Parker's assistant, Ms

¹⁷³ Zanatta MFI-1, 7/7/14, tab 18, p 119.

¹⁷⁴ Butera MFI-3, 28/10/14, p 2, item 26.

¹⁷⁵ Butera MFI-1, 23/10/14, p 162/422, item 104.

¹⁷⁶ Butera MFI-3, 28/10/14, p 2, item 27.

Butera sent an iMessage to Ms Zanatta asking if everything was okay, to which Ms Zanatta responded ‘Yes thank you – done delivered’;¹⁷⁷

(k) Ms Butera’s immediate response upon hearing of a complaint by Lis-Con about a leak from Cbus was to send Ms Zanatta an email headed ‘In-confidence’ saying that they needed to speak.¹⁷⁸ They then had a 5 minute conversation.¹⁷⁹ This led to a flurry of calls between Ms Zanatta and Mr Parker and between Ms Zanatta and Ms Butera the following day, 2 August 2013;¹⁸⁰

(l) when Cbus wrote back to Lis-Con indicating that the leak had come from Mr Gaske alone, and was an isolated occurrence, there was then another flurry of calls between Ms Zanatta and Ms Butera, and also between Ms Zanatta and Mr Parker.¹⁸¹ In between those calls, Ms Butera sent an iMessage to Ms Zanatta indicating she was worried about whether Ms Zanatta had been able to speak with Mr Parker, and Ms Zanatta

¹⁷⁷ Butera MFI-3, 28/10/14, p 2, items 31 and 32.

¹⁷⁸ Zanatta MFI-1, 7/7/14, tab 28, p 219.

¹⁷⁹ Butera MFI-1, 23/10/14, p 164/426, item 21.

¹⁸⁰ See above para 138.

¹⁸¹ See above para 143.

sent an iMessage back saying that ‘everything is still safe in his hands only’.¹⁸²

175. Each of Ms Butera and Mr Parker knew in July and August 2013 that Ms Zanatta had made arrangements to drop information off to Mr Parker’s personal assistant. Not only are there documentary records of Ms Zanatta having made these arrangements with Mr Parker, and a record of Ms Zanatta telling Ms Butera that she had done so, but there is also a record which establishes that Ms Butera herself had made a highly remarkable telephone call to Mr Parker (the most senior officer of the CFMEU in New South Wales) to obtain a personal commitment from him to use very carefully the information that was to be delivered. And, of course, the evidence is that Ms Zanatta did deliver the documents for Mr Parker’s attention on 29 July 2013.

176. These events were relatively recent, and striking. It was a most unusual series of events that led to the delivery of the Zanatta spreadsheets. According to Mr Parker, there had never been another case where an arrangement was made for a Cbus employee to drop a document off in the Lidcombe office for his personal assistant (‘no, definitely, no’).¹⁸³ It was a ‘very unusual’ event.¹⁸⁴

¹⁸² Butera MFI-3, 28/10/14, p 3, items 38, 39 and 40.

¹⁸³ Brian Parker, 28/10/14, T:1175.45.

¹⁸⁴ Brian Parker, 28/10/14, T:1179.34-35.

177. The memorable nature of those events would have been accentuated by the scare that Ms Butera, Ms Zanatta and Mr Parker obviously received not long after, when allegations started to be made by Lis-Con about the leaking of information from Cbus. Mr Parker agreed that he would have remembered events of this kind if they had occurred.¹⁸⁵
178. In these circumstances, these unusual events of August 2013 could not have, and had not, drifted out of the memories of any one or more of Ms Butera, Ms Zanatta or Mr Parker by the time they were called to give their evidence in mid-2014. They remembered the events clearly. Yet they came to this Commission and gave untruthful evidence about these matters. The very fact they have done so is, of itself, telling.
179. To all of this must be added Mr Fitzpatrick's original evidence to the effect that:
- (a) Mr Parker told him that he was getting the information from two women at Cbus,¹⁸⁶ a 'Liz or Lisa' and 'one of the bosses', who would be sacked if they were caught out;

¹⁸⁵ Brian Parker, 28/10/14, T:1171.41-45.

¹⁸⁶ Brian Fitzpatrick, witness statement, 15/7/14, p 107; Brian Fitzpatrick, 15/7/14, T:44.7-8.

- (b) Mr Parker had said that he wanted to get the contact details for Lis-Con workers so that the CFMEU could ring them;¹⁸⁷ and
- (c) Mr Parker gave him the Zanatta spreadsheets for that purpose.¹⁸⁸

There is no reason to doubt that this is what occurred. Mr Fitzpatrick's account of the events has been corroborated by the materials produced to this Commission since he gave his statement.

180. By way of summary, there are nine key matters to remember:

- (a) the terms of the communications described above involving Ms Butera and Ms Zanatta;
- (b) the fact Ms Zanatta went to extraordinary lengths to convey documents to Mr Parker's office in person and in secret;
- (c) the fact Ms Butera and Mr Parker knew about that;
- (d) the fact Ms Butera and Mr Parker knew that the documents that were secretly delivered contained sensitive information that had to be handled very carefully;

¹⁸⁷ Brian Fitzpatrick, witness statement, 15/7/14, para 102.

¹⁸⁸ Brian Fitzpatrick, witness statement, 15/7/14, para 111.

- (e) the fact that the information in those documents that was sensitive was the personal contact details of Lis-Con workers;
- (f) the fact that Ms Zanatta, Ms Butera and Mr Parker were prepared to go so far as to lie on their oath about these matters in the witness box in order to conceal the true position;
- (g) the fact that the story about a routine arrears query on 18 July 2013 makes no sense when assessed against what Mr Parker, Ms Butera and Ms Zanatta actually knew by that date about Lis-Con's arrears;
- (h) the fact that Ms Zanatta said she lied to protect Mr Parker – for if Mr Parker had done nothing wrong there would be nothing to protect him from and no need to lie; and
- (i) Mr Fitzpatrick's evidence as to what Mr Parker said he was obtaining from Cbus, and whom he was obtaining it from.

These nine key matters all point overwhelmingly to the conclusion that Ms Zanatta, Ms Butera and Mr Parker knew that the information provided to Mr Parker, and about which such care needed to be taken, was the personal contact information of the Lis-Con workers. They knew about it both in July and August 2013, and they had not forgotten by the time they gave

their evidence to this Commission in 2014. In fact, as each new development unfolded – a newspaper article in May 2014 reporting Mr Fitzpatrick’s claims, Mr Fitzpatrick’s statement in July 2014, the production of the documents which led to Ms Zanatta’s recall on 3 October 2014, the collapse of Ms Zanatta on 3 October 2014, the recall of Ms Butera on 23 October 2014, the discovery of the iMessages on 24 October 2014, and the third visits to the witness box of Ms Butera and Mr Parker on 28 October 2014 – the most acute pressures on them to search their recollections built up. It is not easy to forget unpleasant things when a recurring series of sharp reminders of them takes place.

181. Having regard to the fact that Ms Butera was Ms Zanatta’s superior within Cbus, and the terms of the 24 July 2013 email addressed to Ms Butera from Ms Zanatta in which the latter asked Ms Butera how *she* would like Ms Zanatta to proceed with the information, it is clear that Ms Butera not only knew what Ms Zanatta was doing, but positively approved and authorised it.

Ms Butera’s false evidence

182. The nature and extent of Ms Butera’s false evidence in this Commission is deeply regrettable.
183. When all of the evidence described above was laid before her, the only credible course for Ms Butera to have taken was to admit the falsity of her evidence to that point (which Ms Zanatta had done in some measure) and provide truthful evidence that would actually assist the Commission (which Ms Zanatta did to a lesser

extent). Ms Butera declined the opportunity to take that course several times. She may have done that because of the fate of Ms Zanatta when she took that course – dismissal. Much of her evidence seemed to reflect a determination to give very vague answers which, she might have thought, would not sustain a perjury charge. But Ms Butera’s rejection of Ms Zanatta’s course caused her to aggravate the position and potentially to expose herself to consequences far more severe than would otherwise have been the case.

184. Of particular note was Ms Butera’s evidence in relation to the matters the subject of the iMessage communications with Ms Zanatta.

185. Take, for example, the iMessage of 26 July 2013 from Ms Zanatta to Ms Butera, in which Ms Zanatta reported to her that she had made arrangements to drop off the information to Mr Parker’s personal assistant and that he was expecting Ms Butera’s call,¹⁸⁹ (which iMessage was sent immediately after Ms Zanatta had, in fact, spoken with Mr Parker¹⁹⁰):

(a) before Ms Butera was shown the iMessage, she said that if such information had been communicated to her that would be a ‘very significant thing’, and that such a thing

¹⁸⁹ Butera MFI-3, 28/10/14, p 2, item 26.

¹⁹⁰ Zanatta MFI-3, 3/10/14, p 198/422, item 254.

had never happened.¹⁹¹ She rejected such a thing ever happened;¹⁹²

- (b) after she was shown the iMessage (which recorded the communication she had denied and which she said she would have remembered if it had occurred) she said ‘I don’t remember any of this’;¹⁹³
- (c) she proceeded to deny, in the face of the iMessages, that she was acting in concert with Ms Zanatta;¹⁹⁴
- (d) she also proceeded to deny, in the face of the iMessages, that she knew Ms Zanatta was going to Sydney;¹⁹⁵
- (e) when she was shown the iMessage, and in the face of it, she said she did not know what ‘information’ Ms Zanatta was talking about through the communication,¹⁹⁶ and said she did not know what ‘information’ Ms Zanatta was dropping off;¹⁹⁷
- (f) when she was given every fair opportunity to give truthful evidence on the matter, and retract her previous

¹⁹¹ Maria Butera, 28/10/14, T:1122.42-1123.4.

¹⁹² Maria Butera, 28/10/14, T:1126.4-11.

¹⁹³ Maria Butera, 28/10/14, T:1131.19.

¹⁹⁴ Maria Butera, 28/10/14, T:1131.21-23.

¹⁹⁵ Maria Butera, 28/10/14, T:1131.28-30.

¹⁹⁶ Maria Butera, 28/10/14, T:1134.5-6.

¹⁹⁷ Maria Butera, 28/10/14, T:1134.40, 1135.42.

evidence about having had no prior knowledge, involvement or participation in the release of the information, she declined to take it, and instead said ‘You’ve heard my evidence’.¹⁹⁸

186. This is but one example. There would be little to be gained by setting out, in this Interim Report, in exhaustive fashion, the full length and breadth of Ms Butera’s false evidence. Some of the other more egregious examples appear in Annexure A to this Chapter.

Ms Zanatta’s false evidence

187. The most notable perjury committed by Ms Zanatta has been described above, when dealing with her evidence of 3 October 2014.
188. Other examples of false evidence given by Ms Zanatta are set out in Annexure B to Chapter 8.3.

Mr Parker’s false evidence

189. Mr Parker also gave false evidence. The evidence he gave as to his lack of involvement of and awareness in the Cbus leak was not true.
190. Mr Parker was a shrewd, capable and cunning man. He had numerous stock phrases which he used to admit what he thought

¹⁹⁸ Maria Butera, 28/10/14, T:1132.10, 19.

counsel would know, but not concede anything else. His evidence was in a state of constant movement. It shifted here and there as more evidence adverse to him came to light.

191. In August 2014, Mr Parker told Ms Mallia that he had telephoned Mr Atkin in July 2013 to get information about Lis-Con compliance, and then had ‘no further contact with anyone from Cbus about Lis-Con’.¹⁹⁹ He did not mention a single phone conversation with Ms Zanatta or Ms Butera, despite the large number he actually had.
192. On 3 October 2014, that position had changed. On that date he accepted there had been a brief phone call to Cbus for Lis-Con arrears information and a brief phone call back from Cbus with that information.²⁰⁰ This conveniently dovetailed with Ms Zanatta’s evidence to that point.
193. Then, when Ms Zanatta made her admissions on 3 October 2014 after Mr Parker had given evidence earlier that day, other ‘possibilities’ or ‘probabilities’ began to admit themselves to Mr Parker’s mind. On occasion Mr Parker would advance different possibilities in answer to the one question – for example ‘I didn’t’, ‘I can’t recall’ and ‘I’m not privy to’ in answer to the same question within the space of about 15 seconds.²⁰¹ In the end, Mr Parker typically sought sanctuary in the harbour of ‘I

¹⁹⁹ Rita Mallia, witness statement, 25/8/14, para 91.

²⁰⁰ Brian Parker, 3/10/14, T:639.42ff.

²⁰¹ Brian Parker, 28/10/14, T:1187.21-34.

don't recall'. Mr Parker presented as a witness who was not prepared to tell the truth, but at the same time wanted to avoid perjury charges.

194. In this regard, on 24 October 2014, Mr Parker said in his evidence:

- (e) he 'probably' told Mr Fitzpatrick that he was getting what he wanted from Cbus and they had agreed to give it to him on the quiet;²⁰²
- (f) he 'possibly' asked Ms Zanatta to get some information about Cbus members who were Lis-Con employees;²⁰³
- (g) Ms Zanatta 'could have' told him on 26 July 2013 that she was coming to Sydney to give him documents, but he could not recall;²⁰⁴
- (h) Ms Zanatta 'possibly' told him in the phone call on the afternoon of 29 July 2013 that she had flown to Sydney on his behalf and had then returned to Melbourne, and she probably told him she had dropped all the material he wanted into the office at Lidcombe;²⁰⁵

²⁰² Brian Parker, 24/10/14, T:992.37-44.

²⁰³ Brian Parker, 24/10/14, T:992.12-14.

²⁰⁴ Brian Parker, 24/10/14, T:993.32-36.

²⁰⁵ Brian Parker, 24/10/14, T:1000.35-38.

- (i) he either ‘probably’, or ‘possibly’, had a discussion with Ms Zanatta on 30 July 2013 about the fact she had dropped some documents off, and what was happening with them, but he could not recall.²⁰⁶

195. After the revelation of the iMessages to Mr Parker on 28 October 2014, he said that:

- (a) he ‘could not recall’ the phone conversation recorded in Ms Butera’s iMessage of 26 July 2013 about him ‘understanding completely’ and being ‘committed to using the information very carefully’;²⁰⁷
- (b) he denied having a recollection of it being arranged with Ms Zanatta on Friday, 26 July 2013 that she would drop off documents to his personal assistant in Lidcombe the following Monday, 29 July 2013;²⁰⁸
- (c) he denied having said to Ms Zanatta on 8 August 2013 that everything was still safe in his hands, even though that is precisely what Ms Zanatta reported to Ms Butera in an iMessage of that date, sent immediately following a telephone call between Ms Zanatta and Mr Parker.²⁰⁹ He was prepared to deny that even though, on his own evidence, he could ‘not recall’ what was said in the

²⁰⁶ Brian Parker, 24/10/14, T:1002.34-37.

²⁰⁷ Brian Parker, 28/10/14, T:1179.8, T:1183.45, 1186.40.

²⁰⁸ Brian Parker, 28/10/14, T:1181.32.

²⁰⁹ Brian Parker, 28/10/14, T:1188.32-47.

conversation.²¹⁰ When the iMessage was shown to him and he was again asked if he had said this, his evidence was ‘I wouldn’t have a clue’.²¹¹ On that evidence, Mr Parker appeared to accept that he may well have said it – he just would not know. If his answer does not mean that, it is yet another evasive, nonsensical and ultimately meaningless answer from Mr Parker in circumstances where he refused to give the only sensible answer that could be given, namely an admission.

196. His remaining denials, as has been explained above, are incapable of acceptance. Mr Parker avoided saying what he knows about the Cbus leak in order to protect himself.
197. Mr Parker, who had been represented by counsel for the CFMEU for most of the inquiry, was separately represented from 6 November 2014 on. The circumstances of the change might bear some examination in future, but not in this Interim Report. The change attracts some sympathy for Mr Parker, and it placed his new team in considerable difficulties, with which they coped admirably. Nothing more could have been said on Mr Parker’s behalf. However, their factual arguments must be rejected. His new counsel advanced elaborate submissions to the effect that Mr Parker never requested personal contact details from Cbus, he never received the personal contact details contained in the Zanatta spreadsheets, and that the things which are said in and

²¹⁰ Brian Parker, 28/10/14, T:1189.20-22.

²¹¹ Brian Parker, 28/10/14, T:1190.40.

can be inferred from the iMessages were the products of misunderstandings capable of innocent explanation. In short, the submissions did not seek to defend Ms Butera and Ms Zanatta, only Mr Parker. But they are unconvincing.

198. With respect, the points just summarised do not meet the strong circumstantial case against Mr Parker. Why was the information not emailed to him, rather than being brought by a clandestine messenger who lied about it? Why did Ms Butera request him to use care? Why did Ms Zanatta seek and get an assurance that ‘everything was still safe in his hands only’? Why disbelieve Mr Fitzpatrick? These questions were not adequately answered. In particular, there was an unfortunate attack on Mr Fitzpatrick. Mr Fitzpatrick’s general credibility was in fact excellent. The main points of his evidence, both in relation to Cbus and in relation to the death threat shortly to be discussed, were convincing, even if on one or two points of detail he was not reliable. It is true that he should not have used the personal contact information, but his evidence was against his interests and Mr Parker’s was self-serving. The contention that what Mr Parker wanted was only information about arrears, not personal contact details, overlooks the fact that the former type of information could not be used to stir up Lis-Con’s employees against their employer.
199. Mr Parker’s submissions relied on the proposition that it was ‘a legitimate part’ of his role ‘to seek and obtain certain kinds of information from Cbus relating to employees of Lis-Con; and, if

necessary, to use that information in dealings with Lis-Con.’²¹²

In reply, Mr O’Neill and Lis-Con submitted:²¹³

Mr Parker was not acting on behalf of any CFMEU members: there was no evidence that he made any enquiry as to whether any Lis-Con worker affected by the disclosure he sought was also a CFMEU member. Mr Parker did not obtain information for his use in “dealings with Lis-Con”. He had no such dealings ... The union made no approach to Mr O’Neill or to Lis-Con in any legitimate, direct way to discuss any issue about superannuation. The purpose of Mr Parker obtaining the information was to use it to stir up trouble for Lis-Con with its workforce, to intimidate or harass its workers with unauthorised contacts and impostures and to provoke industrial dispute or disquiet about Lis-Con from behind the scenes. The way the ‘war-footing’ campaign was conducted belied the complaints which the CFMEU Queensland had made that Lis-Con workers were too afraid to speak up for their rights: the success of the Parker/Fitzpatrick gambit relied on the workers doing just that.

200. There is no answer to those arguments.

201. Mr Parker’s case received a damaging blow in Ms Butera’s submissions in reply. While blaming Ms Zanatta and Mr Parker and preserving a degree of silence about her own role, Ms Butera submitted that the leak could only have taken place on a request or instruction to give Mr Parker the personal contact details, and it was complied with in a pro-union environment where leaks to

²¹² Submissions on behalf of Brian Parker, 19/11/14, para 10.

²¹³ O’Neill/Lis-Con Submissions in Reply to Submissions by Interested Parties, 21/11/14, para 34.

unions by Cbus were not generally frowned upon.²¹⁴ Ms Butera was more forthcoming in the following submission:²¹⁵

Read together, the submissions filed on behalf of Cbus and Parker ask the Commission to accept that Zanatta and Butera breached their duties as Cbus employees and engaged in a subterfuge to deliver personally to Parker private information about Cbus members in circumstances where nobody instructed them to deliver the information to Parker, and where Parker did not ask for nor want the information. Such a conclusion defies the evidence as well as logic and the Commission should reject it.

202. The submission positively intimates that Mr Parker asked for and wanted the information, and raises the question: Who within Cbus had the power to make the request or give the alleged instruction to deliver the information? It assumes the answer: only Mr Atkin. Those submissions correspond with the evidence that Mr Parker spoke to Mr Atkin on 18 July 2013, though, according to Mr Atkin, no request was made for personal contact details. The submissions are not inconsistent with the evidence that Mr Parker spoke to Ms Zanatta on 18 July 2013. At least so far as Mr Parker's submissions are claiming that he had never requested personal contact details are concerned, those of Ms Butera refute them. The question of who within Cbus was giving instructions need not be dealt with in this Interim Report.
203. What is stated above in relation to Ms Butera's submissions in reply is by way of observation only. The Commission does not rely on those submissions in making any conclusion adverse to Mr

²¹⁴ Submissions in Reply to other affected parties on behalf of Maria Butera, 21/11/14, para 9. The key passage is quoted below at para 309.

²¹⁵ Submissions in Reply to other affected parties on behalf of Maria Butera, 21/11/14, para 11.

Parker or Mr Atkin, who have not yet had the opportunity to deal with these particular submissions.

A few further observations on the false evidence

204. Before leaving the topic of the false evidence of Ms Butera, Ms Zanatta and Mr Parker, a few further observations should be made.
205. First, if these witnesses had told the truth at the outset, the Commission would have been spared great expense, and the case study could have been concluded swiftly and economically. The cost, trouble and difficulty that this Commission has had to go to in dealing with this false evidence may be of considerable significance in any subsequent prosecution. There has also been a cost for third parties. An example concerns the numerous banks, courier, airline and taxi businesses who received notices to produce with a view to collecting evidence about Ms Zanatta's movements on 26 and 29 July 2013. To comply with a notice to produce requires a search. Searches, successful or not, cost businesses time and money.
206. Secondly, the fact that Ms Butera, Ms Zanatta and Mr Parker were prepared not only to give untruthful evidence in answer to Mr Fitzpatrick's evidence, but to sit back and allow what they knew to be wild allegations to be made against Mr Fitzpatrick (which allegations he rightly described as 'nonsense' and

‘rubbish’²¹⁶), makes their conduct all the more unsavoury. It also makes regrettable the CFMEU’s inappropriate public criticism of what it said it perceived to be the Commission’s position in relation to Mr Fitzpatrick.²¹⁷ Those comments should now be the subject of public apologies from the CFMEU to both the Commission and Mr Fitzpatrick.

Mr Roberts

207. The last witness deserving of attention is Mr Thomas Roberts.
208. Mr Roberts is the senior legal officer of the Construction and General Division of the CFMEU nationally. In the witness box he gave the impression of being shrewd, cautious and intelligent. As events unfolded, the evidence he originally gave turned out to be quite unreliable and incorrect. But counsel assisting went further and launched a strong attack on his credibility along the following lines.
209. The CFMEU provided the Commission with a statement from Mr Roberts. Mr Roberts subsequently gave evidence that the statement was true.

²¹⁶ Brian Fitzpatrick, 24/9/14, T:299.20-24, 340.26-33.

²¹⁷ Brian Fitzpatrick, 24/9/14, T:341.32-38.

210. In that statement, Mr Roberts asserted that he received a yellow folder from Mr Fitzpatrick on 15 July 2013 containing various documents, including two copies of the Zanatta spreadsheets.²¹⁸
211. Mr Roberts annexed what he said was a copy of the contents of the yellow folder he received on 15 July 2013 to his statement, at annexure TR-9.
212. The original yellow folder was subsequently produced by the CFMEU, and was tendered as Fitzpatrick MFI-2, 24 September 2014.
213. Annexure TR-9 to Mr Roberts' statement was thicker than the yellow folder.²¹⁹ CFMEU's senior counsel stated that the originals of the Zanatta spreadsheets, plus one photocopy, had been in the yellow folder.²²⁰
214. Mr Roberts did not refer to the Zanatta spreadsheets anywhere in the body of his statement. The fact that his evidence was to this effect, and the significance of that evidence in the context of this case study, was not highlighted by the CFMEU or Mr Roberts when the statement was provided. The fact and significance of this evidence would only have been apparent to a keen eye undertaking a careful review of the bulky exhibits to his

²¹⁸ Thomas Roberts, witness statement, 23/9/14, paras 17-18.

²¹⁹ 24/9/14, T:314.13-14.

²²⁰ Mr Agius SC, 24/9/14, T:314.30-43.

statement, keeping in mind at the time of that review the precise chronology in respect of the Cbus leak.

215. Mr Roberts' evidence was advanced in order to support a theory to the effect that Mr Fitzpatrick must have had the Zanatta spreadsheets before 18 July 2013 (the date of Ms Zanatta's request of Mr Walls), and as such, he must have got them himself and from some 'secret source' within Cbus before Ms Zanatta began her work on 18 July 2013.²²¹ The forensic enterprise was to try to distance Mr Parker from the conduct of Ms Zanatta on and after 18 July 2013.
216. This was done in circumstances where Mr Parker had decided not to provide a statement denying anything that Mr Fitzpatrick had said. Without anything from Mr Parker, the CFMEU needed some shred of direct evidence to challenge Mr Fitzpatrick in the way described above. Mr Roberts' statement served this purpose.
217. Mr Roberts's statement that he had received the Zanatta spreadsheets from Mr Fitzpatrick on 15 July 2013 looked highly questionable at the time he made it. In this regard, at that time:
- (a) there was no record to indicate that anyone had sought and obtained from Superpartners or Cbus any document containing the private contact details of Lis-Con employees prior to Ms Zanatta's request of Mr Walls on 18 July 2013;

²²¹ Brian Fitzpatrick, 24/9/14, T:299.20-23.

- (b) the various internal Cbus and Superpartners emails already in evidence in the period from 18 to 24 July 2013 created a strong impression that the Zanatta spreadsheets had been created out of the documents that Mr Walls sent Ms Zanatta on 22 July 2013. They were identical, save that some columns had been deleted, and evidence had already been given by Mr Walls that his document was able to be manipulated in this way;²²²
- (c) Mr Walls' documents of 22 July 2013 were sent by Ms Zanatta to Ms Butera by email on 24 July 2013, referring to the documents as the data that Brian Parker had requested.²²³

218. All of those matters were known to Mr Roberts at the time he prepared his statement on 15 August 2014, and when he came to give his evidence on the first occasion on 23 September 2014. He was the most senior lawyer in the entire Division.²²⁴ He had been closely following the hearings and evidence pertaining to his Division.²²⁵

219. All of those matters would have given reasonably minded persons in Mr Roberts's position cause to have real doubt as to whether they received the Zanatta spreadsheets from Mr Fitzpatrick on 15 July 2013, and prior to 22 July 2013.

²²² Anthony Walls, 7/7/14, T:116.22ff.

²²³ Zanatta MFI-1, 7/7/14, p 119ff.

²²⁴ Thomas Roberts, 24/10/14, T:1027.31-36.

²²⁵ Thomas Roberts, 24/10/14, T:1028.15-24.

220. However, Mr Roberts was not minded to express any real doubt. In the witness box on 23 September 2013, not only did he say that his statement was true, he went further and said he was ‘very sure’ about when he got the Zanatta spreadsheets from Mr Fitzpatrick, and that he could ‘be sure of those matters’.²²⁶
221. There was no reason for Mr Roberts to have any confidence about such matters. He had no diary note in which he recorded receipt of those particular documents. There was no contemporary correspondence. He was working off memory. Even on his own evidence, he had only glanced at the documents in the yellow folder that Mr Fitzpatrick handed him, and then put them on his shelf where they proceeded to gather dust for almost a year.²²⁷ His evidence was that he effectively did nothing with these materials when they were given to him in July 2013, even though he had been the one given responsibility by the National Executive for marshalling the materials to use in the union’s fight against Lis-Con.²²⁸
222. Mr Roberts’ evidence, therefore, lacked credibility when given. In light of the matters set out above, known to Mr Roberts on 23 September 2014, he could not have been sure that the yellow folder he received from Mr Fitzpatrick on 15 July 2013 included the Zanatta spreadsheets. His evidence to the contrary was

²²⁶ Thomas Roberts, 23/9/14, T: 211.31-212.20.

²²⁷ Thomas Roberts, 23/9/2014, T:216.22-23, 216.44, 217.35-36.

²²⁸ Parker MFI-1, 3/10/14, p 76; Thomas Roberts, 23/9/14, T:218.34-35.

exaggerated in order to assist his union and protect Mr Parker's position.

223. The credibility of Mr Roberts' evidence is now in tatters, as a result of events which have transpired since 23 September 2014, including Ms Zanatta's evidence of 3 October 2014, his own performance in the witness box when recalled on 24 October 2014, and the content of the iMessages between Ms Butera, Ms Zanatta and Mr Parker which were located later that day and tendered on 28 October 2014.
224. On 3 October 2014, Ms Zanatta admitted that she had personally delivered documents for Mr Parker on 29 July 2013. She said she 'suspected' (i.e. knew) the documents she delivered were the Zanatta spreadsheets, and she did not identify any other documents as being ones she may have delivered. She positively rejected a suggestion raised by the CFMEU's counsel that the document she delivered was a print out of the totality of the attachment to Mr Walls' email of 22 July 2013. That possibility appears to have been raised in an attempt to save Mr Roberts's evidence and credit. That attempt failed.
225. Mr Roberts was summoned to be examined again on 24 October 2014 in light of the admissions of Ms Zanatta, and in light of certain other evidence, including a Superpartners query log which indicated that the only query that had been run in respect of Lis-Con was the one Mr Walls had run on 22 July 2013.

226. On 24 October 2014, Mr Roberts was afforded the opportunity to consider a substantial list of matters which all weighed strongly against Mr Roberts having received the Zanatta spreadsheets in the yellow folder on 15 July 2013.²²⁹ He was asked to agree that reasonably minded persons would have accepted that their recollection was probably faulty on that matter, and that if they did get those documents, they must have received them sometime after 22 July 2013.
227. Again, Mr Roberts proved to be not so minded. While he accepted that his memory is not infallible, he was not prepared to do better than to say that it was ‘possible’ that his recollection was faulty.²³⁰
228. His refusal to make obviously appropriate concessions was unimpressive. It reflected poorly on his credit. He was too interested in trying to protect himself, Mr Parker and the CFMEU’s cause. When this was put to him, and reference was made to the fact that Ms Mallia had described working as a lawyer for the CFMEU as a vocation rather than a job, Mr Roberts played word games and pretended he did not understand what the word vocation meant in that context.²³¹ This, too, reflected poorly on him.

²²⁹ Thomas Roberts, 24/10/14, T:1023ff.

²³⁰ Thomas Roberts, 24/10/14, T:1027.22-23.

²³¹ Thomas Roberts, 24/10/14, T:1027.41ff.

229. It is telling that, when Mr Roberts was recalled on 24 October 2014, he said he had something he wished to say by correction or clarification. It concerned a conversation with Mr O’Grady about the fact there was a file in his room.²³² He said he made this further statement out of a desire to be ‘open’.²³³ But this had no real bearing on any issue.
230. The subject matter of this short new oral statement was something he said had occurred to him after hearing Ms Zanatta’s evidence on 3 October 2014.²³⁴ Mr Roberts was quite unable to explain why, if he was seized with a spirit of openness, he did not explain why this new information was held back from the Commission until he stepped into the witness box on 24 October 2014.²³⁵
231. Worse for Mr Roberts, although saying he wished to be ‘open’, his short additional oral statement did not allude to the fact that, quite contrary to the evidence he gave on 23 September 2014 to the effect that he was certain that he received the Zanatta spreadsheets on 15 July 2013, since 3 October 2014 his state of mind had changed, and he was now of the view that he was possibly wrong about that. This was not volunteered by Mr Roberts. He was not being open at all.

²³² Thomas Roberts, 24/10/14, T:1021.32ff.

²³³ Thomas Roberts, 24/10/14, T:1039.24-25.

²³⁴ Thomas Roberts, 24/10/14, T:1038.26ff.

²³⁵ Thomas Roberts, 24/10/14, T:1039.17ff.

232. When Mr Roberts was pressed further about the Zanatta spreadsheets, and shown the originals, he admitted that he did not know where those originals had come from, and whether they had been in the records of the CFMEU at any time prior to the preparation of his statement, and as such he was unsure whether they had come from out of the yellow folder that Mr Fitzpatrick said he had given him on 15 July 2013.²³⁶
233. It was then put to Mr Roberts that all he could really say was what had been in his yellow folder when he handed it over to the CFMEU's lawyers in 2014. That was obviously the true position. He evaded answering that question, and ultimately fell back on the evidence he gave 'on the last occasion'. The problem with that answer was that the evidence he gave in September 2014 was entirely different from that which he gave on 24 October 2014.
234. So much for the submissions of counsel assisting.
235. Senior counsel for the CFMEU and Mr Roberts did not submit that any of the arguments of counsel assisting attacking Mr Parker, Ms Butera and Ms Zanatta were wrong. Nor did senior counsel for the CFMEU and Mr Roberts submit that the yellow folder he received on 15 July 2013 contained copies of the Zanatta spreadsheets. Instead he submitted that Mr Roberts *believed* that the yellow folder he received that day contained

²³⁶ Thomas Roberts, 24/10/14, T:1033.17-37.

copies of the Zanatta spreadsheets.²³⁷ And he submitted that there were documents available which might have formed the reasonable basis of a view that the Zanatta spreadsheets had been generated before 15 July 2013 and that this possibility had not been foreclosed by the time Mr Roberts's statement was provided to the Commission.²³⁸ That last submission matured into a submission that there was 'an inference available that Mr Fitzpatrick came into possession of similar or identical material' to the Zanatta spreadsheets before 15 July 2013. Those last two submissions must be rejected, because there is very little to support them. But what of the primary submission about Mr Roberts's belief?

236. It is certainly correct that Mr Roberts did himself no favours by the stubbornness with which he pursued the impossible task of defending his memory against the relevant evidence. Early in his evidence on 24 October 2014, six times Mr Roberts was asked whether in the light of what had become known by that date, it was likely or probable that his recollection of the yellow folder of 15 July 2013 contained the Zanatta spreadsheets was incorrect. Each time he accepted that it was possible but not probable or likely.²³⁹ The furthest he would go – and this was 25 pages of transcript later – was to accept that the evidence suggesting that the Zanatta spreadsheets did not come into existence until after

²³⁷ CFMEU submissions, Pt 8.3, 21/11/14, para 3.

²³⁸ CFMEU submissions, Pt 8.3, 21/11/14, paras 10-12.

²³⁹ Thomas Roberts, 24/10/14, T:1025.35-1027.23.

15 July 2013 was ‘strong and there is a prospect that my recollection is incorrect’.²⁴⁰

237. A more convincing approach might have been to accept the strength of the external evidence, to say that his memory was as it was, but to concede readily and quickly that his memory had probably led him into error. There is nothing shameful in that. Not only would the approach have been more convincing, it would have caused less trouble for himself. His evidence creates doubts about his intelligence. But does it destroy his credibility?
238. The question of Mr Roberts’s credibility is not central to the issues surrounding Cbus. Those issues are resolved by examining the contemporary documents and circumstances, the express evidence of Mr Fitzpatrick, and the lies of Mr Parker, Ms Butera and Ms Zanatta. Whatever is to be made of Mr Roberts counts for very little either way on those issues.
239. Counsel assisting submitted that Mr Roberts had exaggerated his evidence about continuing to believe that the yellow folder contained the Zanatta spreadsheets in order to assist the union and Mr Parker. To reach that conclusion, even on the balance of probabilities, is a serious thing in relation to an experienced solicitor. It would have grave consequences for Mr Roberts, as senior counsel for the CFMEU submitted.²⁴¹ Senior counsel also pointed to the absence of cogent evidence that Mr Roberts would

²⁴⁰ Thomas Roberts, 24/10/14, T:1052.22-23.

²⁴¹ CFMEU submissions, Pt 8.3, 21/11/14, para 15.

knowingly give false evidence for the benefit of another. To these points might be added the fact, though senior counsel for the CFMEU did not, that Mr Fitzpatrick thought Mr Roberts was ‘a very good person’, and he thought him to be ‘straightforward’ up ‘until yesterday’ – Mr Roberts’s first visit to the witness box.¹ Although, for the reasons given by counsel assisting, there are grounds for not accepting Mr Roberts’s evidence, the arguments outlined above lead to the conclusion that, on balance, no finding should be made that Mr Roberts was lying when he claimed to have the belief he did.

KPMG findings of widespread disclosures

240. On 11 May 2014, an article was published in the Sydney Morning Herald titled ‘Super fund in union leak claim’ alleging that the private financial details and home addresses of hundreds of non-union workers employed by Lis-Con were disclosed by a Cbus employee to a whistleblower, Mr Fitzpatrick, and to Mr Parker without authorisation. Cbus subsequently engaged KPMG to provide forensic investigation services on this matter.
241. A KPMG preliminary findings report of 25 June 2014 identified a number of incidents relating to the improper release of private information.² The KPMG report revealed that between 1 January 2013 and 12 May 2014, there were 59 incidents where Cbus members’ personal information was e-mailed externally

¹ Brian Fitzpatrick, 24/9/14, T:297.24-28.

² Zanatta MFI-2, 7/7/14, tab 60, pp 613-638.

from Cbus email accounts. In some instances, members' information including tax file numbers was disclosed to trade union officials. None of the incidents, however, appears to be comparable with the leak under consideration in this Chapter.

242. The KPMG report²⁴⁴ did not identify the transmissions of the information received by Ms Zanatta by email to any other parties. However, the report notes that the nature of the information provided to Ms Zanatta is similar to the information the subject of the 11 May 2014 article. The report also noted that it had not conducted further procedures to determine if the information was leaked through other means such as hard-copy printouts or the transfer of data using portable memory devices.
243. The submission of United Super Pty Ltd set out numerous remedial and other measures which have been taken both before and since October 2014.²⁴⁵ One of them was the dismissal of Ms Zanatta. Another is a direction to Ms Butera not to perform any duties and a placement of her on leave.²⁴⁶

Mr Atkin

244. No submissions adverse to Mr Atkin were made other than those of Ms Butera and those of Mr O'Neill and the Lis-Con companies. Ms Butera's submissions strongly insinuate that Mr

²⁴⁴ Zanatta MFI-2, 7/7/14, tab 60, pp 625-626, para 3.4.2.

²⁴⁵ Outline of submissions of United Super Pty Ltd as trustee for Cbus, 14/11/14, paras 34-35.

²⁴⁶ Outline of submissions of United Super Pty Ltd as trustee for Cbus, 14/11/14, para 38.

Atkin had instructed Ms Butera and Ms Zanatta to ensure delivery of personal contact details to Mr Parker personally. The O'Neill/Lis-Con submissions made several detailed points questioning Mr Atkin's evidence justifying the provision of information by Cbus to the CFMEU and distancing himself from the Butera/Zanatta disclosure.²⁴⁷ There are reasons why it is undesirable to make findings about Mr Atkin at this stage. First, Mr Atkin's position is central to the debate between counsel assisting and United Super Pty Ltd about the cultural problems, if any, of Cbus. No findings one way or the other are being made on that topic in this Interim Report. Secondly, Mr Atkin's position is central to the issue of what reasonable steps were taken to preserve privacy. No findings one way or the other are made on that either. It is desirable to stand over consideration of the Butera insinuation and the O'Neill/Lis-Con criticisms in relation to Mr Atkin until a future report.

C – CONCLUSIONS

245. Counsel assisting then turned to the conclusions to be drawn from the facts in terms of the unlawful conduct of Mr Parker and others, and also to deal with some broader policy issues concerning Cbus.

246. Counsel assisting identified issues with respect to:

²⁴⁷ O'Neill/Lis-Con submissions, 14/11/14, paras 3(4), 11-21. See Outline of Submissions of United Super Pty Ltd in Reply to the Submissions of the Lis-Con Parties, 21/11/14, paras 7-10.

- (a) breaches of the *Privacy Act 1988* (Cth) by Cbus;
- (b) breaches of the *Corporations Act 2001* (Cth) by Ms Zanatta, Ms Butera and Mr Parker;
- (c) breaches by Mr Parker of professional standards expected of an officer of a registered organisation; and
- (d) perjury.

247. Counsel assisting also identified two broader policy issues. These were:

- (a) cultural problems within Cbus, including the unhealthy loyalty that Cbus employees have to the CFMEU; and
- (b) problems with the current Cbus privacy policy and the lack of policies and procedures within Cbus to prevent occurrences of the kind dealt with in this case study from occurring in the future.

***Privacy Act 1988* (Cth) breaches**

248. The *Privacy Act 1988* (Cth) was substantially amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth). However, these amendments only commenced operation on 12 March 2014, after the date of the leak of the material by Cbus to the CFMEU. The conduct of Cbus and others falls to be

assessed under the legislation in force as at July 2013. It is this (now superseded) legislation that is addressed below.

- 249. Section 16A of the *Privacy Act* 1988 (Cth) provided that an ‘organisation’ must not do an act, or engage in practice, that breached an approved privacy code that bound the organisation or, if the organisation was not bound by an approved privacy code, the National Privacy Principles (**NPPs**).
- 250. Section 13A further provided that an act or practice of an organisation is an interference with the privacy of an individual if the act or practice breaches an NPP that relates to the individual (or an approved privacy code if it is covered by one).
- 251. The term ‘organisation’ was defined to include a body corporate that is not a small business operator, registered political party, agency, State or Territory authority or prescribed instrumentality of a State or Territory (s 6C). A small business operator was one with an annual turnover of \$3 million or less in a financial year (s 6D).
- 252. As United Super Pty Ltd as trustee of Cbus is a body corporate with an annual turnover of over \$3 million, it was an ‘organisation’ under the Act. Further, as Cbus was not bound by an approved privacy code, the NPPs applied in respect of information held by it.
- 253. The NPPs, which were provided as a Schedule to the *Privacy Act* 1988 (Cth), provided principles regarding, among other things,

the collection, use, disclosure and handling of ‘personal information’. Section 6 of *Privacy Act* 1988 (Cth) defined personal information as information or an opinion, whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion.

254. As to the disclosure of personal information, NPP 2.1 provided that, subject to various exceptions, an organisation must only disclose personal information for the primary purpose of collection.

255. The Guidelines to the National Privacy Principles (**NNP Guidelines**) in relation to NPP 2.1 recognised that:

- (a) when an individual provides and an organisation collects personal information they almost always do so for a particular purpose – for example, to buy or sell a particular product or receive a particular service;
- (b) how broadly an organisation can describe the primary purpose will need to be determined on a case by case basis and it will depend on the circumstances.

256. Disclosure for a purpose other than the primary purpose (the ‘secondary purpose’) was not permitted unless it fell under the following exceptions:

- (a) where both of the following applied:

- (a) the secondary purpose was related to the primary purpose of collection and, if the personal information was sensitive information, directly related to the primary purpose of collection; and
- (b) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose;²⁴⁸ or
- (b) where the individual had consented to the disclosure;²⁴⁹
- (c) where the organisation had reason to suspect that unlawful activity had been, or was being or may be engaged in, and used or disclosed the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities;²⁵⁰ or
- (d) where the disclosure was required or authorised by or under law.²⁵¹

257. The NPP Guidelines dealt with the operation of these exceptions, providing that, amongst other things:

²⁴⁸ National Privacy Principles 2.1(a).

²⁴⁹ National Privacy Principles 2.1(b).

²⁵⁰ National Privacy Principles 2.1(f).

²⁵¹ National Privacy Principles 2.1(g).

- (a) for a secondary purpose to be related to the primary purpose, it must be something that arose in the context of the primary purpose. The test for what the individual would ‘reasonably expect’ would be applied from the point of view of what an individual with no special knowledge of the industry would expect;²⁵²
- (b) consent to the use of disclosure could be express or implied. Implied consent would arise where the consent may reasonably be inferred in the circumstances from the conduct of the individual and the organisation. If the organisation’s use or disclosure had serious consequences for the individual, the organisation would have to be able to show that the individual could have been expected to understand what was going to happen to information about them and gave their consent.²⁵³

258. NPP 4.1 provided that an organisation holding personal information must take such steps as are reasonable in the circumstances to protect the information from misuse, unauthorised access or disclosure.

259. The APP Guidelines stated whether reasonable steps have been taken to secure personal information will depend on the organisation’s particular circumstances, including the sensitivity

²⁵² Office of the Federal Privacy Commissioner, Guidelines to the National Privacy Principles, p 35-36.

²⁵³ Office of the Federal Privacy Commissioner, Guidelines to the National Privacy Principles, p 37.

of the personal information, the harm that is likely to result to people if there is a breach of security, how the organisation stores, processes and transmits the personal information, and the size of the organisation (the larger the organisation, the greater the level of security required).²⁵⁴

260. NPP 5.1 required an organisation to set out a publicly available privacy policy setting out the organisation's general information handling practice, as well as handling notices to people whose information is collected setting out matters such as the purpose of collection. This policy had to set out the main purposes for which the organisation held the information and whether it contracted out services that involved disclosing personal information.²⁵⁵

Cbus trust deed

261. The terms of the Cbus superannuation fund are set out in a trust deed in respect of which United Super Pty Ltd, the trustee, is a party.²⁵⁶

262. Clause 6.4 of the trust deed provides as follows:

Privacy

In accordance with the Relevant Law, the Trustee will hold, and treat as confidential, all records and information it may hold, receive

²⁵⁴ Office of the Federal Privacy Commissioner, Guidelines to the National Privacy Principles, p 45.

²⁵⁵ Office of the Federal Privacy Commissioner, Guidelines to the National Privacy Principles, p 47.

²⁵⁶ Atkin MFI-1, 3/10/14, tab 1.

or become aware of in its capacity as Trustee in relation to Employers, Members or Beneficiaries and shall not disclose or make known any such records or information to any third party except as may be required in relation to the administration of the Fund or to facilitate the provision of services or Benefits to Members or as may be required by the Relevant Law or as it may otherwise be lawfully required to do except that a Member may authorise the Trustee to release information pertaining to that Member to a third party.

263. The term ‘Relevant Law’ is the subject of a lengthy definition and includes, amongst other things the *Privacy Act 1988* (Cth).

Contracts with members

264. The Member Declaration in Cbus’ Product Disclosure Statement of 1 July 2013, which forms part of the suite of contractual documents executed when a person becomes a member of the Cbus fund, includes the following statement in relation to privacy:²⁵⁷

Cbus collects, stores and discloses the personal information you provide for the specific purpose of administering your account and in accordance with the Fund Privacy Policy. Except where required by law, the Fund will not use your personal information for any other purpose. You can access the Cbus Privacy Policy at **www.cbussuper.com.au** or contact the Fund for a copy to be sent to you. By signing this application I consent to the use of my personal information for the establishment and ongoing administration of my superannuation account.

²⁵⁷ Supplementary Tender, Cbus Member Handbook for Industry Superannuation Product Disclosure Statement: 1 July 2013, 31/10/14.

Cbus privacy policy

265. At the relevant time, Cbus had a member privacy policy. It was referred to in the passage from the member declaration quoted above. That policy included the following relevant passage:²⁵⁸

Cbus outsources the administration of its member and employer records to an external superannuation administration company and contracts with life insurers and other service providers to provide services to you. They are authorised to only use your personal information under the strictest confidence.

Cbus believes it is important that employer contributions are paid regularly and any late or non-payments are identified so steps can be taken to recover late contributions. As part of the process of monitoring contributions Cbus, from time to time, supplies fund sponsors with information on contributions received for members who are working on sites where an award, industrial agreement or enterprise bargain agreement is in place.

The Fund's debt collection agency may also be provided with access to information for the purposes of collecting outstanding contributions. Confidentiality agreements with staff and service providers ensure your details are not passed on to any unauthorised third party.

Your personal information will not be used or disclosed for any other purpose without your consent, except where required by law.

266. The paragraph of the policy dealing with disclosure of information to fund sponsors (such as the CFMEU) provided only that Cbus supplies 'information on contributions received' to sponsors 'as part of the process of monitoring contributions'. Further, the only entity to which information would be provided for the purpose of chasing arrears was the fund's debt collection agency.

²⁵⁸ Zanatta MFI-2, 7/7/14, tab 55, p 535.

Privacy issues: analysis

267. It is useful to set out what United Super Pty Ltd, the trustee of Cbus, thought of the conduct of Ms Butera and Ms Zanatta. It submitted²⁵⁹ that their conduct:

was in breach of their duties to Cbus and the terms of their contracts of employment. For example:

- (1) both Ms Butera and Ms Zanatta were in breach of their undertaking to keep Confidential Information (as defined) subject to limited permitted disclosures;
- (2) Ms Butera acted contrary to the Code of Conduct, which included to “ensure that the Fund complies with all legal requirements” and “to maintain confidential information of the Fund”;
- (3) each has breached their implied duty of fidelity to Cbus “not to engage in conduct which impedes the faithful performance of [her] obligations, or is destructive of the necessary confidence between employer and employee”; and
- (4) Ms Butera has also breached her duty, as a senior employee, to disclose acts of misconduct by fellow employees. (footnotes omitted)

268. That is correct. The submissions of the trustee also accept, correctly, the factual reasoning of counsel assisting.

269. What of Cbus? Counsel assisting submitted that Cbus breached the *Privacy Act* 1988 (Cth), the Trust Deed, its own privacy policy and its contracts with members. Mr Parker induced each of those breaches, and that finding is quite independent of the

²⁵⁹ Outline of submissions of United Super Pty Ltd as trustee for Cbus, 14/11/14, para 31.

question whether it was a crime or a civil wrong for him to have done so.

270. First, the telephone numbers and other personal contact details of employees of Lis-Con set out in the documents provided by Cbus to Mr Parker constituted ‘personal information’ of ‘individuals’ within the meaning of those expressions in the *Privacy Act* 1988 (Cth).
271. Secondly, with regard to NPP 2.1, on a broad view, the primary purpose of the personal information of each member was for the proper administration by the trustee of that member’s account within the superannuation fund. On a narrower view, the primary purpose was to enable Cbus staff to contact the member in relation to his or her superannuation account.
272. Thirdly, that information was used or disclosed by Cbus to Mr Parker for quite a different purpose. It was disclosed in order to meet a request by Mr Parker for that information so that CFMEU staff could use that information to ring those individuals directly and speak to them about whether Lis-Con was in arrears in payment of superannuation entitlements, and if so, by how much.
273. That behaviour by the CFMEU forms no part of the proper administration of the fund by Cbus or the administration of services to Cbus members. Cbus had its own staff, including a large number of former CFMEU organisers who became Cbus organisers, who could contact members and deal with defaulting employers. It also had a retained debt recovery agency that could

pursue employers for arrears. What was contemplated by Mr Parker, Ms Zanatta and Ms Butera was the use of personal information in an entirely inappropriate and unauthorised way, hence the secrecy at the time and the campaign of concealment which continued all the way up to Ms Zanatta's confession on 3 October 2014.

274. Fourthly, the circumstances were not such as to bring Cbus within one of the exceptions to the general statutory prohibition on disclosure of the information.
275. The consent exception in NPP 2 has no application. At no point did any Lis-Con employees consent to Cbus disclosing their personal contact details to the CFMEU for any purpose, let alone for the purpose of enabling officers of the CFMEU to contact them directly.
276. The privacy policy, as earlier noted, did not contemplate such a disclosure. The only possible disclosure of information to the CFMEU identified in that policy was of 'information on contributions received', and only 'as part of the process of monitoring contributions'. As such, it was not suggested that personal contact details of members would be disclosed to the CFMEU. Further and in any event, the personal contact details were not disclosed to the CFMEU for the purpose of monitoring

contributions. The CFMEU already had information for this limited purpose, in the form of the statement of arrears.²⁶⁰

277. The privacy policy further expressly provided that in respect of chasing arrears, information may be provided to the trustee's debt collection agency (i.e. not the CFMEU). It also expressly stated that the information would not otherwise be disclosed without the member's consent. No such consent was given.
278. As to the 'secondary purpose' exception in NPP 2, for much the same reasons it has no application. For that exception to apply, the secondary purpose would need to be related to the primary purpose and the member would have to reasonably expect Cbus to use or disclosure the information for that secondary purpose.
279. Neither of these requirements can be satisfied in circumstances where Cbus' own privacy policy expressly provides for disclosure of limited information to the CFMEU for a limited purpose (neither which applies in the present case for reasons given above), and where the policy expressly stated that the information would not otherwise be disclosed without the member's consent.
280. Having regard to the express terms of the privacy policy, the reasonable expectation of members would be that, if their

²⁶⁰ Even if this were not so, a member's signature on the application form does not constitute an informed consent of the kind required. The application form provides for a 'bundled consent' of a kind which the Privacy Act regulator has indicated will not constitute an informed and effective consent for the purposes of the legislation.

employer fell into arrears, Cbus would pursue the employer, if necessary with the aid of its retained debt collection agency.

281. On no sensible basis could it be said that members of a superannuation fund would reasonably have expected their private telephone numbers to be handed out by the trustee of their superannuation funds to a trade union so that trade union officials could contact them directly, and out of the blue, to discuss their superannuation position. The submissions of United Super Pty Ltd accept this.²⁶¹
282. Those calls and the retention of their private contact details by a trade union, is a significant invasion on the privacy of these members.
283. Counsel assisting submitted that Cbus acted inconsistently with, and thus breached, the NPPs set out in subclause 2.1 and 4.1 by providing the information to Mr Parker. This, in turn, constituted a contravention by Cbus of section 16A of the *Privacy Act* 1988 (Cth). The submissions of counsel assisting set out above are accepted.
284. Counsel for United Super Pty Ltd pointed out that the conduct of Ms Butera and Ms Zanatta was in breach of their duties to Cbus and unauthorised by Cbus. They also pointed to its clandestine character. They in effect denied that Cbus had failed to take reasonable steps within the meaning of NPP 4.1, while accepting

²⁶¹ Outline of submissions of United Super Pty Ltd as trustee for Cbus, 14/11/14, para 43.

that the steps taken had been insufficient. But they accepted that Cbus had to take further steps to protect its members' information from misuse, unauthorised access or unauthorised disclosure. They looked to the Samuel Governance Review for assistance along these lines.²⁶²

285. It is probably true that there has been under-analysis of the internal position of Cbus, of how Ms Butera and Ms Zanatta came to offend, and of what steps had been taken to stop that type of conduct. Instead the focus has been on the relations between officers of Cbus and the CFMEU. For that reason it is desirable not to make a finding one way or the other until further evidence comes to light.

Breach of trust and contract and inducement by Mr Parker

286. However, the reasoning of counsel assisting in relation to the *Privacy Act* 1988 (Cth) does support the conclusion that Cbus has acted in breach of clause 6.4 of Cbus's trust deed, its own privacy policy and the terms of its contracts with the Lis-Con members. The submissions of United Super Pty Ltd accept this.²⁶³

287. It is not clear one way or the other whether Mr Parker had sufficient notice of the terms of the contracts with Lis-Con

²⁶² Outline of submissions of United Super Pty Ltd as trustee for Cbus, 14/11/14, para 45.

²⁶³ Outline of submissions of United Super Pty Ltd as trustee for Cbus, 14/11/14, para 46.

members to render him liable for the tort of interference with contract.

Possible breaches of the law and of CFMEU's professional standards

288. The submissions of counsel assisting and the various parties deal with possible breaches of the law, including in particular the offences of perjury under s 6H of the *Royal Commissions Act* 1902 (Cth) and breaches of the *Corporations Act* 2001 (Cth). The question of whether Mr Parker breached the CFMEU's professional standards was also debated.
289. As noted above, these are important questions. In due course, the Commission will consider them in detail and make appropriate recommendations. However, it is possible that further evidence will be called in relation to the matters the subject of this Chapter in 2015. In these circumstances, the Commission will not in this Interim Report deal with these issues. Rather, resolution of these issues, and conclusions as to whether recommendations will be made, and if so on what terms, will be reserved for a future report.

Cultural problems within Cbus

290. Counsel assisting posed two questions. Why did this happen? Why did two senior employees, one an executive manager (a direct report to the Chief Executive Officer) and a 'responsible

person’²⁶⁴ with 16 years of service, and the other, a senior adviser with 15 years of service, carry out a most serious breach of the fund’s policies and their clear duties to its members? Counsel assisting then put the following submissions.

- 291. This is not a case of inadvertence or even recklessness. It is a case of conduct undertaken by senior leaders with full knowledge at the relevant time that their actions were so seriously improper that discovery would put their future employment in jeopardy. Nor can the conduct be attributed to a mere failure of corporate governance by virtue of some deficiency in the privacy policies and procedures of Cbus.
- 292. The conduct can only be explained as a symptom of an unhealthy culture in play within at least the Workplace Distribution team at Cbus.
- 293. In all organisations, culture is critical to compliance with the law. Compliance policies and procedures are worthless in an organisation where the underlying norms of behaviour and attitude are in conflict with the intent of the policies.
- 294. Culture is a responsibility of leadership. Leaders set the tone. In a corporation the board sets the tone from the top. The Commission has not examined nor considered the function of the

²⁶⁴ Ms Butera was in a sufficiently senior role to be designated as a ‘responsible person’ for the purposes of CBUS’s ‘Fit and Proper Policy’ and compliance with Prudential Standard SPS 520 supervised by the Australian Prudential Regulation Authority.

board of Cbus and makes no comment on it other than to note that its composition, so divided in interests and agendas, poses particular challenges in a modern corporate governance environment.

295. The Commission is, however, well-placed to comment on the operations of the Workplace Distribution team led by Ms Butera. Whether or not the following observations reflect on the performance of the Cbus board or the broader operations of Cbus is not the subject of these submissions.
296. The Workplace Distribution team at Cbus does not have a strong culture focussed on the integrity of Cbus, the interest of Cbus' members, and strict compliance with rules and procedures.
297. Indeed the real problem is that there is no strong and independent *Cbus* culture at all. The environment at management and operational level is infected by the separate private interests of the CFMEU, and a deep seated loyalty to those interests. Those interests and loyalties are all pervasive, and prevent the development of a true Cbus culture, where Cbus and its members come first, at the expense of the CFMEU.
298. The scale of the cultural corruption is evident from the fact that the relevant misconduct was carried out at the upper echelons of management. It was not carried out by a wayward junior staff member who did not know better. The fact senior management are prepared to behave in this fashion is a strong indicator of the existence of an invasive cultural problem. It is not just that they

acted as they did. Their actions betray underlying attitudes. And those attitudes would manifest themselves through the behaviour of these managers in the workplace on a daily basis, across a whole range of tasks, and would rub off on to the staff they are supposed to be leading.

299. The problem is exacerbated by the fact that many of those staff members (whose behaviour the leadership is influencing) are highly receptive to misguided attitudes of this kind. This is because many of the staff who are exposed to these attitudes and behaviours from senior management are themselves former employees or members of the CFMEU. They come with strong loyalties to the CFMEU. Following their arrival, they are led by senior managers who share those loyalties.
300. The problem is further aggravated by the fact that Cbus is, at least to a degree, commercially dependent upon the CFMEU. It relies on the CFMEU to promote it to builders, subcontractors and workers. It relies on the fact that the CFMEU pattern enterprise bargaining agreements nominate Cbus (and not one of its competitors) as the default superannuation fund.
301. All businesses are dependent on their customers. In the ordinary course, this leads businesses to seek to accommodate the wishes of those customers. However, in the ordinary course, businesses have a culture and a set of rules and policies that enable its management and workers to know where to draw the line in terms of the level of accommodation that can be given. That culture does not exist in Cbus.

302. Ultimately, the root cause of this cultural failure is the symbiotic relationship between the CFMEU and CBUS. Many of the employees of the Workplace Distribution team of CBUS are drawn from the retired ranks of the CFMEU. Some of those employees have concurrently held honorary positions with the CFMEU. This creates a significant risk of conflict of interest. Cbus's current conflict policies have not been sufficient, on their own, to deal with this at the operational level.
303. If Cbus is to recruit from the ranks of the CFMEU, much more will need to be done by it to ensure that these workers receive a strong and continuous injection of an independent and law abiding Cbus culture through training, performance reviews, and substantive exposure to employer representatives and non-union members of Cbus so that they can develop a more balanced perspective. Those injections will need to be administered by senior managers who are (and who are seen to be) sufficiently divorced from the CFMEU.
304. Counsel for United Super Pty Ltd denied the propositions set out above. The submissions of United Super Pty Ltd are full of interesting detail about the superannuation industry in general and Cbus in particular, though these are largely beside the present point.
305. Counsel for United Super Pty Ltd made several criticisms of the submissions of counsel assisting. One was that to criticise the role of CFMEU former employees or members sat uncomfortably with equal opportunity and freedom of association laws. Another

was that it overlooked the historical role played by unions in promoting superannuation entitlements for employees and monitoring employer compliance. Another criticism concerned the reference to the division of the board ‘in its interests and agendas’.²⁶⁵ These criticisms were not entirely convincing. They did not face up to a fundamental point raised by Mr O’Neill and Lis-Con – the need to ensure that Cbus employees are not placed in a position of conflict between duty and interest or duty and duty.²⁶⁶

306. However, it was submitted that no adverse finding should be made about ‘cultural corruption’ at Cbus. For the moment, that submission should be accepted, but only for the moment. A longer consideration of the evidence, particularly in view of the Cbus board’s recent appointment of the Samuel Governance Review, may cast further light on the problems which weigh on counsel assisting. It may also be necessary to return to consider the position of Cbus if further evidence emerges, whether from the Samuel Governance Review or otherwise.

307. It is desirable to remember one point on which counsel assisting and counsel for United Super Pty Ltd collide. Counsel for United Super Pty Ltd submitted:²⁶⁷

²⁶⁵ Outline of submissions of United Super Pty Ltd as trustee for Cbus, 14/11/14, paras 39, 40.

²⁶⁶ O’Neill/Lis-Con Submissions in Reply to Submissions by Interested Parties, 21/11/14, para 18.

²⁶⁷ Outline of submissions of United Super Pty Ltd as trustee for Cbus, 14/11/14, para 41.

Mr Atkin noted that culture was an issue that should be reviewed by Cbus as part of its review, but he did not agree there was a widespread cultural issue.²⁶⁸ It was not put to Mr Atkin that there were systemic cultural issues at Cbus. Mr Atkin did not agree that there was a “cultural difficulty ... because of their background with a particular union”. Rather, Mr Atkin said that “the fact that they come from a union background assists their understanding of the environment that they work within and I’ve got confidence in the work that they do”.²⁶⁹ Cbus’ results in the Great Place to Work Institute’s 50 Best Workplaces study also suggest that there are no systemic cultural issues, with 95% of staff surveyed this year indicating that they are “proud to tell others I work at Cbus”, and where credibility, respect and fairness are all rated above 80.²⁷⁰

308. In reply, counsel assisting submitted:²⁷¹

While Cbus contends that the Butera/Zanatta leak was, in effect, an isolated act by rogue employees, that contention does not address the fact that Ms Butera and Ms Zanatta were members of senior management, who held views so strongly supportive of the CFMEU that they were unable to look after the interests of Cbus and its members. It is likely that these prejudicial views and tendencies manifested themselves on a daily basis in their attitudes to their work, towards employers, and in response to favours and views expressed by CFMEU officers. The fact that Ms Zanatta and Cbus [were] prepared to comply without question with the CFMEU’s instructions to sue Lis-Con is an illustration of this. It is difficult to see how these deeply engrained prejudices held by senior management could not have permeated through to the more junior staff who looked up to and learned from these member of management, particularly where the more junior staff were themselves recruits from the CFMEU. The fact there may have been many occasions upon which information has leaked from Cbus to the CFMEU is supportive of this proposition.

Mr Atkin, the Cbus CEO, accepted in his evidence that KPMG had identified a ‘cultural disconnect’, that departures from policies and procedures often relate to such cultural problems, that one of the cultural issues that Cbus needed to address was the fact that a large number of Cbus employees are former union employees, and that

²⁶⁸ David Atkin, 23/10/14, T:908.31-34.

²⁶⁹ David Atkin, 23/10/14, T:907.36-40.

²⁷⁰ Cbus Annual Report 2013/2014, p 65.

²⁷¹ Submissions in reply to Cbus of counsel assisting, 25/11/14, paras 27-28.

the evidence was sufficient to demonstrate the need for an examination of this cultural issue.²⁷²

309. Ms Butera, too, criticised Mr Atkin's claim that there was no conflict of loyalties in Cbus staff who were members, former members or employees of the CFMEU being loyal to the union but also having to be loyal to Cbus. She said that claim was unsupported.²⁷³ This is true. Ms Butera, whose written submissions were much more frank than much of what she said in her testimony, also criticised the Cbus approach of treating herself and Ms Zanatta as rogue employees responsible only for an isolated incident unrelated to the Cbus/CFMEU culture. She pointed to her distinguished record, which involved working closely with employer groups as well as unions throughout her professional life. She claimed to be devoted to her job, to have a high professional reputation, to be loyal to the interests of Cbus, and to be deeply respected there. There is no reason to doubt these claims. Nor, she submitted, was the Butera/Zanatta incident isolated. She pointed to the McWhinney leak, the Gaske leaks, and the findings of the KPMG report which 'details an apparently liberal approach taken by the unions to requesting member information from Cbus, and a history of Cbus complying with the union's requests'.²⁷⁴ Hence, Ms Butera submitted that she was unlikely to have acted as a rogue in blind loyalty to the CFMEU in disregard of her professional obligations and the

²⁷² David Atkin, 23/10/14, T:907-908.

²⁷³ Submissions in reply on behalf of Maria Butera, 21/11/14, para 2-4.

²⁷⁴ Submissions in reply on behalf of Maria Butera, 21/11/14, paras 5.

interests of Cbus members.²⁷⁵ Therefore, she submitted that the ‘more likely thesis’ was:²⁷⁶

- (a) The leak to Parker of the personal details of Cbus members who were Lis-Con employees cannot logically be isolated to the behaviour of two rogues inside Cbus who surreptitiously operated independently of instructions. The leak could only have taken place on a request or instructions to give Parker private details of the relevant Cbus members in a pro-union working environment where leaks to unions were not generally frowned upon; and
- (b) The leak of the Cbus private member details to Parker in those circumstances was a function of the cultural dilemma inside Cbus between loyalty to members and loyalty to the unions (especially the CFMEU) rather than a demonstration of the absence of the cultural dilemma. Zanatta’s actions represent a cultural loyalty to the union movement inside Cbus. Her behaviour was not the anomalous behaviour of a rogue.

310. While Ms Butera did not explain explicitly where she herself fits into this thesis, it may have considerable force.

311. The friction between these competing points of view may generate some useful energy in the coming months.

D – RETURNING THE ZANATTA SPREADSHEETS

312. Mr Roberts accepted that the Zanatta spreadsheets, which the CFMEU had in its possession, were not the CFMEU’s. He said that the CFMEU would not give them back because they were being used for the purposes of the inquiry. He said there were no copies of the Zanatta spreadsheets ‘floating around’ Slater &

²⁷⁵ Submissions in reply on behalf of Maria Butera, 21/11/14, para 8.

²⁷⁶ Submissions in reply on behalf of Maria Butera, 21/11/14, para 9.

Gordon. He also said that the only copies in the possession of the CFMEU were copies that exist for the purposes of the Commission and they were part of the files of the lawyers.²⁷⁷ Some may think it strange, after this doubtless sincere but somewhat informal testimony, that no precise audit of the Zanatta spreadsheets seems to have taken place with a view to the CFMEU informing Cbus of how many are retained and why, and returning to Cbus those which are surplus to legitimate requirements. The CFMEU treats itself as the victim of rogue activity by Ms Butera, Ms Zanatta and Mr Fitzpatrick. It makes no claim that it was entitled to receive the Zanatta spreadsheets. It is, therefore, strange that it does not return them or explain why it should not have to.

²⁷⁷ Thomas Roberts, 24/10/14, T:1041.4-1042.32.

ANNEXURE A

EXAMPLES OF FALSE EVIDENCE GIVEN BY MS BUTERA

Examples of the false evidence given by Ms Butera in the hearings on 7 July 2014, 23 October 2014 and 28 October 2014 include:

- (a) she asked Ms Zanatta to make enquiries in relation to the arrears status of Lis-Con.²⁷⁸ The enquiry that Ms Zanatta was being asked to make was a routine enquiry,²⁷⁹ and would involve Ms Zanatta collating the arrears information and ringing Mr Parker to tell him about the results, and this is what occurred;²⁸⁰
- (b) the query and the response to it was ‘unremarkable’;²⁸¹
- (c) she did not know how the personal information of Lis-Con employees ended up with Mr Parker;²⁸²

²⁷⁸ Maria Butera, 7/7/14, T:77.23-26.

²⁷⁹ Maria Butera, 7/7/14, T:79.5-6.

²⁸⁰ See, for example, Maria Butera, 7/7/14, T:77.24-26, 83.44-46.

²⁸¹ Maria Butera, 7/7/14, T:83.40-42.

²⁸² Maria Butera, 7/7/14, T:83.33-35.

- (d) 'I had no prior knowledge, involvement or participation in the release of that information'.²⁸³ This was something she repeated, even in the face of the iMessages of 26 July 2013, and even after she was given an open opportunity to retract this evidence in the face of those messages;²⁸⁴
- (e) that the only discussion she had with Ms Zanatta was about her telling Mr Parker what the arrears position was, and they discussed nothing else;²⁸⁵
- (f) that she had 'no idea' that Ms Zanatta was making arrangements about a trip to Sydney;²⁸⁶
- (g) that her phone call with Mr Parker at 2.40pm on 26 July 2013 was to say no more than that she had actioned his request on the Lis-Con arrears, and to discuss a sponsorship program;²⁸⁷
- (h) that she rang Mr Parker on this occasion (even though she knew Ms Zanatta had been tasked to tell him about the Lis-Con arrears) as a 'goodwill' gesture;²⁸⁸

²⁸³ Maria Butera, 23/10/14, T:934.1-2.

²⁸⁴ Maria Butera, 28/10/14, T:1132.8-19.

²⁸⁵ Maria Butera, 23/10/14, T:954.40-955.5.

²⁸⁶ Maria Butera, 23/10/14, T:958.38-39.

²⁸⁷ Maria Butera, 23/10/14, T:959.16ff.

²⁸⁸ Maria Butera, 23/10/14, T:960.31-32.

- (i) she had no discussion with Ms Zanatta about what she had done on Monday, 29 July 2013;²⁸⁹
- (j) she was not involved in the leak and did not work in concert with Ms Zanatta ('I totally refute that');²⁹⁰
- (k) Ms Zanatta acted on her own and off her own bat entirely;²⁹¹
- (l) to her knowledge, Ms Zanatta did not involve anyone else at Cbus;²⁹²
- (m) Ms Zanatta was acting without her knowledge and approval;²⁹³
- (n) Ms Zanatta never communicated with her about dropping off information to Brian Parker's PA;²⁹⁴
- (o) she did not set about with Ms Zanatta working out how to get that information to Mr Parker (which she said even in the face of the iMessages of 26 July 2013);²⁹⁵

²⁸⁹ Maria Butera, 23/10/14, T:965.47-966.2.

²⁹⁰ Maria Butera, 23/10/14, T:967.43-47.

²⁹¹ Maria Butera, 23/10/14, T:968.2-4.

²⁹² Maria Butera, 23/10/14, T:968.12-14.

²⁹³ Maria Butera, 23/10/14, T:968.21-23.

²⁹⁴ Maria Butera, 28/10/14, T:1122.42-44.

²⁹⁵ Maria Butera, 28/10/14, T:1132.44-46.

- (p) she did not know on 26 July 2013 that Ms Zanatta was going to go to Sydney (which she said even in the face of the iMessages of 26 July 2013);²⁹⁶
- (q) she did not know what information Ms Zanatta was dropping off (which was said in the face of the iMessages of 26 July 2013);²⁹⁷
- (r) the words in the iMessage that she sent to Ms Zanatta on 26 July 2013 ‘could mean anything’;²⁹⁸
- (s) she did not know what information Ms Zanatta dropped off.²⁹⁹

²⁹⁶ Maria Butera, 28/10/14, T:1131.28-30.

²⁹⁷ Maria Butera, 28/10/14, T:1134.40.

²⁹⁸ Maria Butera, 28/10/14, T:1135.8.

²⁹⁹ Maria Butera, 28/10/14, T:1135.42.

ANNEXURE B

EXAMPLES OF THE FALSE EVIDENCE GIVEN BY MS ZANATTA

The false evidence given by Ms Zanatta included the making of the following affirmed statements:

- (a) that she was not personally involved in the provision of information concerning Lis-Con employees to the CFMEU;³⁰⁰
- (b) that there was never an occasion on which she participated in the release of members' information to anyone at the CFMEU;³⁰¹
- (c) that she had never provided the CFMEU with members' addresses and telephone numbers;³⁰²
- (d) that when Mr Walls sent her the query results she was overwhelmed by the amount of private information that

³⁰⁰ Lisa Zanatta, 7/7/14, T:21.7-9.

³⁰¹ Lisa Zanatta, 7/7/14, T:21.27-32.

³⁰² Lisa Zanatta, 7/7/14, T:21.34-36.

was provided and she wanted to make sure it was secure;³⁰³

- (e) that she had been told that there was data released to the CFMEU, but she could not confirm that the data in the attachments to Mr Walls' email of 22 July 2013 was released to the CFMEU;³⁰⁴
- (f) that she did not know the contents of the data that was released to the CFMEU;³⁰⁵
- (g) that she had not seen the contents of the data that was released to the CFMEU;³⁰⁶
- (h) that she was unaware when the data was released to the CFMEU;³⁰⁷
- (i) that she was unaware who released the data to the CFMEU;³⁰⁸
- (j) that she had 'no idea', 'absolutely none' about the disclosure of the information to CFMEU;³⁰⁹

³⁰³ Lisa Zanatta, 7/7/14, T:34.4-7.

³⁰⁴ Lisa Zanatta, 7/7/14, T:34.42-44.

³⁰⁵ Lisa Zanatta 7/7/14, T:35.3-4.

³⁰⁶ Lisa Zanatta, 7/7/14, T:35.3-4.

³⁰⁷ Lisa Zanatta, 7/7/14, T:35.28.

³⁰⁸ Lisa Zanatta, 7/7/14, T:35.28.

- (k) that she did not know how the information found its way to the CFMEU in New South Wales;³¹⁰
- (l) that the information did not come from her to the CFMEU;³¹¹
- (m) that at no stage did she pass the information on to the CFMEU;³¹²
- (n) that she has never released Cbus data to a third party containing the addresses, mobile phone numbers and email addresses of members;³¹³
- (o) that she did not pass on the data to CFMEU;³¹⁴
- (p) that she was unaware that the query that she received from Mr Walls had been leaked anywhere. ‘I had no idea. How many times do I need to tell you that’;³¹⁵
- (q) that she did not know what methods were employed to enable the material to be passed from Cbus to the CFMEU;³¹⁶

³⁰⁹ Lisa Zanatta, 7/7/14, T:36.17-22.

³¹⁰ Lisa Zanatta, 7/7/14, T:38.22-24.

³¹¹ Lisa Zanatta, 7/7/14, T:38.26-28.

³¹² Lisa Zanatta, 7/7/14, T:39.16-17.

³¹³ Lisa Zanatta, 7/7/14, T:43.40-42.

³¹⁴ Lisa Zanatta, 7/7/14, T:45.7.

³¹⁵ Lisa Zanatta, 7/7/14, T:49.37-39.

- (r) that she had come to Sydney on 29 July 2013 for the purpose of a Cbus Property and joint unions meeting and had gone to the locations and made the calls described earlier in these submissions;³¹⁷
- (s) that she had not made up the false story described in the previous sub-paragraph;³¹⁸
- (t) that she did not arrange for Ms Heintz to book her trip to Sydney on 26 July 2013 ('I absolutely did not');³¹⁹
- (u) that she did not ring Mr Parker and tell him that she would bring the Zanatta spreadsheets to Sydney ('That's absolutely incorrect');³²⁰
- (v) that she did not arrange for the Zanatta spreadsheets to be couriered to her home so that she could take it to Sydney the following Monday;³²¹
- (w) that she had not arranged with Mr Parker for her to bring the Zanatta spreadsheets to Sydney;³²²

³¹⁶ Lisa Zanatta, 7/7/14, T:59.43-46.

³¹⁷ Lisa Zanatta, 3/10/14, T:732.38ff.

³¹⁸ Lisa Zanatta, 3/10/14, T:736.7-10.

³¹⁹ Lisa Zanatta, 3/10/14, T:742.37-39.

³²⁰ Lisa Zanatta, 3/10/14, T:742.44-47.

³²¹ Lisa Zanatta, 3/10/14, T:744.44-745.13.

³²² Lisa Zanatta, 3/10/14, T:745.25-26.

- (x) that (even after being shown the taxi records indicating she had gone to the CFMEU office) her recollection was that the meeting with Cbus Property (which she had made up) was to be held on 29 July 2013.³²³ This shows that, but for the adjournment that was then granted, Ms Zanatta would have attempted to continue to give false evidence to the Commission about what had occurred.

³²³ Lisa Zanatta, 3/10/14, T:748.4-6.

CHAPTER 8.4

THE CONVERSATION OF 27 MARCH 2013

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A – OVERVIEW

1. This chapter concerns the conduct of officers of the New South Wales Branch of the Construction and General Division of the CFMEU (**NSW Branch**) towards Mr Brian Fitzpatrick, then an organiser in that branch. The officers in question are Mr Darren Greenfield (organiser), Mr Brian Parker (State Secretary) and Ms Rita Mallia (State President). Its title has been selected in deference to the CFMEU's opposition to the title 'death threat' by Mr Greenfield in the corresponding part of counsel assisting's submissions.¹
2. There was a conflict of testimony between Mr Fitzpatrick and Mr Greenfield which was in a sense narrow, but was sharp and not easy to resolve. Counsel assisting submitted that it should be resolved in the following way. Their analysis is generally sound, but the submissions of the CFMEU, Mr Parker, Mr Greenfield and Ms Mallia will have to be examined at relevant points.
3. The findings include the following:
 - (a) on 27 March 2013 Mr Greenfield made an anonymous, violent and abusive telephone call to Mr Fitzpatrick, during which he threatened to kill him;
 - (b) by so acting, Mr Greenfield may have committed several criminal offences and may have breached the CFMEU's published standards of behaviour in a most egregious way;

¹ CFMEU submissions, 14/11/14, Pt 8.4, para 1.

- (c) Mr Parker shied away from carrying out any rigorous or comprehensive investigation into the incident, avoided arriving at any properly considered conclusion, and generally sought to whitewash the incident rather than discipline Mr Greenfield appropriately;
- (d) Mr Parker set about marginalising and attempting to remove Mr Fitzpatrick from the CFMEU after he complained about the way in which the incident had been handled and about the nature and extent of the union's dealings with companies associated with Mr George Alex; and
- (e) the failure of Mr Parker to take any appropriate action in response to Mr Fitzpatrick's complaints about the death threat incident represented a dereliction of his duty as a union official and, coupled with his attempts to have Mr Fitzpatrick removed, fell short of the professional standards expected of him as an officer of the CFMEU.

B – RELEVANT FACTS

Brian Fitzpatrick

4. Mr Fitzpatrick is a veteran of the union movement. He started working at the NSW Branch in 1988, and remained there for the following 25 years.² In his closing oral submission, his counsel correctly described him as 'an old school trade unionist who lived and breathed the

² Brian Fitzpatrick, witness statement, 14/7/14, para 9.

CFMEU for more than 25 years. He fought very hard for workers' rights'. His counsel said that Mr Fitzpatrick 'went that extra yard because he actually cared.'³ Senior counsel for the CFMEU, in his closing oral submissions which immediately succeeded those of Mr Fitzpatrick's counsel, did not challenge that characterisation.

5. For much of his long career with the CFMEU, Mr Fitzpatrick was an organiser, or a co-ordinator of teams of organisers, responsible for ensuring that workers were being appropriately looked after by their employers.
6. During 2013, and for many years prior to that, he was based at the head office of the NSW Branch at Lidcombe.

Brian Parker

7. Mr Parker was elected Secretary of the NSW Branch by the members in late 2011. He works out of the Lidcombe office of the NSW Branch. He has been an official of the Branch for 25 years. He held various elected positions before 2011. He was well regarded by Mr Donald McDonald AM, a distinguished former Secretary of the Branch, in point of integrity, commitment, honesty and high standing among the members.⁴
8. Mr Fitzpatrick and Mr Parker were long-time friends, having started at the union at about the same time and having worked closely alongside each other across many years.

³ Morrison, 28/11/14, T:5.27-30.

⁴ Donald Patrick McDonald, witness statement, 15/8/14, para 17.

9. Although Mr Parker comes from a strong labour family and has been a unionist for a long time, his lifestyle and tastes are perhaps not those of the ordinary worker. According to Mr Fitzpatrick, he has a reputation for mixing with the rich and famous,⁵ and is nicknamed ‘Sparkles’. At one point his wife was part owner of a race horse along with the wives of Jim Byrnes and a criminal identity Denis Delic (now deceased). Mr Parker read the eulogy at Mr Delic’s funeral.

Darren Greenfield

10. Darren Greenfield is an organiser who works for the NSW Branch. He was elected to that position in 2012. Unlike Mr Parker and Mr Fitzpatrick, he is based in the Sydney city office of the NSW Branch. Mr Greenfield has had extensive experience in the construction industry for over 30 years. In his years as a scaffolder, he served as a delegate for the NSW Branch for 12 years, and was on the Branch Committee of Management in the years 2000-2004.⁶ Mr Greenfield used to work for a scaffolding company. When that company went out of business in about 2010, Mr Parker recruited him to become an organiser for the union. According to Mr Fitzpatrick, Mr Greenfield came to the union with a fierce reputation for assaulting people.⁷ There is no evidence that he actually has a *disposition* for physical violence. But whether he actually has does not matter: it is relevant to the events of 27 March 2013 that Mr Fitzpatrick believed that he had that reputation.

⁵ Brian Fitzpatrick, witness statement, 14/7/14, para 29.

⁶ Darren Greenfield, witness statement, 15/8/14, paras 2-5.

⁷ Brian Fitzpatrick, witness statement, 14/7/14, para 32.

11. Initially Mr Greenfield's areas of responsibility as a union organiser were spread across various different areas. However at some point Mr Parker agreed to give Mr Greenfield exclusive responsibility for the scaffolding sector.⁸

Defaults by 'Active' and 'Elite' companies in 2013

12. As at mid-March 2013 Mr George Alex was one of the persons who stood behind a number of companies in the construction industry. One of those companies was Active Labour Pty Ltd (**Active Labour**). It was a labour hire company. Another company was Elite Holdings Group Pty Ltd (**Elite Holdings**), a scaffolding company. Those companies had entered EBAs signed by officers of the CFMEU.
13. The relationships between, on the one hand, Mr Alex, his companies and associates, and, on the other hand, the CFMEU and its officials, is the subject of an ongoing investigation to be continued next year. What is said here does not prejudice the outcome of that investigation. What is said here is said only as a background to the conversation of 27 March 2013.
14. In mid-March 2013 both Active Labour and Elite Holdings were in arrears in relation to moneys owed by them in respect of workers' entitlements, including superannuation and redundancy payments.
15. Mr Sammy Manna and Mr Jock Miller were the two organisers with day to day carriage of labour hire issues. Each reported to Mr

⁸ Brian Fitzpatrick, witness statement, 14/7/14, para 33.

Fitzpatrick, who was a co-ordinator. Mr Greenfield was the organiser with day to day responsibility for the scaffolding sector.

16. In mid-March 2013, a union delegate working on a building site in Crows Nest, Sydney, met Mr Fitzpatrick at the Lidcombe head office. He said to Mr Fitzpatrick:⁹

I need some help. I've got blokes on the site who are not being paid on time and whose entitlements are not being paid. It's the scaffolders and the body hire men. Greenfield has been out and promised to fix the problem, but weeks have gone by and nothing's been done.

17. Mr Fitzpatrick undertook to look into the matter.
18. Mr Fitzpatrick came to learn that the labour hire company was Active Labour, and the scaffolding contractor was Elite Holdings. He was familiar with Active Labour and knew that Mr Alex was behind that company. It was at this time that he came to discover that Mr Alex was also behind Elite Holdings.¹⁰
19. In the course of his investigations into the matter, he followed his regular procedure of checking with Cbus (the superannuation fund manager to which Mr Alex's companies were supposed to be making contributions) and ACIRT (a redundancy fund to which Mr Alex was supposed to be making payments per employee) to see whether Active Labour and Elite Holdings were in fact paying employee entitlements.¹¹

⁹ Brian Fitzpatrick, witness statement, 14/7/14, para 41.

¹⁰ Brian Fitzpatrick, witness statement, 14/7/14, para 42.

¹¹ Brian Fitzpatrick, witness statement, 14/7/14, para 44.

20. He discovered, through this process, that those companies had not been paying employees their entitlements. Indeed they were very substantially in arrears. The deficit was in the hundreds of thousands of dollars.¹²
21. Elite Holdings had not paid workers' entitlements to ACIRT and Cbus for the period September to November 2012 or for March 2013. About \$100,000 was owed.¹³ Active Labour was also heavily in arrears.

Knowledge and inaction of Mr Greenfield

22. One of the concerns raised for Mr Fitzpatrick's attention was that Mr Greenfield knew about the arrears but was not taking any action.
23. Mr Greenfield has given conflicting accounts over time as to what he knew about the extent of Elite Holdings's arrears, and action taken by him in respect of those arrears in late 2012 and early 2013. Indeed the accounts have been markedly different.
24. Ms Mallia interviewed Mr Greenfield in relation to this subject on 16 May 2013. On that occasion, as Ms Mallia's contemporaneous notes of the meeting make plain, Mr Greenfield effectively admitted his inaction in the period prior to mid-March 2013, but sought to explain it away on the basis that he had been heavily committed on other matters, including in particular issues arising during the decline of Action Scaffolding and Built Scaffolding.¹⁴ Mr Greenfield's oral evidence

¹² Brian Fitzpatrick, witness statement, 14/7/14, para 44

¹³ Greenfield MFI-2, p 38.

¹⁴ Greenfield MFI-2, pp 7-11.

that he had given a different explanation to Ms Mallia¹⁵ stands in contrast with the detailed nature of the notes taken by Ms Mallia.

25. In his evidence, Mr Greenfield set out an entirely different version of events, namely that he knew about the Elite Holdings' arrears position in 2012 and took action to ensure that some outstanding payments were made.¹⁶ First, it is inconsistent with the account he gave Ms Mallia in May 2013. Secondly, it is not supported by any documents. The union's wage claim records in relation to Elite Holdings post-date March 2013, and there is no wage claim record at all in respect of 2012. Thirdly, Mr Greenfield's evidence is inconsistent with the fact that Elite Holdings was heavily in arrears throughout the last quarter of 2012. But for present purposes it is unnecessary to resolve these conflicts.

Action taken by Mr Fitzpatrick

26. Mr Fitzpatrick responded to the complaint made to him in respect of the Crows Nest site by contacting Mr Doug Westerway, who he understood to be one of the people Mr Alex had put forward to 'front' Active given that Mr Alex was himself an undischarged bankrupt.¹⁷ Mr Greenfield knew Mr Westerway and understood him to be employed as a manager of Elite.¹⁸

¹⁵ Darren Greenfield, 3/10/14, T:703.8.

¹⁶ Darren Greenfield, 3/10/14, T:702.6-20; Darren Greenfield, witness statement, 15/8/14, paras 15-20.

¹⁷ Brian Fitzpatrick, witness statement, 14/7/14, paras 47-48.

¹⁸ Darren Greenfield, witness statement, 15/8/14, para 22.

27. Mr Fitzpatrick did not get a clear answer from Mr Westerway as to when the outstanding entitlements would be paid. He therefore contacted Mr Alex directly and told him that he had 24 hours to pay all of his labourers up to date, and that he had a week to fix up three out of the five months that he was behind on superannuation and redundancy payments.¹⁹
28. Mr Alex responded: 'Look, that's alright. I will fix that up. I've got a cheque coming from Ralan Constructions on Friday. That will enable me to pay 3 months of Cbus (super) and ACIRT (redundancy) for the body hire.'²⁰
29. On the Friday Mr Alex had indicated payment would be made, Mr Fitzpatrick telephoned Mr Steve Nolan, the principal from Ralan Constructions, to check that he had made the payment to Mr Alex. In that conversation Mr Nolan said that there was no amount due to be paid to Mr Alex that day.²¹
30. Later that same day Mr Fitzpatrick received a call from Mr Westerway to say that Mr Alex was aggravated about the fact that Mr Nolan had been spoken to. Mr Fitzpatrick said 'Well mate, so be it, but my concern is not with him. My concern is with my job and what I have got to do, and that's part of our work and we will do it.'²²

¹⁹ Brian Fitzpatrick, witness statement, 14/7/14, para 48.

²⁰ Brian Fitzpatrick, witness statement, 14/7/14, para 49.

²¹ Brian Fitzpatrick, witness statement, 14/7/14, para 50.

²² Brian Fitzpatrick, witness statement, 14/7/14, para 51.

31. Mr Alex then rang Mr Fitzpatrick and spoke to him in an angry and threatening tone. He told Mr Fitzpatrick not to ring his clients, and a heated argument ensued. During the course of that argument Mr Fitzpatrick indicated that he did not think much of the fact that workers had not been paid what they were owed.
32. Mr Fitzpatrick then told Mr Alex 'how things were going to work from the union's point of view'.²³ Mr Alex's reaction to this was to say 'You will do as you are told.'²⁴ Mr Alex also said words to the effect that he wouldn't put up with the union 'not keeping its deals'.
33. After the telephone call between Mr Fitzpatrick and Mr Alex, the former went to see Mr Parker immediately to describe what had occurred, and said 'You better get the bloke in here. We have got to read him the riot act because he is going to start telling us how to run things.'²⁵ Mr Parker acquiesced.
34. The following week a meeting took place at the union's Lidcombe office between Mr Parker, Mr Fitzpatrick, Mr Alex, Mr Westerway and Mr Joe Antoun (an associate of Mr Alex who has since been shot dead).²⁶ Mr Fitzpatrick noted that Mr Alex was 'very much in charge of this group and did the talking'.²⁷

²³ Brian Fitzpatrick, witness statement, 14/7/14, para 52.

²⁴ Brian Fitzpatrick, witness statement, 14/7/14, para 52.

²⁵ Brian Fitzpatrick, witness statement, 14/7/14, para 53.

²⁶ Brian Fitzpatrick, 15/7/14, T:23.39-43; Brian Fitzpatrick, witness statement, 14/7/14, para 54.

²⁷ Brian Fitzpatrick, witness statement, 14/7/14, para 55.

35. Mr Alex's mood and demeanour were markedly different from those which Mr Fitzpatrick had experienced in their telephone conversation. Mr Alex was conciliatory. He said that he did not want problems. He said that he would fix matters. He said he was prepared to sit down with the union and representatives from Cbus and ACIRT. Mr Fitzpatrick agreed to arrange that meeting.²⁸
36. After the meeting, Mr Fitzpatrick tried to speak with Mr Greenfield over the telephone. He did so because Mr Greenfield was the scaffolding organiser and Mr Fitzpatrick wanted him to get involved in the discussions going forward so that both the labour hire and the scaffolding issues could be sorted out. Mr Greenfield did not answer Mr Fitzpatrick's call.²⁹
37. Mr Fitzpatrick thought this was unusual, and raised it with Mr Parker. Mr Parker told him: 'Greenfield won't talk to you'. Mr Fitzpatrick said he could not understand why.³⁰
38. Mr Fitzpatrick saw it as unusual that Mr Greenfield refused to talk to him at this point, and that Mr Parker was apparently indifferent to this state of affairs. In Mr Fitzpatrick's own words, 'The union policy is if you've got a problem with an organiser, you talk to him. Greenfield never spoke to me. He refused to speak to me'.³¹

²⁸ Brian Fitzpatrick, witness statement, 14/7/14, para 55.

²⁹ Brian Fitzpatrick, witness statement, 14/7/14, para 56.

³⁰ Brian Fitzpatrick, witness statement, 14/7/14, para 57.

³¹ Brian Fitzpatrick, 24/9/14, T:354.14-16.

39. Mr Greenfield gave evidence that during this period he heard reports that Mr Fitzpatrick had been chasing Mr Alex for arrears owed by Active. He was told that while Mr Fitzpatrick was doing so, he would also take up with Mr Alex the issue of Elite's arrears.³²
40. This concerned Mr Greenfield because scaffolding was his area of responsibility, and he did not like the fact that Mr Fitzpatrick was 'getting involved' in that area.³³
41. According to Mr Greenfield, he raised these concerns with Mr Parker and Mr Kera, and they told him that they would deal with it and that Mr Fitzpatrick had been instructed not to get involved in scaffolding issues.³⁴
42. No witness from the CFMEU has testified that either Mr Parker or Mr Kera gave such an instruction to Mr Fitzpatrick. Further, Mr Fitzpatrick's evidence is, as described above, to the effect that he was trying to ring Mr Greenfield to discuss the Elite matter, that Mr Greenfield would not speak with him, and that Mr Parker had confirmed that Mr Greenfield would not speak with him.
43. Further, Mr Greenfield spoke to Ms Mallia on 16 May 2013 in terms which indicated that he was having to do a lot of work on his own, and would have appreciated help from other organisers.³⁵ Counsel assisting submitted that if that was so, it is unlikely that he would have

³² Darren Greenfield, witness statement, 15/8/14, para 23.

³³ Darren Greenfield, witness statement, 15/8/14, para 24.

³⁴ Darren Greenfield, witness statement, 15/8/14, para 24.

³⁵ Greenfield MFI-2, p 11.

been complaining to Mr Parker and Mr Kera about Mr Fitzpatrick involving himself in recovering arrears from Elite simply because the scaffolding area was Mr Greenfield's area not Mr Fitzpatrick's. Mr Greenfield's irritation that Mr Fitzpatrick was 'getting involved' in relation to the Elite matter must have been based on some other concern, such as a concern that Mr Fitzpatrick was taking action against Mr Alex's interests. However, again, it is not necessary, for present purposes, to reach any conclusion about Mr Greenfield's evidence in these respects, or whether the taking of action by Mr Fitzpatrick against Mr Alex's interests was the cause of Mr Greenfield's irritation.

44. The meeting with the ACIRT and Cbus representatives that Mr Fitzpatrick had promised to organise took place, although Mr Alex did not attend on that occasion. Mr Fitzpatrick was the only union official who attended that meeting. Mr Greenfield did not attend.³⁶
45. Following that meeting Mr Fitzpatrick came to an arrangement with Mr Alex that would see workers paid their full entitlements in the short term.

³⁶ Brian Fitzpatrick, witness statement, 14/7/14, para 58.

Mr Fitzpatrick receives a death threat

46. On 27 March 2013, at 5.07pm, Mr Fitzpatrick was sitting in his office at Lidcombe when his mobile telephone rang.

47. Mr Fitzpatrick picked up his phone and answered it. A voice screamed at him:³⁷

You have gone too far this time you fucking fat cunt!! You're dead!! I'm going to kill you!! You understand?! I don't care how many police you've got with you, I'm coming over there tomorrow and I'm going to kill you!! You're dead!!

48. The voice on the other end was 'fever pitch, screaming ... in an absolute rage'.³⁸ In his subsequent triple zero call, Mr Fitzpatrick described the caller to the police as 'absolutely screaming ballistic' and described the call as a 'blitzkrieg of hate and anger'. He thought the person on the other end of the phone sounded 'wild and dangerous'.³⁹

49. Mr Greenfield gave a different account of events. For reasons later described, that account cannot be accepted.

50. The CFMEU's contention, made clear in its cross-examination of Mr Fitzpatrick, is that Mr Fitzpatrick 'made up' a story that the person that had called him had threatened to kill him, and in doing so had 'added' to and 'augmented' what had really been said, and having done so, was then 'trapped' with that 'story' and 'had to go on with that'.⁴⁰ This

³⁷ Brian Fitzpatrick, witness statement, 14/7/14, para 61.

³⁸ Brian Fitzpatrick, 15/7/14, T:25.22-23.

³⁹ Brian Fitzpatrick, witness statement, 14/7/14, para 63.

⁴⁰ Counsel for CFMEU, 24/9/14, T:351.1-352.29.

untenable contention is entirely contradicted by the uncontroversial surrounding circumstances (such as the nature of Mr Fitzpatrick's response to the call as observed by Ms Raju and Mr Thomas, as shortly described). It should be rejected.

51. Mr Fitzpatrick was, in fact, very shaken by the call. To use his words, the call had hit Mr Fitzpatrick like a shot,⁴¹ and he was 'seriously worried'.⁴²
52. At the time of this call Mr Fitzpatrick had the protection of an apprehended violence order (AVO) that had been obtained following threats he had previously received from a CFMEU member called Ian Fraser. Mr Fitzpatrick could not tell from the call whose voice it was, but given his history with Ian Fraser, assumed that he must have been the caller. Mr Fitzpatrick later recalled the voice on the phone did not sound like Mr Fraser.⁴³
53. When Mr Fitzpatrick had obtained the AVO, the police had told him that if Mr Fraser ever threatened him again, he should call the police straight away. As a result, after receiving the call Mr Fitzpatrick immediately called Ms Radhika Raju, a solicitor employed by the CFMEU who worked in an office upstairs from Mr Fitzpatrick. He told her that she needed to come and see him urgently. She was about to go home, but he said 'it can't wait until tomorrow.'⁴⁴

⁴¹ Brian Fitzpatrick, 15/7/14, T:26.12.

⁴² Brian Fitzpatrick, witness statement, 14/7/14, para 63.

⁴³ Brian Fitzpatrick, 15/7/14, T:25.35-36.

⁴⁴ Raju MFI-1, p 13.

54. Ms Raju then went downstairs and into Mr Fitzpatrick's office, and heard about what had occurred. She noticed that Mr Fitzpatrick looked distressed and his face was red.⁴⁵ He was 'very, very upset.'⁴⁶
55. After this discussion, Ms Raju went to speak to her superior in the legal team, Ms Leah Charlson. She told her what had happened. Ms Charlson instructed her to call the police immediately.
56. Ms Raju then returned to Mr Fitzpatrick's office and said that she was going to call the police. She proceeded to do so.
57. By this time Mr Fitzpatrick had asked for Mr Peter Thomas to come into his room to examine his mobile phone. Mr Thomas worked in the union's technology department. He had previously been involved in analysing calls and messages Mr Fitzpatrick had received from Mr Fraser. He knew the numbers that Mr Fraser had been using.⁴⁷
58. Mr Thomas noted that Mr Fitzpatrick was 'very unsettled' and 'shaken' and not like his normal self.⁴⁸
59. Ms Raju first called Auburn police station directly and she reported the death threat. The police told her they would send an officer but could not provide an estimated time of arrival. Ms Raju then told Mr Fitzpatrick that the police seemed relaxed and could not give a time of

⁴⁵ Radhika Raju, 15/7/14, T:80.27-38.

⁴⁶ Raju MFI-1, p 37.

⁴⁷ Brian Fitzpatrick, witness statement, 14/7/14, para 68.

⁴⁸ Peter Thomas, 15/7/14, T:104.44-105.35.

arrival. Mr Fitzpatrick, worried about the death threat and the potential for it to be carried out very soon, told Ms Raju to call triple zero.⁴⁹

60. In view of one of the submissions advanced by the CFMEU and Mr Greenfield, it is desirable to set out the whole of the call as transcribed.⁵⁰

OPERATOR:	Please go ahead, Telstra.
TELSTRA:	269040.
OPERATOR:	Thanks, Telstra. Police emergency. This is Lisa.
MS RAJU:	Hi Lisa. Look, my name is Radhika Raju. I'm calling from the construction union. I'm a lawyer here. We've had a matter where one of our members – his name is Ian Taylor – sorry, Ian Fraser.
OPERATOR:	Ian Fraser, yep.
MS RAJU:	He is a very, very – he's got a history of crime and violence. He's threatened one of our officials here, Brian Fitzpatrick, a death threat – various death threats. The police have been investigating and the police today took an AVO out on Brian Fitzpatrick's behalf, as well as charged him. Now Ian Taylor called at 5 o'clock – Ian Fraser called at 5 o'clock today and indicated that tomorrow he'll be killing Brian Fitzpatrick.
OPERATOR:	Okay. Do you have an address. Where are you calling from, sorry, Radhika?
MS RAJU:	I'm calling from the CFMEU, the construction union.
OPERATOR:	The CFMU.

⁴⁹ Fitzpatrick MFI-1, 15/7/14, Vol. 2, Tab 11, p 34.

⁵⁰ Fitzpatrick MFI-2, 15/7/14.

MS RAJU: And, look, the threats were really, really bad on the phone. That's why we're calling you.

OPERATOR: Alright then. Now, the threat has now been made from Ian Fraser, who's a member of yours.

MS RAJU: Yes, that's correct.

OPERATOR: Towards Ryan Fitzpatrick.

MS RAJU: Brian, Brian, B --

OPERATOR: Oh Brian.

MS RAJU: Yes.

OPERATOR: B-R-Y- or B-R-I?

MS RAJU: B-R-I-A-N.

OPERATOR: Brian Fitzpatrick, is it?

MS RAJU: Yes, that's correct.

OPERATOR: And who is Brian Fitzpatrick? He is --

MS RAJU: He is an officer of the union.

OPERATOR: So he is an official?

MS RAJU: Yes, yes.

OPERATOR: Alright then. Ian Fraser. Okay. And what did Ian say?

MS RAJU: I'll actually give you to Brian Fitzpatrick to tell you the exact words.

OPERATOR: Okay.

OPERATOR: I think we need to send --

MR FITZPATRICK: Yeah, hello.

OPERATOR: Hello. Brian, is it?

MR FITZPATRICK: Yeah. Look, he just rang me about 5.00, 5.05, me mobile, he's got me mobile now. He's been ringing the office, but he rang me mobile this afternoon – obviously he's got it – and he just let fly, launched with a blitzkrieg of hate and anger and said, "I don't give a fuck how many people are there, I'm going to kill you tomorrow, you're gone, you bastard, you fat so-and-so" and he went absolutely screaming ballistic.

OPERATOR: Alright. What we need to do is organise for police to come out and see you.

61. As Ms Raju was speaking with the police on the telephone, Mr Thomas recognised that the phone number of the death threat caller was not the number of the phone that Mr Fraser had used previously. Mr Fitzpatrick then looked at the union telephone list that he had on his desk and identified the number as Mr Greenfield's.⁵¹
62. Understandably, Mr Fitzpatrick, Ms Raju and Mr Thomas were shocked.⁵²
63. With the police already on their way, Ms Raju said that Mr Parker was still in his office. Mr Fitzpatrick said 'Can you go and get him because he needs to get involved. This situation is crazy.'⁵³ Ms Raju agreed.
64. Mr Parker was in a meeting at the time, and Ms Raju interrupted him and indicated that there was a personal matter that required urgent

⁵¹ Brian Fitzpatrick, witness statement, 14/7/14, paras 69-70.

⁵² Raju MFI-1, p 20.

⁵³ Brian Fitzpatrick, witness statement, 14/7/14, para 71.

attention.⁵⁴ Mr Parker told Ms Raju that he was in a meeting and to come back later. When Ms Raju went back to report this to Mr Fitzpatrick, he told her to go back and interrupt Mr Parker again because the matter was extremely urgent.

65. Ms Raju did so, and in due course Mr Parker attended at Mr Fitzpatrick's office and was told what had occurred. Ms Raju noted that Mr Parker was frustrated and upset that the police had been called. At one stage in her evidence Ms Raju said Mr Parker had said something to the effect that he was 'pissed off' that the police had been called, although later she sought to retreat from this evidence.⁵⁵ Ms Raju repeatedly gave the impression, both during her private examination on 30 May 2014 (the transcript of which was subsequently tendered) and her public examination of 15 July 2014 that she was fearful of saying things which might upset her superiors within the union and result in her losing her job.⁵⁶ She gave the fate of Brian Fitzpatrick as an example.

66. Ms Raju claimed that this and the many other changes she made to her evidence during her public hearing were justified on the ground that she had not slept for three days before the private hearing. Senior counsel for Ms Raju, in attacking the submission of counsel assisting just summarised, relied on the three days without sleep to explain the changes in her evidence. He also submitted that her evidence about fear for her job related to her failure to challenge a public statement by the union executive, which she had no duty to do, and that that was in a

⁵⁴ Brian Parker, 3/10/14, T:606.15-17.

⁵⁵ Raju MFI-1, p 20; Radhika Raju, 15/7/14, T:82.6-37, 89.2-19, 92.4-6.

⁵⁶ Raju MFI-1, p 37; Radhika Raju, 15/7/14, T:93.11-94.13.

different category from her duty to give true evidence, and to correct earlier evidence if necessary. He further made the point that she had been called to give her evidence at the private hearing viva voce, without any statement being prepared.⁵⁷ The reference to not sleeping for three days is an obvious exaggeration. While the distinction which senior counsel for Ms Raju drew is sound in theory, the fact is that Ms Raju made a larger number of corrections which cannot readily be explained either by fatigue or the fact that she gave her evidence viva voce. She did have a statement, prepared within three weeks of 27 March 2013, on 17 April 2013, and so far as she was asked about fresh matters, the forensic experience of the years suggest that answers to unforeseen questions are more likely to be truthful than the answers of witnesses who have been taken through multiple drafts of a statement. The submission of counsel assisting that what she said in the private hearing was her honest and accurate recollection of events is correct.

67. Mr Parker denied being irritated that the police had been called, and said his real concern ‘would have been’ that nobody had told him that the police had been called.⁵⁸ This makes no sense. Ms Raju did tell Mr Parker that the police had been called. If what Mr Parker meant to say was that nobody told him that the police were going to be called, it was hardly necessary for anyone to get Mr Parker’s approval before calling the police to respond to a death threat. The fact that Ms Charlson, Ms Raju and Mr Fitzpatrick did not hesitate to call the police

⁵⁷ Submissions on behalf of Radhika Raju, 13/11/14, paras 1-6.

⁵⁸ Brian Parker, 3/10/14, T:606.36-38.

demonstrates this to be so. Mr Parker was irritated the police had been called.

68. Mr Fitzpatrick said to Mr Parker:⁵⁹

Listen mate, you better go and talk to him and tell him to back off because this ain't going away. You need to get a meeting between us so we can sort out what's behind it all.

69. The meeting that Mr Fitzpatrick suggested was the sort of meeting that was typically held between executives and employees when there is a significant disagreement, and provides an opportunity for the parties concerned to 'clear the air' and settle their differences.

70. Mr Fitzpatrick also said to Mr Parker 'I'm going to have to follow it up because I can't leave this go because we're talking about a person who is dealing with George Alex'.⁶⁰ Mr Fitzpatrick was worried about the fact Mr Greenfield appeared to have an association with Mr Alex and that Mr Alex was someone with a 'colourful' history.⁶¹

71. Mr Parker then left the room, and Mr Fitzpatrick understood he was going back to his office to ring Mr Greenfield. About 10 minutes later Mr Parker returned to Mr Fitzpatrick's office. At this point Mr Thomas left the room.

72. Ms Raju gave evidence that after Mr Parker had returned to Mr Fitzpatrick's office, he reported on what Mr Greenfield had said to

⁵⁹ Brian Fitzpatrick, witness statement, 14/7/14, para 72.

⁶⁰ Brian Fitzpatrick, 15/7/14, T:29.32-34.

⁶¹ Brian Fitzpatrick, 15/7/14, T:29.34-36; Brian Fitzpatrick, 24/9/2014, T:355.36-38, T:357.7-10.

him. Mr Parker did not give any indication at this point that Mr Greenfield had denied making the death threat.⁶² Mr Parker then asked Ms Raju to leave, and she did so.

73. Mr Parker closed the door and they had the following conversation:⁶³

Parker:	No good mate, he's not going to back off and he said he's going to destroy you.
Fitzpatrick:	What does that mean? Physically?
Parker:	No. He said he's going to destroy you on the building sites.
Fitzpatrick:	Well, hang on mate. You're the secretary of this union. What are you going to do about it? Are you going to accept that?
Parker:	Well, what can I do if two people don't like each other?
Fitzpatrick:	Well, you can stand him down for a start to get to the bottom of this and you can't accept it. You're the secretary of the union.
Parker:	I'm not going to do that.

74. Mr Parker also told Mr Fitzpatrick that Mr Greenfield had denied making a death threat.⁶⁴

75. Mr Fitzpatrick was shocked by Mr Parker's indifference to what had occurred and his reluctance to discipline Mr Greenfield.

76. Mr Fitzpatrick asked Mr Parker 'Are you prepared to get a meeting tomorrow set with yourself, myself, and Rita Mallia, the president,

⁶² Radhika Raju, 15/7/14, T:96.10-12.

⁶³ Brian Fitzpatrick, witness statement, 14/7/14, para 75.

⁶⁴ Brian Fitzpatrick, 15/7/14, T:29.45-46.

with our solicitors, Taylor and Scott, to go through this?'.⁶⁵ This was the general union practice for resolving differences between two officials. Mr Parker refused to set up a meeting.⁶⁶

77. Mr Fitzpatrick then told Mr Parker to either bring a lie detector in to see whether he or Mr Greenfield was telling the truth about the death threat or to talk to the solicitors to investigate the matter further because he was not prepared to leave it.⁶⁷
78. At some stage two police officers arrived. Ms Raju let them in and took them to see Mr Fitzpatrick and Mr Parker.
79. Mr Fitzpatrick said to the police that he was sorry and that it had been a false alarm. When they asked him what he meant by that, Mr Fitzpatrick said that he had received a death threat, but it had come from a fellow official, not Mr Fraser.
80. Mr Fitzpatrick then recounted what had occurred and the police indicated that they could take a report of the incident. After hearing the facts, the police said 'Well, look, we can prove the call took place but we can't prove who said what. It's you versus them. We can't make an arrest, simple as that'.⁶⁸
81. Mr Fitzpatrick was aware that if he asked the police to follow up on Mr Greenfield's death threat, the union would punish him for calling the

⁶⁵ Brian Fitzpatrick, 15/7/14, T:30.7-10.

⁶⁶ Brian Fitzpatrick, 15/7/14, T:30.32-33.

⁶⁷ Brian Fitzpatrick, 15/7/14, T:30.35-42.

⁶⁸ Brian Fitzpatrick, 15/7/14, T:31.15-20.

police on a ‘mate’.⁶⁹ However, Mr Fitzpatrick felt that he wanted a report to be made so it would be on the record in case something happened in the future.⁷⁰

82. Mr Fitzpatrick was clearly still fearful of the death threat and felt he needed to make a police report even though he knew there would be repercussions from the union.
83. There can be no question that Mr Fitzpatrick was very shaken by the fear engendered in his mind by the call, and by the perplexing indifference exhibited by Mr Parker.
84. Indeed Ms Raju was so concerned about Mr Fitzpatrick’s wellbeing given his reaction to these events that she rang and spoke to a former union official, Mr Peter McClelland, who ran an enterprise called Mates in Construction that assists workers experiencing difficulty.⁷¹

Mr Greenfield’s version of the call

85. Mr Greenfield has admitted making an abusive call to Mr Fitzpatrick but denies making a death threat. The version of the telephone call given by Mr Greenfield to the Commission was as follows:⁷²

It’s Greenfield here. You fucking fat cunt. You’re a slimy piece of shit. You’re a racist and a bully. Don’t undermine me. I’ve sat back and watched you tread on everyone else’s toes in this organisation and if

⁶⁹ Brian Fitzpatrick, 15/7/14, T:31.24-26.

⁷⁰ Brian Fitzpatrick, witness statement, 14/7/14, para 76; Brian Fitzpatrick, 15/7/14, T:31.27-31.

⁷¹ Raju MFI-1, pp 36-37.

⁷² Darren Greenfield, witness statement, 15/8/14, para 27.

you're now coming after me I'll fucking tread on your toes starting tomorrow.

86. Counsel assisting submitted in chief that for a number of reasons this evidence cannot be accepted.
87. First, there are marked differences between Mr Greenfield's version of this call and that of Mr Fitzpatrick. It is highly unlikely that Mr Fitzpatrick, a seasoned and hard-nosed union official, would have responded to the call in the way he did had the call been as Mr Greenfield described. According to Mr Greenfield he identified himself and did not make any death threat. Yet Mr Fitzpatrick was visibly shaken and upset. He told people straight away that he had received a death threat. The police were called.
88. All of this behaviour is consistent with Mr Fitzpatrick having received the call he describes. None of it is consistent with him having received a call of the kind Mr Greenfield describes, in which Mr Greenfield introduces himself and speaks of 'treading on toes'.
89. Secondly, the version of the phone call given by Mr Greenfield in evidence is different in a number of material respects from the version he described to Ms Mallia in May 2013. In Ms Mallia's note, she set out in quotes what she was told by Mr Greenfield about this call. In that version, Mr Greenfield is quoted as saying 'Its Greenfield here you fat piece of shit, sat back and watch you tread on everyone else's toes in this organisation, you are now coming after me, I'll tread on yours starting tomorrow'.⁷³

⁷³ Greenfield MFI-2, p 2.

90. In this version Mr Greenfield does not call Mr Fitzpatrick a ‘fucking fat cunt’. He does not call him a ‘slimy shit’. He does not call him a ‘racist and a bully’. He does not say ‘Don’t undermine me’. In other words in this (earlier) version of the call Mr Greenfield does not include four of the first five sentences appearing in the version advanced in his evidence to the Commission. The fact Mr Greenfield has given quite inconsistent accounts of the conversation at different times counts against the credibility of his evidence.
91. Thirdly, Mr Fitzpatrick’s evidence has generally been shown to be credible, and the version of events he has given has, in due course, been corroborated. His evidence in relation to the Cbus leak is a good example of this (as to which see Chapter 8.3).
92. Fourthly, Ms Raju gave evidence that in a discussion she had with Mr Greenfield she spoke to him about whether he had identified himself to Mr Fitzpatrick, and Mr Greenfield said ‘I didn’t need to. He knew who it was’.⁷⁴ This contradicts Mr Greenfield’s evidence about how the call began. There is no reason why Ms Raju would make something like that up, and it is difficult to see how she could have been in any way confused about what was said to her. Mr Greenfield denied this conversation,⁷⁵ but Ms Raju’s evidence on the subject should be preferred. Mr Greenfield’s evidence was motivated by self-interest; Ms Raju’s was not.
93. Fifthly, Mr Greenfield’s version of events rests on the premise that he was angered by the fact that Mr Fitzpatrick was continuing to involve

⁷⁴ Radhika Raju, 15/7/14, T:96.47-97.25.

⁷⁵ Darren Greenfield, 3/10/14, T:693.18.

himself in the scaffolding sector when that was Mr Greenfield's area of responsibility, and it was upon hearing about this again from Mr Westerway that he became angry and rang Mr Fitzpatrick. When describing the fact he was very angry in his evidence, he said 'Mr Fitzpatrick had not called me to discuss Elite or warn me about meeting with Elite'.⁷⁶

94. However the proposition that Mr Greenfield was angry about Mr Fitzpatrick involving himself in a scaffolding sector matter (of itself) is difficult to accept for the reasons earlier set out. Mr Greenfield's complaint to Ms Mallia was that he did not have enough help.
95. Further, even if the fact that Mr Fitzpatrick was doing some work in the scaffolding sector did irritate Mr Greenfield as he alleges, it was a fact known to Mr Greenfield well prior to 5.07pm on 27 March 2013. That fact had not led him to any abusive telephone calls to Mr Fitzpatrick before that time.
96. Sixthly, Mr Greenfield's evidence rests on the premise that he received a call from Mr Westerway shortly before making his abusive call to Mr Fitzpatrick, during which Mr Westerway told him that Mr Fitzpatrick had criticised Mr Greenfield for not doing his job and had caused confusion as to who Elite Holdings had to deal with from the CFMEU. Mr Greenfield said this made him 'very angry', and led to him ringing Mr Fitzpatrick and abusing him.⁷⁷

⁷⁶ Darren Greenfield, witness statement, 15/8/14, para 26.

⁷⁷ Darren Greenfield, witness statement, 15/8/14, para 25-26.

97. However that sequence of events is not correct. Further, his evidence as to what Mr Westerway told him on that call conflicts with a prior statement made by him about that matter. In this regard:

- (a) the notion that Mr Greenfield was enraged by the call from Mr Westerway and reacted by ringing Mr Fitzpatrick is not correct. Phone records demonstrate that Mr Greenfield rang Mr Parker's phone immediately prior to calling Mr Fitzpatrick, and had a two minute phone call.⁷⁸ Mr Greenfield rang Mr Fitzpatrick within a matter of seconds after this call to Mr Parker's phone;
- (b) neither Mr Parker nor Mr Greenfield was prepared to admit participating in this two minute call. A vague suggestion was made by Mr Parker that Ms Wray might have been in possession of and answered Mr Parker's phone,⁷⁹ although Mr Parker said elsewhere that it was 'possible' that he had spoken with Mr Greenfield immediately before Mr Greenfield rang Mr Fitzpatrick.⁸⁰ Mr Greenfield said he 'didn't recall' ringing Mr Parker⁸¹ - this from a witness who said he had a 'very good recollection' of what happened that day,⁸² who had plainly been alerted to the issue by his lawyers in advance of giving evidence⁸³ but who had avoided it in the statement

⁷⁸ Parker MFI-7, 3/10/14, p 1.

⁷⁹ Brian Parker, 3/10/14, T:609.27-34.

⁸⁰ Brian Parker, 3/10/14, T:606.42.

⁸¹ Darren Greenfield, 3/10/14, T:695.47-696.1.

⁸² Darren Greenfield, 3/10/14, T:697.4-10.

⁸³ Darren Greenfield, 3/10/14, T:699.5-8.

he provided to the Commission. Mr Greenfield and Mr Parker feigned ignorance in relation to this critical call which immediately preceded the call from Mr Greenfield to Mr Fitzpatrick;

- (c) in any event, whether Mr Greenfield spoke to Mr Parker or Ms Wray, this intervening two minute discussion puts an altogether different complexion on the sequence of events. Mr Greenfield had engaged with someone else – either Mr Parker or Ms Wray – between speaking with Mr Westerway and Mr Fitzpatrick. This unexplained intervening substantive communication makes it much more difficult to accept that Mr Greenfield simply flew off the handle at Mr Fitzpatrick after having spoken with Mr Westerway. There was more to the sequence of events, and whatever else occurred between the Westerway and Fitzpatrick calls has not been revealed by Mr Greenfield or anyone else;
- (d) Mr Greenfield gave a different description of the call from Mr Westerway when he spoke with Ms Mallia in May 2013.⁸⁴ On that occasion he said that Mr Westerway had said that Mr Fitzpatrick had claimed credit for a recent payment that he, not Mr Greenfield, had chased up.

98. Seventhly, Mr Greenfield's recollection of the sequence of events has been found wanting in other respects. He has consistently said since May 2013 that immediately after he called Mr Fitzpatrick he

⁸⁴ Greenfield MFI-2, p 2.

telephoned Mr Parker and reported what he had done. He repeated this in testimony to the Commission. However this is not supported by the phone records. The call to Mr Fitzpatrick was at 5.07pm. In the following half hour Mr Greenfield spoke with Mr Kera on a number of occasions.⁸⁵ Mr Greenfield did not take or receive a call from Mr Parker until 5.44pm, when Mr Parker rang him and they spoke for a couple of minutes. Mr Greenfield's memory is not a reliable source of information.

99. What submissions did the CFMEU and Mr Greenfield advance against these submissions?
100. They quite properly submitted that to find in favour of Mr Fitzpatrick's version and against Mr Greenfield's version involved making a serious finding against Mr Greenfield. So serious a finding should only be made with caution.⁸⁶
101. The submissions of the CFMEU and Mr Greenfield drew attention to the differences between Mr Fitzpatrick's evidence of what Mr Greenfield said in the 5.07pm call, and what Mr Fitzpatrick is recorded as having said to Lisa of Police Emergency, taking the call from Ms Raju and Mr Fitzpatrick a little later. So far as there are similarities, of course, they support Mr Fitzpatrick. But the CFMEU/Greenfield submissions concentrated on the differences. It is these differences that underlie the repeated references in those submissions to Mr Fitzpatrick's 'latest account'.⁸⁷ The submissions contrast this with Mr

⁸⁵ Parker MFI-7, 3/10/14, p 1.

⁸⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁸⁷ Submissions on behalf of CFMEU, Pt 8.4, paras 17, 23.

Greenfield's denials of any death threat on various occasions up to and including his testimony.⁸⁸ The CFMEU/Greenfield submissions contend that the differences have not been explained. They contend: 'It is open to conclude that Mr Fitzpatrick has embellished his account for the purpose of giving testimony to the Royal Commission.'⁸⁹

102. Prima facie this is a reasonable submission. But it overlooks several points. First, what Mr Fitzpatrick said to Lisa did not purport to be a verbatim account. That follows from the metaphors and words of summary Mr Fitzpatrick employed – 'he just let fly', 'launched with a blitzkrieg of hate and rage', 'went absolutely screaming ballistic'. Secondly, Mr Fitzpatrick resorted to euphemism – 'so and so'. Speaking to Lisa in the presence of Ms Raju, it is not surprising that a man of Mr Fitzpatrick's generation omitted the two obscenities he testified to – one even now regarded as serious, one he may have regarded as a very shocking word to use in the presence of women. Thirdly, the CFMEU/Greenfield submission is that Mr Fitzpatrick has engaged in a deliberate falsification of what happened. Even in places strictly bound by the rules of evidence, which the Commission is not, it is permissible to rebut allegations of afterthought by pointing to prior consistent statements. One recollection of what Mr Fitzpatrick's earlier accounts of the incident were was that of Ms Raju. In the statement, made only three weeks after the 27 March 2013 phone call,

⁸⁸ Submissions on behalf of CFMEU, Pt 8.4, para 29.

⁸⁹ Submissions on behalf of CFMEU, Pt 8.4, para 24.

which was received at her private hearing, she recalled Mr Fitzpatrick saying to Lisa:⁹⁰

he said to me “You fat f*cking c*nt. I’m going to kill you, I’m going to come after you. I’m going to get you tomorrow regardless of the police being there just call him and sort it out with him. I’ve written his number down. Here it is.

103. Now that is not what Mr Fitzpatrick is recorded as having said to Lisa. But it is a reasonable inference that Ms Raju heard Mr Fitzpatrick give that account to her and has mistakenly attributed it to the call to Lisa. Another recollection which Ms Raju recorded in her near contemporary statement is that the first thing Mr Fitzpatrick said to her when she came to his room straight after the call from Mr Greenfield was: ‘I’ve been threatened again by Ian Fraser and he was serious this time. He’s coming to kill me tomorrow. He said he doesn’t care about the police.’ That certainly establishes consistency in its reference to a death threat. And it is consistent both with the call to Lisa and with Mr Fitzpatrick’s testimony in speaking of a threat to kill Mr Fitzpatrick which would be carried out no matter how much protection – whether ‘police’ or ‘people’ – Mr Fitzpatrick had.
104. Fourthly, a claim to absolute precision in recollecting a conversation, and mechanically flawless consistency in narrating it, are more commonly badges of invention than of truth.
105. Fifthly, it is clear that Ms Raju believed, based on Mr Fitzpatrick’s appearance, conduct and statements, that Mr Fitzpatrick had received a death threat, whatever words it was couched in.

⁹⁰ Radhika Raju, witness statement, 17/4/13, para 7, tendered as Fitzpatrick MFI-1, 15/7/14, pp 33-36.

106. Another argument advanced in the CFMEU/Greenfield submissions can conveniently be dealt with at this point. The argument is that neither Mr Fitzpatrick nor counsel assisting offer any explanation of why the caller eventually identified as Mr Greenfield would refer to police in the call.⁹¹ One answer is that those threatened with death often ask for and sometimes get a measure of police protection. Another is that a reference to police is a colourful method of stressing how determined the person using the threat is to carry it out.

107. The next CFMEU/Greenfield submission was that while Mr Fitzpatrick was frightened by the call for so long as he believed the caller to have been Mr Ian Fraser, he:

changed his mood and demeanour after learning that it was Mr Greenfield who made the call. He stated to Mr Parker that he was willing to accept an apology from Mr Greenfield for the phone call and was willing to meet with Mr Greenfield to sort out what was behind it. Clearly once he knew that the call was made by Mr Greenfield he did not regard the conversation in the call as a threat to his life.⁹²

108. That submission is not supported by the evidence with precision. Mr Fitzpatrick seemed to have remained in a state of distress for some time, even after his suggestion of a meeting with Mr Greenfield.

109. The CFMEU/Greenfield submission then submitted:⁹³

[Mr Fitzpatrick's] evidence is that he told the police what happened and that he wanted to report it. If such a report exists the Royal Commission has not provided it. It is however telling that once Mr Fitzpatrick discovered that the call came from Mr Greenfield he regarded it as a false alarm.

⁹¹ Submissions on behalf of CFMEU, Pt 8.4, para 23.

⁹² Submissions on behalf of CFMEU, Pt 8.4, para 26.

⁹³ Submissions on behalf of CFMEU, Pt 8.4, para 27.

110. This misrepresents Mr Fitzpatrick's evidence. When the police came, Mr Fitzpatrick's evidence as to what happened was as follows:⁹⁴

I said to the police that I was sorry and it had been a false alarm. They asked me what I meant. I said that I had got a death threat, but not from the person who had been threatening me previously. They then asked who it was and I told them that it was somebody I worked with, a fellow official. They asked me what happened and I told them. They said they could take a report of it. I said that I wanted them to do that so there would be something on the record in case anything else happened.

111. That is, Mr Fitzpatrick was not saying to the police: I want to make a report to you at some future stage.' He was saying: 'I want you to "take a report of it" now.' He wanted to ensure that something was placed on the record as a result of what he actually said to the police there and then.

112. Then the CFMEU/Greenfield submissions asserted that counsel assisting did not refer to evidence from Mr Greenfield and Mr Westerway that the latter had told the former that Mr Fitzpatrick had said disparaging things about him.⁹⁵ That is not correct. Counsel assisting did deal with the preceding call from Mr Westerway to Mr Greenfield.⁹⁶ Those submissions pointed out at some length that there was an intervening call, seemingly between Mr Greenfield and Mr Parker, which has not been explained or clarified. The failure of the CFMEU/Greenfield submissions to notice and deal with the submissions relating to Mr Westerway does not engender confidence in the balance of them. Other problems in Mr Greenfield's account raised by counsel assisting have likewise not been dealt with.

⁹⁴ Brian Fitzpatrick, witness statement, 14/7/14, para 76.

⁹⁵ Submissions on behalf of CFMEU, Pt 8.4, para 30.

⁹⁶ Submissions of counsel assisting, 31/10/14, paras 97-98.

113. Finally, the CFMEU/Greenfield submissions contrasted Mr Fitzpatrick's evidence that he had tried to call Mr Greenfield a number of times to talk about the Elite Scaffolding arrears with phone records showing that there was only one call, on 15 March, lasting 38 seconds. Does the existence of only one call contradict evidence that Mr Fitzpatrick 'tried' a number of times? It depends what is meant by 'tried'. If there is a contradiction, how does it advance Mr Greenfield's side of the controversy about what was said on 27 March 2013? It could only do so if it went to credit in a damaging way.
114. It is convenient to turn to considerations of credit at this point.
115. Counsel assisting did not attack Mr Greenfield's general credibility save by reference to particular problems in his testimony. Nor is there any reason to doubt Mr Greenfield's general credibility. But submissions were made attacking Mr Fitzpatrick's credibility, particularly but not only by Mr Parker.
116. First, it was said that Mr Fitzpatrick should not be believed about the 27 March 2013 incident because of his role in using the personal contact details in the Zanatta spreadsheets to contact Cbus members in order to make them disgruntled with Lis-Con.⁹⁷ It is true that his conduct was unsatisfactory, but his revelation of it against his own interests enhanced his credibility. And it does not lie well in the mouth of Mr Parker, the most powerful person in the branch, or in the mouth of the union itself, to rely on Mr Fitzpatrick's conduct when Mr Parker

⁹⁷ Submissions on behalf of Brian Parker, 19/11/14, paras 20-32; Submissions on behalf of CFMEU, 14/11/14, Pt 8.4, para 53(b).

was not only at least a party to it, but was a person without whose consent it could not have taken place.

117. Secondly, it was said that Mr Fitzpatrick should not be believed about the 27 March 2013 incident because he was embittered and had fallen out with the union leadership.⁹⁸ That must be weighed with the fact that it was the failure of the union leadership to respond properly to the 27 March 2013 incident that had made him embittered.
118. The CFMEU also criticised Mr Fitzpatrick for a number of minor errors in his evidence, and for disclosing to Mr Fodor that he had given evidence in private.⁹⁹ Mr Fitzpatrick apologised for the latter lapse voluntarily and on his own initiative. And the minor errors do not defeat Mr Fitzpatrick's reliability on the central aspects of his testimony.
119. The fact is that Mr Fitzpatrick's credibility was in fact good overall. His demeanour was very good. His credibility in relation to the 27 March 2013 phone call issue was significantly strengthened by his vindication on the key points in relation to the Cbus scandal. Initially his version was denied by the CFMEU and Cbus, but it has been completely confirmed by subsequent events. Aspects, large and small, of his good credibility were discussed in that connection.¹⁰⁰

⁹⁸ Submissions on behalf of CFMEU, 14/11/14, Pt 8.4, para 45.

⁹⁹ Submissions on behalf of CFMEU, 14/11/14, Pt 8.4, para 53.

¹⁰⁰ See Chapter 8.3.

120. Counsel for Mr Fitzpatrick argued that the position of the CFMEU and Mr Parker was as follows:¹⁰¹

Brian Fitzpatrick did not receive a death threat, according to both the CFMEU and Parker. Fitzpatrick was doing Darren Greenfield's work without permission. This caused Greenfield to get upset and abuse him and no more. Fitzpatrick knew that Greenfield was the person who had simply abused him. He then feigned real fear to his colleagues and had the Police called. He plotted to tell Police the caller was Fraser and pretended he had received a death threat from him. Fitzpatrick then feigned shock when it was discovered that the caller was Greenfield. He then continued the plot, informing Parker that Greenfield had threatened to kill him, when the truth was that he had only been abused. When the police arrived Fitzpatrick told them it was a false alarm because it was Greenfield not Fraser who had made the call.

121. Counsel for Mr Fitzpatrick then posed a series of questions:¹⁰²

What possible reason would Fitzpatrick have for calling the police unless he had received the death threat and believed it was authentic? If he knew the call was from Greenfield what possible reason did he have for saying he believed it came from Fraser? What motivation did he have to harm Greenfield? If he had motivation to harm Greenfield why did he name Fraser? If he wanted to harm Greenfield why did he then tell the police it was a false alarm?

122. The answer to the second last question is that it is impossible to say. The answer to the other questions must be in the negative. Counsel for Mr Fitzpatrick then argued:¹⁰³

Fitzpatrick was aware of the union policy of keeping disputes in-house, which was precisely why he asked for Parker the moment he discovered the caller was Greenfield. He wanted Parker to intervene and find out why Greenfield had threatened to kill him. Fitzpatrick did not tell the police it was a false alarm because a death threat had not been made. It was

¹⁰¹ Submissions on behalf of Brian Fitzpatrick in reply to those made on behalf of CFMEU and Brian Parker, 21/11/14, para 7.

¹⁰² Submissions on behalf of Brian Fitzpatrick in reply to those made on behalf of CFMEU and Brian Parker, 21/11/14, para 9.

¹⁰³ Submissions on behalf of Brian Fitzpatrick in reply to those made on behalf of CFMEU and Brian Parker, 21/11/14, para 10.

because he had discovered the caller was Greenfield, not Fraser, and because he wanted to observe union policy to deal with the matter in-house.

123. The reasons advanced by the CFMEU and Mr Greenfield for preferring Mr Greenfield's version are not convincing. The reasons advanced by counsel assisting and counsel for Mr Fitzpatrick are. The finding must be that in substance Mr Fitzpatrick's version is correct.

Initial failure to investigate

124. As has already been described, Mr Parker's initial response to the incident was as follows. He spoke to each of Mr Fitzpatrick and Mr Greenfield quickly. He concluded that it was a case of one person's word against another. He took no further action. Counsel for Mr Parker defended this response, on the ground that the police said they could not make an arrest because it was word against word.¹⁰⁴ But even if the police response was satisfactory, the CFMEU had the ability to probe more deeply. Mr Greenfield could have refused to answer police questions. In a practical sense it would be much harder to refuse to answer Mr Parker's questions.
125. Counsel for Mr Parker submitted that whatever the need for an urgent response to a threatening act thought to be from Mr Ian Fraser, there was 'less objective cause for concern' when it became apparent that the caller was Mr Greenfield.¹⁰⁵ It is not clear why. This suggests that a threat from one official to another can be ignored, even when the

¹⁰⁴ Submissions on behalf of Brian Parker, 21/11/14, paras 10, 16.

¹⁰⁵ Submissions on behalf of Brian Parker, 21/11/14, para 14.

victim repeatedly but unsuccessfully seeks the intervention of senior union officials.

126. That was a grossly deficient response from the Secretary of the NSW Divisional Branch of the CFMEU. Mr Quirk later complained about this in writing to Mr O'Connor, the National Secretary of the CFMEU.¹⁰⁶
127. Neither Ms Mallia nor Mr Parker, the two most senior figures in the NSW Divisional Branch, took any further step to investigate the matter until complaints were made by individuals within the union as to the lack of investigation that had been undertaken.
128. It is remarkable that neither Mr Parker nor Ms Mallia sought to create, in the immediate aftermath of the incident, a written report incorporating a record of Mr Greenfield's and Mr Fitzpatrick's version of events. In order to find the first written record of Mr Greenfield's account of what occurred, one has to travel forward almost two months, to Ms Mallia's note of 16 May 2013. Counsel for Mr Parker called this 'minor'.¹⁰⁷ That is not so. A record of what had been said very soon after it had been said would have been much more accurate than records created months later.
129. The lack of investigation, analysis and recording on the day of the incident and in the days which followed indicates that neither Mr Parker nor Mr Mallia regarded it as particularly worrying that one official had allegedly threatened to kill another. This is remarkable.

¹⁰⁶ Fitzpatrick MFI-1, 15/7/14, p 247.

¹⁰⁷ Submissions on behalf of Brian Parker, 21/11/14, para 18.

Initial attack on Mr Fitzpatrick

130. Having received the death threat Mr Fitzpatrick then found himself under attack within the CFMEU. Mr Fitzpatrick noted that ‘it was right on from there’ and that ‘there was a full frontal attack to get me out’.¹⁰⁸
131. On 12 April 2013, a Committee of Management meeting was held that included an agenda item raised by Mr McNamara regarding union officials ringing police on another official. The Committee of Management did not discuss the death threat itself. They only discussed the fact that a union official had rung the police about another official. This was not on the agenda, but is recorded in the minutes.¹⁰⁹
132. Mr Fitzpatrick had been invited to attend the meeting as a visitor but was told to leave the room during discussions on the relevant agenda item.¹¹⁰

The McDonald Report

133. Faced with some criticism about the lack of response to Mr Fitzpatrick’s complaints, Ms Mallia agreed to appoint Mr Donald McDonald AM, a respected and retired former leader of the Branch, to look into the matter.

¹⁰⁸ Brian Fitzpatrick, 15/7/14, T:31.30-35.

¹⁰⁹ Fitzpatrick MFI-1, 15/7/14, Vol. 1, p 27 (‘Officials ringing police’).

¹¹⁰ Brian Fitzpatrick, 15/7/14, T:33.4-8.

134. Mr McDonald was not engaged by Mr Parker or Ms Mallia to conduct a thorough investigation into whether Mr Greenfield had behaved as Mr Fitzpatrick had alleged. He was engaged to conduct a type of investigation, but not a thorough one. That can be inferred from the McDonald Report itself.¹¹¹ The vast majority of the McDonald report does not concern the death threat incident at all. It concerns, instead, the existence of a series of ‘powerful forces’ operating against the union and contains a large number of statements with respect to the way in which officials of the union should behave in meeting a series of broad challenges facing the union. Indeed the report is entitled ‘The Challenge Ahead’.
135. It emerged from Mr McDonald’s examination that his investigation into the death threat incident took place in meetings held over the course of part of a day.¹¹² In his report, Mr McDonald indicated that the discussions with witnesses were of ‘an informal nature’, and that the matters raised in those discussions ‘were not able to be tested or fully substantiated’.¹¹³ The report does not contain any detailed statement as to what each interviewee had said to him during the informal discussions. Mr McDonald said in his evidence that, while he took some notes during those discussions, he destroyed them afterwards.¹¹⁴

¹¹¹ Rita Mallia, witness statement, 15/8/14, annexure RGM 15.

¹¹² Donald McDonald, 24/9/14, T:391.41-393.45.

¹¹³ Rita Mallia, witness statement, 15/8/14, annexure RGM 15, p 362.

¹¹⁴ Donald McDonald, 24/9/14, T:393.7-32.

136. Mr McDonald made it clear in his report that it was ‘not intended to be judgmental’.¹¹⁵ In keeping with that approach, Mr McDonald did not express any view in his report as to what had occurred as between Mr Fitzpatrick and Mr Greenfield. Instead, he suggested that ‘like golf’, ‘the advice is that you should never think of your last shot, just concentrate on your next shot’.¹¹⁶ Plainly, Mr McDonald’s approach was to encourage those involved to look ahead.
137. No criticism is made of Mr McDonald for failing to undertake a penetrating investigation. As he indicated in his evidence, he was not asked to undertake such an investigation.¹¹⁷
138. It must have been immediately obvious to Ms Mallia and Mr Parker, and any reader of the McDonald report, that he had not been asked to undertake, and had not undertaken, any real investigation into the events to determine what had happened.
139. However on receipt of that report, neither Ms Mallia nor Mr Parker made any complaint. They did not send Mr McDonald back to investigate further. They did not ask him to do anything else.¹¹⁸ By this time Ms Mallia’s report had been commissioned.
140. At a high level, some of the statements in the McDonald report must have only encouraged inaction. Mr McDonald referred to the fact that the leadership was operating in difficult times and this required ‘ALL

¹¹⁵ Rita Mallia, witness statement, 15/8/14, annexure RGM 15, p 362.

¹¹⁶ Rita Mallia, witness statement, 15/8/14, annexure RGM 15, p 367.

¹¹⁷ Donald McDonald, 24/9/14, T:394.45-395.1.

¹¹⁸ Donald McDonald, 24/9/14, T:395.15-27.

OFFICIALS AND STAFF TO CLOSE RANKS', stated that it was 'NECESSARY FOR EVERYONE WHO REPRESENTS THE UNION TO BE LOYAL, COOPERATIVE AND ACCEPT AND IMPLEMENT THE DECISIONS OF THE LEADERSHIP'.¹¹⁹

141. The McDonald report reflects a deeply engrained attitude within the CFMEU that the union is to be protected at any cost, and that officials should not speak out against the leadership.
142. Such sentiments, while no doubt strongly held and well meant by Mr McDonald and others, do not provide a healthy environment within which officials and employees can feel free to voice their concerns about potential misconduct by the leadership and officials who are closely aligned with the leadership. They have the opposite effect. They assume that the leadership and other high ranking officials will not engage in misconduct.¹²⁰
143. The McDonald report was tabled at a 7 May 2013 extraordinary meeting of the Committee of Management. The members of that management committee do not appear to have taken it upon themselves to complain that there had been no real investigation into the death threat incident. It may have been that they were heeding Mr McDonald's advice to close ranks. Or they may have been waiting for Ms Mallia's report.

¹¹⁹ Rita Mallia, witness statement, 15/8/14, annexure RGM 15, p 369.

¹²⁰ Donald McDonald, 24/9/14, T:399.26-30.

Ms Mallia's report

144. Ms Mallia ultimately undertook a separate inquiry into the death threat incident. She has never explained why it took her so long to do so.
145. Ms Mallia is a trained lawyer.¹²¹ She appreciated that it was important, for there to be a proper investigation into the matter, for account to be taken of the objective circumstances.¹²² Yet she did not do this when dealing with Mr Fitzpatrick's complaint against Mr Greenfield.
146. As part of the investigative process Ms Mallia obtained statements from Mr Thomas on 16 April 2013 and Ms Raju the next day. Ms Mallia then interviewed Mr Greenfield on 16 May 2013.¹²³
147. A few days prior to interviewing Mr Greenfield, Ms Hamson (Branch Finance Officer) sent an email to Steve Kamper in relation to Mr Fitzpatrick. The email attached Ms Hamson's calculations of what the union would have to pay in the event Mr Fitzpatrick was terminated on 31 May 2013.¹²⁴ Ms Hamson indicated she understood that Mr Parker and Ms Wray had been speaking to Mr Kamper about it, and added that Ms Mallia had asked that Mr Kamper have a look at the calculations and advise on options.
148. The fact is that Ms Mallia, Mr Parker and others were, on the one hand, working out what it would cost to terminate Mr Fitzpatrick's

¹²¹ Rita Mallia, 25/9/14, T:436.27-29.

¹²² Rita Mallia, 25/9/14, T:436.31-34.

¹²³ Rita Mallia, witness statement, 15/8/14, para 49.

¹²⁴ Mallia MFI-1, 25/9/14, p 1-1.

employment, and, on the other hand, conducting a somewhat limited investigation into Mr Fitzpatrick's complaint. It is difficult to see how an investigation could be carried out in good faith in such circumstances. It was all about appearance, not substance. The CFMEU submitted that this was only a coincidence, and that Mr Fitzpatrick was having discussions with various officials and former officials about leaving the union.¹²⁵ When the events of 2013 are viewed as a whole, the contemporaneity of Mr Fitzpatrick's slide out of the union, the ineffectual reports into the 27 March 2013 incident, and Mr Fitzpatrick's growing persecution is not just a coincidence.

149. Ms Mallia's report was tabled at a Committee of Management meeting on 31 May 2013.¹²⁶
150. In her report, Ms Mallia concluded that, on the balance of probabilities, it could not be concluded that Mr Greenfield had made a death threat. She said that Mr Greenfield used 'harsh words, in a threatening manner'.¹²⁷
151. Although Ms Mallia made reference in her report to the balance of probabilities, and well understood the meaning of that expression, she did not undertake any real weighing exercise when considering the evidence before her. In fairness to her, of course, some of the evidence tendered to the Commission was not before her. And what evidence she did have has probably been examined much more thoroughly by the four sets of lawyers (now five since Mr Parker's separate

¹²⁵ Submissions on behalf of the CFMEU, 14/11/14, Pt 8.4, para 45.

¹²⁶ Fitzpatrick MFI-1, 15/7/14, pp 68-80.

¹²⁷ Fitzpatrick MFI-1, 15/7/14, p 78.

representation) who have examined it in the Commission. Four of those lawyers (those for the CFMEU, Mr Parker, Ms Raju and Mr Fitzpatrick) were deeply adversarial in approach.

152. In this regard, there were a number of significant factors weighing in favour of Mr Fitzpatrick's version of events. They are set out. They include Mr Fitzpatrick's account of the incident, the nature of Mr Fitzpatrick's immediate response, and accounts given by Ms Raju and Mr Thomas about how Mr Fitzpatrick had reacted, what he had said, and how shocked he appeared.
153. There was, in contrast, really only one piece of evidence to the contrary, namely the account given by Mr Greenfield. That account, as already noted, was not consistent with the nature and extent of Mr Fitzpatrick's reaction to the events as recounted by him and observed by others.
154. Ms Mallia did not undertake any review of the phone records, even though they were at her disposal. A review would have shown that Mr Greenfield had spoken to someone on Mr Parker's phone (either Mr Parker or Ms Wray) for almost two and a half minutes prior to the death threat call. That review would also have shown that Mr Greenfield did not, contrary to his statement to Ms Mallia, ring Mr Parker immediately after the death threat call.
155. Ms Mallia was in a less advantageous position than the Commission. But even if she found it hard to accept Mr Fitzpatrick, it is very difficult to see why she did not *either* accept Mr Fitzpatrick *or* conclude that it was not possible to choose between him and Mr

Greenfield. To conclude that Mr Greenfield was the more likely verges on the irrational, with respect.

Persistent attempts to remove Mr Fitzpatrick

156. In and after May 2013 Mr Fitzpatrick continued to pursue Mr Alex about his outstanding entitlements to his workers. He continued to raise difficult questions concerning the nature and extent of the union's dealings with companies associated with Mr Alex. There were now published reports about Mr Alex associating with criminals. It was clear that Mr Alex was a phoenix operator who ran various businesses through one insolvency after another.
157. There then began a sustained campaign within the NSW Branch to force Mr Fitzpatrick out of the union.
158. As earlier noted, consideration was being given to Mr Fitzpatrick's removal and calculations as to the cost of that exercise were well underway in May 2013.
159. Mr Fitzpatrick was then demoted and had many of his responsibilities taken away.¹²⁸ In this regard, on 1 July 2013 there was a Committee of Management meeting where it was agreed that Mr Fitzpatrick's role would be abolished.¹²⁹

¹²⁸ Brian Fitzpatrick, 15/7/14, T:37.39-41.

¹²⁹ Brian Fitzpatrick, witness statement, 14/7/14, para 78; Submissions of counsel assisting, 31/10/14, paras 97-98; CFMEU submissions, chapter 8.4, para 39.

160. On 1 July 2013, there was a joint meeting between the Branch's Committee of Management and the union organisers.¹³⁰
161. Mr Fitzpatrick was barred from attending the part of the meeting that concerned the incident. He later discovered that some of those attending the meeting —Mr Steve Costigan and Mr Denis McNamara— had pressed for Mr Fitzpatrick to be sacked.¹³¹ Mr Costigan and Mr McNamara were friends of Mr Parker. They had obtained seats on the Committee of Management through Mr Parker.¹³² Counsel for Mr Parker submitted that he could not be responsible for the actions of his friends.¹³³ This is to take one incident for which Mr Parker may have limited responsibility in isolation. In fact it is one of a long series of incidents, many of which Mr Parker had a responsibility for.
162. On 1 July 2013,¹³⁴ Mr Fitzpatrick was vilified by a committee of management worker as an 'arsewipe' and a 'dog'.¹³⁵
163. Then, after July 2013 Mr Parker began threatening Mr Fitzpatrick with the sack. However Mr Fitzpatrick pointed out to Mr Parker that in circumstances where he knew what Mr Parker had done in relation to the leak of the Zanatta spreadsheets by the Cbus employees, Mr Parker would not dare to sack him. And so it proved to be.

¹³⁰ Brian Fitzpatrick, 15/7/14, T:31.42-43.

¹³¹ Brian Fitzpatrick, 15/7/14, T:31.44-46; Brian Fitzpatrick, witness statement, 14/7/14, para 78.

¹³² Brian Fitzpatrick, witness statement, 14/7/14, para 78.

¹³³ Submissions on behalf of Brian Parker, 21/11/14, para 22.

¹³⁴ Corrected by Rita Mallia, witness statement, 15/8/14, para 111.

¹³⁵ Brian Fitzpatrick, witness statement, 14/7/14, p 179; Fitzpatrick MFI-1, 15/7/14, p 229.

164. With the threat to sack Mr Fitzpatrick having come to nothing, a new strategy was deployed. Mr Ferguson, who was no doubt perceived by Mr Parker and others to have the respect of Mr Fitzpatrick, went to see Mr Fitzpatrick in his office.

165. According to Mr Fitzpatrick, at some time which is not entirely clear, they had the following conversation:¹³⁶

Ferguson: Look, you're 69 mate. You're only a few months off 70. Why don't you just go?

Fitzpatrick: The only way you are going to get rid of me is to sack me. If they sack me, I will take them on. The union has got no right to be treating me this way. I'm staying.

Ferguson: They're going to make your life hell, you know. You will be digging holes from here until the end.

Fitzpatrick: Well, so be it. I've made my mind up. That's it.

Ferguson: Look, I can get you 12 months wages and conditions, help minimise it legally with the tax system and all that sort of thing.

Fitzpatrick: I'm not interested in that. I want to see my time out and leave on my own terms. I deserve that. I have been here a lot of years. What's happening is wrong.

Ferguson: Look, how long is your term to go before the next elections. Is it about 2 1/2 years? I'll go for that. Get you pay, wages and conditions for that period.

166. At this point in the conversation Mr Fitzpatrick was taken aback about the value of the offer being put to him. It was a proposal which, in dollar terms, was of the order of \$300,000. This made Mr Fitzpatrick

¹³⁶ Brian Fitzpatrick, witness statement, 14/7/14, para 117.

Feel uncomfortable, and he therefore refused the offer. The conversation then continued:¹³⁷

Ferguson: I'm very confident I can get you your balance and wages for the full 3 year term.

Fitzpatrick: That's something I couldn't come at. I don't deserve it and it would look like a pay off or whatever you call it. I don't want my 25 years seen to be finishing up where I'm taking 3 years of money for a payout.

167. Sometime later Mr Ferguson returned and said that he had spoken to Mr Parker and Ms Mallia about it and he was able to confirm the offer previously made. Mr Fitzpatrick said 'Look Andrew, we've been through this. I've got an hour and a half to waste if you have, but nothing is going to change. I'm not taking it. That's it.'¹³⁸ Mr Ferguson said he would let Mr Parker and Ms Mallia know.
168. Mr Ferguson denied some aspects of these conversations. However he did ultimately accept, after some obfuscation, many parts of the conversation that Mr Fitzpatrick described.
169. In particular, it is now not controversial that Mr Ferguson approached Mr Fitzpatrick at Mr Parker's request, and that the discussion concerned Mr Fitzpatrick's possible exit from the union, and the terms upon which that might occur. Further, it is not controversial that Mr Fitzpatrick was not persuaded, at that time, to resign.
170. On 16 September 2013, an organiser, Mr Terry Kesby, wrote to Mr Parker and Ms Mallia complaining of the treatment being meted out to

¹³⁷ Brian Fitzpatrick, witness statement, 14/7/14, para 117.

¹³⁸ Brian Fitzpatrick, witness statement, 14/7/14, para 118.

Mr Fitzpatrick, and saying that he was appalled at what he described as a conspiracy to discredit or terminate Mr Fitzpatrick.¹³⁹

171. The threat of sacking Mr Fitzpatrick had failed. Mr Parker's approach to Mr Fitzpatrick through Mr Ferguson had also not borne fruit. Yet another strategy was invoked, this time issuing formal correspondence to Mr Fitzpatrick about alleged misbehaviour around the office.
172. In this regard, Mr Parker signed and sent to Mr Fitzpatrick a letter dated 3 September 2013.¹⁴⁰
173. The letter began by stating that there were '*a number of issues in relation to your conduct that have arisen recently*'. The issues were said to be of a '*serious nature*' and a written response was demanded within 48 hours. A number of alleged incidents were then set out. Shortly stated, the allegations were that (a) on one occasion Mr Fitzpatrick wandered up and down the corridors of the office speaking loudly about the unavailability of union officials, (b) Mr Fitzpatrick sought access to the union's wage claims file for Action 'without any legitimate reason for doing so', (c) Mr Fitzpatrick had demanded a meeting with Mr Parker about an email that he thought was demeaning, (d) Mr Fitzpatrick showed animosity and acted inappropriately towards another employee, Ms Wray.
174. It would be difficult to conceive of a more contrived and less convincing disciplinary letter from one officer of the CFMEU to another. All but the last were relatively minor personality-related

¹³⁹ Fitzpatrick MFI-1, 15/7/14, p 229; Brian Fitzpatrick, witness statement, 14/7/14, p 179.

¹⁴⁰ Fitzpatrick MFI-1, 15/7/14, pp 224-225.

incidents that senior and seasoned unionists, dealing with large scale industrial and workplace conflict on a daily basis, would be well able to manage without correspondence of the kind that Mr Parker generated.

175. This letter was sent to Mr Fitzpatrick out of the blue. He had not had prior discussions with Mr Parker or others about the matters in the letter. Mr Fitzpatrick's behaviour in and around the office had not altered in any material way across his 25 years of service (although in his letter to Mr Parker and Ms Mallia of 16 September 2013 Mr Kesby described Mr Fitzpatrick as having mellowed in recent years).¹⁴¹ He was outspoken. He was gruff. No doubt he had the propensity to ruffle feathers from time to time. There was nothing new in any of this. The union prides itself on having representatives who are not renowned for their diplomacy, and they live with and manage the personality issues that arise as a result. They had done so in the case of Mr Fitzpatrick for many years. The change in management's behaviour only occurred after Mr Fitzpatrick had agitated over the union's relationship with Mr Alex, and after attempts to remove Mr Fitzpatrick had failed.

176. A further letter was sent by Mr Parker to Mr Fitzpatrick on 13 September 2013.¹⁴² This letter complained that Mr Fitzpatrick had been talking to other people about the letter of 6 September 2013, and that this somehow constituted a 'serious breach of your obligations as an employee'. That allegation was absurd. There was no reason why

¹⁴¹ Fitzpatrick MFI-1, 15/7/14, p 229; Brian Fitzpatrick, witness statement, 14/7/14, p 179.

¹⁴² Fitzpatrick MFI-1, 15/7/14, p 227.

Mr Fitzpatrick could not discuss his position with colleagues if he chose to do so. Mr Parker's earlier letter of 3 September 2013 did not make any request for confidentiality.

177. On 16 September 2013 Mr Fitzpatrick sent a letter to Ms Mallia responding to the allegations and denying wrongdoing on his part.¹⁴³

178. After all of these events had occurred, Mr Fitzpatrick received a telephone call from Mr Frank O'Grady. Mr O'Grady was a long time union representative based in Melbourne. He was someone Mr Fitzpatrick had known for many years and regarded well. This was no doubt common knowledge in the CFMEU office. Ms Mallia had arranged for Mr O'Grady to become involved.¹⁴⁴ Mr O'Grady told Mr Fitzpatrick that he was coming to Sydney and would like to have a meeting with him. Mr Fitzpatrick agreed.¹⁴⁵

179. During the meeting that was arranged, they had the following conversation:¹⁴⁶

O'Grady: Look mate, they are going to sack you. You should not go out like this.

Fitzpatrick: They aren't going to sack me mate. Just drop the crap.

O'Grady: Look I can get you paid the rest of the term, 3 years and throw in the car too.

¹⁴³ Fitzpatrick MFI-1, 15/7/14, p 228.

¹⁴⁴ Mallia MFI-1, 25/9/14, p 13.

¹⁴⁵ Brian Fitzpatrick, witness statement, 14/7/14, para 124.

¹⁴⁶ Brian Fitzpatrick, witness statement, 14/7/14, para 125.

Fitzpatrick: Mate, I'm not going to take it. I can't take it. The moment I leave they will say that I was corrupt and they had to pay me off to get rid of me.

180. The conversation then continued for some time. Mr Fitzpatrick was able to discuss his experiences with someone he knew and trusted. During the discussions Mr O'Grady continued to express his view that the best thing for Mr Fitzpatrick was to leave. Mr Fitzpatrick started to feel persuaded that accepting a redundancy would be better than fighting further. He said to Mr O'Grady that he had proven to himself and those around him that the union had not been able to sack him.
181. Ultimately Mr Fitzpatrick was persuaded that accepting a redundancy package was something he could live with. He said, 'Alright I'll leave. Pay me 12 months of my conditions and it's done.'¹⁴⁷ Mr O'Grady asked him whether he wanted the car thrown in as well, and Mr Fitzpatrick said he would take it if it could be organised.
182. They then returned to the Lidcombe office and Mr O'Grady said he would go and speak with Mr Parker. Five or so minutes later Mr O'Grady came back to Mr Fitzpatrick and said 'It's a deal. A year and the car.'¹⁴⁸
183. By the end of that week the terms of the severance between Mr Fitzpatrick and the CFMEU had been agreed, and a deed of settlement dated 26 September 2013 was executed.¹⁴⁹ The deed provided for Mr Fitzpatrick to resign from his position forthwith, and for him to receive

¹⁴⁷ Brian Fitzpatrick, witness statement, 14/7/14, para 127.

¹⁴⁸ Brian Fitzpatrick, witness statement, 14/7/14, para 128.

¹⁴⁹ Fitzpatrick MFI-1, 15/7/14, pp 232-237.

an eligible termination payment of \$132,266.89 together with accrued entitlements totalling \$49,301.61.

184. On the following day, 27 September 2013, Mr Fitzpatrick sent a letter to the committee of management of the NSW Branch resigning from the position of branch organiser and as delegate to the national conference.¹⁵⁰
185. Counsel for Mr Parker submitted that there is no adequate evidence that any of the dealings with Mr Fitzpatrick about the terms on which he would leave his employment with the CFMEU was connected with the alleged death threat incident, because there were many other factors involved.¹⁵¹ But the death threat incident was a crucial incident, leading to two ineffective inquiries in 2013 and much ill-will towards Mr Fitzpatrick.

Mr Parker's misleading statements to the public and members

186. In early 2014 Mr Fitzpatrick was interviewed by members of the press and gave an account of the way in which he was treated.
187. In response, Mr Parker issued a series of contrived and misleading statements to the public,¹⁵² and to the members of the CFMEU.¹⁵³

¹⁵⁰ Fitzpatrick MFI-1, 15/7/14, p 238.

¹⁵¹ Submissions on behalf of Brian Parker, 21/11/14, para 23.

¹⁵² Parker MFI-1, 3/10/14, pp 159-160.

¹⁵³ Parker MFI-1, 3/10/14, pp 161-163.

188. Mr Parker declared to the public and to the union's members that 'these are the facts' in relation to the death threat incident. The so-called 'facts' were set out in six short bullet points:

- The CFMEU legal department called the police as soon as Mr Fitzpatrick alerted them to it.
- He did not pursue the matter with the police and as far as I am aware the police did not pursue the matter.
- An investigation was conducted internally.
- Mr Greenfield denied making the threat. The union could not form a conclusion that Mr Fitzpatrick's allegations were true.
- The union took steps to remind officials of their responsibilities and the expected code of conduct in the union.
- Mr Fitzpatrick did not pursue a review of the outcome through the processes available to him in the Union.

189. The fourth bullet point was misleading, in that though Mr Greenfield denied making the threat on many occasions, he does not seem to have denied it to Mr Parker in the late afternoon of 27 March 2013.¹⁵⁴

190. Mr Parker's six bullet points also reflect a very selective slice of the facts actually known to him at the time.

191. Other critical facts known to Mr Parker but withheld from the public and the union's members included that:

- (a) to the observation of both Mr Thomas and Ms Raju on 27 March 2013, Mr Fitzpatrick was greatly shaken by the call, requested immediate aid from lawyers and police and

¹⁵⁴ Radhika Raju, 15/7/14, T:93.25-95.13.

continued to be greatly shaken even after it was discovered that the caller was not Mr Fraser but Mr Greenfield. Anyone who was informed of these facts would have had little difficulty appreciating from all of the relevant circumstances that Mr Greenfield had made, at the very least, an extremely aggressive and highly personal threat directed to Mr Fitzpatrick's safety;

- (b) on any reckoning, Mr Greenfield had called Mr Fitzpatrick that day and abused and threatened Mr Fitzpatrick on the phone call, and worse, to Mr Parker's knowledge, had threatened to 'destroy' Mr Fitzpatrick. Again, none of these facts were revealed by Mr Parker's statements to members and the public. Indeed the very fact that there had even been a telephone call between Mr Greenfield and Mr Fitzpatrick on the day in question was not disclosed in the announcements. It was studiously avoided;
- (c) to many people outside the union movement the call, even on Mr Greenfield's account of it, would have been extremely alarming. The press release gives a rather bland impression. It misled the public as to the true nature of the call even on Mr Greenfield's 'innocent' version; and
- (d) Mr Greenfield had spoken to someone on Mr Parker's mobile phone for two and a half minutes immediately prior to his threatening call to Mr Fitzpatrick.

192. The statements issued by Mr Parker included that the union could not tell whether ‘Mr Fitzpatrick’s allegations were true’. This, coupled with the incomplete account of the relevant events, carried with it the implicit suggestion that Mr Fitzpatrick (not Mr Greenfield) was the one whose word could not be believed.
193. Mr Parker, Ms Mallia and the many other union officials and press advisers who were involved in the preparation of this statement did not want the public or members to be informed of all of the facts so that they could make their own assessment.
194. This betrays a consciousness, on the part of Mr Parker and Ms Mallia, that a revelation of all relevant facts would demonstrate the likelihood that Mr Fitzpatrick’s version of events was correct.

The Slevin investigation

195. In early 2014, Mr Tony Slevin of counsel was retained by CFMEU’s solicitors, Slater & Gordon Lawyers, to investigate a number of issues. One was the union’s response to the death threat allegation. Mr Slevin was supported by Mr Thomas Roberts, senior national legal adviser, Construction and General Division, CFMEU.
196. When news of the death threat incident became public, the CFMEU made much of the fact that Mr Slevin had been commissioned to undertake an investigation.
197. What the union did not make clear was that Mr Slevin had been instructed not to undertake any investigation into the death threat

incident itself. This is apparent from the terms of his report, and the fact that he was not instructed to speak with key witnesses to the event, such as Ms Raju or Mr Thomas. Mr Slevin's instructions were limited to considering the adequacy of the Branch's investigation into the incident.

C – LEGAL AND OTHER ISSUES

Use of a carriage service to make a death threat

198. Under section 474.15 of the *Criminal Code* 1995 (Cth) it is an offence to use a carriage service to threaten to kill another with the intent to lead the other to fear the threat will be carried out.
199. The penalty for a contravention of this section is imprisonment for 7 years.
200. Section 7 of the *Telecommunications Act* 1997 (Cth) defines a carriage service as 'a service for carrying communications by means of guided and/or unguided electromagnetic energy'. A telephone call clearly constitutes use of a carriage service.
201. Section 474.15(3) of the *Criminal Code* 1995 (Cth) states that it is not necessary that the person receiving the threat actually fear that the threat will be carried out.
202. In this regard, Mr Greenfield may have used a carriage service, namely his telephone, to threaten to kill Mr Fitzpatrick. He may have done so

with an intention that Mr Fitzpatrick would fear that the threat would be carried out.

Use of a carriage service to menace

203. Under section 474.17 of the *Criminal Code* 1995 (Cth) it is an offence to use a carriage service in a way reasonable persons would regard as menacing, harassing or offensive in the circumstances.
204. The penalty is imprisonment for 3 years.
205. As previously discussed, a telephone call constitutes use of a carriage service.
206. In *JL Holland v GJ Cocks & Anor*,¹⁵⁵ it was held that the word ‘menace’ does not have a clear definition, and that generally speaking it is clear that ‘menace’ means a threat and should be construed liberal so as to encompass more than the threat of physical violence.
207. The call made by Mr Greenfield to Mr Fitzpatrick on 27 March 2013 was one which reasonable persons may regard as menacing, harassing or offensive in the circumstances. This is so regardless of which version of the call one accepts. Even on Mr Greenfield’s version, the call was very threatening, harassing and offensive. It is recommended that this Interim Report be referred to the Commonwealth Director of Public Prosecutions in order that consideration may be given to whether Darren Greenfield should be charged with and prosecuted for

¹⁵⁵ Unreported, NSWSC, Hidden J, 1997.

offences against s 474.15 and s 474.17 of the *Criminal Code* 1995 (Cth).

Common assault

208. A threat to kill can constitute common assault. Under Section 61 of the *Crimes Act* 1900 (NSW), it is an offence to assault a person without occasioning actual bodily harm. The penalty is two years imprisonment.
209. The elements of common assault are found at common law. In *Pemble v R*,¹⁵⁶ Owen J set out the elements of assault as follows:
- (a) the actus reus of assault consists in the expectation of physical contact which the offender creates in the mind of the person whom he threatens; and
 - (b) the mens rea consists in the realisation by the offender that his demeanour will produce that expectation.
210. The threat must create the expectation of immediate violence.¹⁵⁷ Assault may be committed through a telephone call.¹⁵⁸
211. By calling Mr Fitzpatrick and using the language he did, Mr Greenfield created an expectation of immediate harm in Mr Fitzpatrick's mind.

¹⁵⁶ [1971] HCA 20.

¹⁵⁷ *R v Knight* (1988) 35 A Crim R 314.

¹⁵⁸ *R v Ireland* [1998] AC 147.

This is apparent from his reaction witnessed by Ms Raju and Mr Thomas and the fact the police were called.

212. Mr Greenfield, in clearly articulating a death threat and a screaming tone of voice, may have realised that his demeanour would create an expectation of fear in Mr Fitzpatrick's mind and may have intended that it do so.
213. It is recommended that this Interim Report be referred to the New South Wales Director of Public Prosecutions in order that consideration may be given to whether Darren Greenfield should be charged with and prosecuted for common assault contrary to s 61 of the *Crimes Act* 1900 (NSW).

Unprofessional conduct of Mr Greenfield, Ms Mallia and Mr Parker

214. The NSW Branch published code of conduct for officers provides that no officer engaged by the union shall converse in an abusive or derogatory manner towards any person.
215. Clause 51(b) of the Rules for the Construction and General Division of the CFMEU provides that any officer of a divisional Branch may be removed from office by a two thirds majority of the divisional Branch management committee where the officer has been charged and found guilty of 'gross misbehaviour or gross neglect of duty'.
216. Mr Greenfield's conduct towards Mr Fitzpatrick may have been a serious breach of the code of conduct and may have constituted gross

misbehaviour within the meaning of that expression in clause 51(b) of the Rules.

217. Notwithstanding the way in which Mr Greenfield acted, and the unsurprising effect it had on Mr Fitzpatrick, no meaningful disciplinary action was taken against Mr Greenfield. His word was effectively preferred to that of Mr Fitzpatrick, notwithstanding the weight of evidence to the contrary. He was given the mildest possible reprimand, and merely provided with a copy of the officers' code of conduct that he had breached so comprehensively.
218. Mr Fitzpatrick meanwhile, the victim of the attack, was marginalised and made the subject of repeated attempts to remove him from the union because he was prepared to speak out in respect of the union's questionable behaviour.
219. By ignoring the death threat incident and not ensuring the proper investigation of it, and by instead turning on Mr Fitzpatrick and embarking on a campaign to have him removed from the union (which campaign began before there had even been an investigation into the matter), Mr Parker may have engaged in a 'gross neglect of duty' within the meaning of that expression in the Rules. In doing so he may have breached the professional standards expected of them. By so acting, he may have demonstrated an unwillingness or inability to conduct himself to a standard that is expected of them by members of the CFMEU and the community at large.
220. It is recommended that this Interim Report be referred to the Management Committee of the New South Wales Divisional Branch of

the Construction and General Division of the CFMEU in order that consideration may be given to whether any action should be taken against Mr Parker under r 51 of the Rules for the Construction and General Division of the CFMEU.

221. Counsel for Mr Parker submitted that the Interim Report should contain no findings that Mr Parker had breached the Code of Conduct. They submitted that it was for the union itself ‘to weigh up all the relevant considerations from an internal perspective in deciding what order would be “appropriate action”. The Royal Commission cannot put itself in that position and should therefore not make any findings on the basis of the Code of Conduct’.¹⁵⁹
222. Given the point made in the first sentence, it is desirable for the Divisional Branch Management Committee to examine the question. The making of the recommendation just indicated does not involve behaviour of the kind to which Mr Parker’s submission objects.
223. It is not proposed to make a like recommendation in relation to Ms Mallia. Compared to Mr Parker, she lacks real power. Her report was not satisfactory, but it was made in difficult circumstances. It does not seem just to describe it as a ‘gross neglect of duty’. And it is not proposed to make a recommendation for Mr Greenfield. To do so might involve an element of double jeopardy.

¹⁵⁹ Submissions on behalf of Brian Parker, 21/11/14, para 5.

CHAPTER 8.5

CFMEU NSW DEALINGS WITH ALEX COMPANIES

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A – INTRODUCTION

1. The written submissions of counsel assisting describe the progress of investigations into dealings between Mr Parker, Mr Greenfield and Mr George Alex. Because the investigation will continue next year, it is undesirable to say anything about these dealings, save in one respect. The submissions of counsel assisting are factually uncontroversial. The CFMEU said of the views expressed by Mr Parker about Mr Barrios, which are quoted below, that they ‘are indefensible and the CFMEU does not condone or adopt them in any way’.¹ This is a strong thing for the CFMEU to say of its own State Secretary. The facts are as follows.

B – MR BARRIOS

George Alex and companies associated with him

2. Mr Alex is a Sydney based undischarged bankrupt. He reportedly has relationships with convicted criminals. He was made bankrupt on 19 April 2011 following the hearing of a creditor’s petition filed by the Deputy Commissioner of Taxation.²
3. A photograph published in the Sydney Morning Herald on 10 March 2013 showed Mr Alex arm in arm with various persons attending a

¹ CFMEU submissions, 14/11/14, Pt 8.5, para 6.

² CFMEU MFI-6, 28/10/14.

\$3,000 a head private event with the former world champion boxer Mike Tyson.³

4. In the photograph, Mr Alex has his right arm around Mr Bilal Fatrouni. That gentleman has been convicted and jailed in relation to steroid and gun charges. Pictured on the other side of the group is Mr Sam Hamden, a former Commancheros bikie, and Mr Khaled Sharrouf, a man convicted and jailed in relation to a terror plot. The article reports that Mr Alex was once in business with Mr Peter Sidirourgous, a convicted amphetamine manufacturer.
5. Mr Alex has, and has had, an underlying interest in and control over various businesses operating in the commercial construction industry in NSW. Of particular relevance for present purposes are:
 - (a) a labour hire business run through companies using the name 'Active'. As the business becomes insolvent, one Active company is wound up and another is created to take its place. The most recent Active company has only just failed;
 - (b) recently failed labour hire, traffic management and security businesses run by a company called 'Metropolis'.
6. Questions have also been raised as to whether Mr Alex has an interest in or exercises some control over a labour hire, traffic management and security business run by a company called Capital, which has essentially had the Active and Metropolis business and assets

³ Parker MFI-1, 3/10/14, p 61.

transferred to it following the financial collapse of those two companies.

7. A little history of the Active, Metropolis and Capital businesses is needed in order to place the events of August 2014 concerning Mr Parker and Mr Barrios in some context.

Active

8. A company called Active Workforce (NSW) Pty Ltd (**Active Workforce NSW**) was registered on 2 November 2009.⁴ Mr Alex's sister, Ms Athina Alex, was appointed a director of this company on 29 March 2010. The shareholders of Active Workforce NSW were, at the relevant time, various corporations, including another 'Active' entity.
9. Active Workforce NSW was granted an initial enterprise bargaining agreement by the CFMEU in April 2010. It was granted a further agreement on or about 7 June 2011. The latter agreement had a nominal expiry date of 30 June 2014.
10. On 20 April 2012 (that is, only some 9 months into the life of the second agreement and long before its expiry date) administrators were appointed to Active Workforce NSW. The company entered into a deed of company arrangement in June 2012 and subsequently, on 28 February 2014, liquidators were appointed.⁵

⁴ Parker MFI-2, 3/10/14, Tab 3, p 36.

⁵ Parker MFI-2, 3/10/14, Tab 3, pp 39-40.

11. Not long before the appointment of administrators to Active Workforce NSW, a new Active company, Active Labour Pty Ltd (**Active Labour**) was incorporated.⁶ It was registered on 3 February 2012. At that time its directors and shareholders included Ms Alex, Mr Joe Antoun and (subsequently) Mr Mazen Hourani. Mr Hourani is now the sole director and shareholder.
12. Shortly after that, and on 5 June 2012, another Active company, Active Site Payroll Services (NSW) Pty Ltd was incorporated (**Active Payroll**).⁷ Mr Alex was not recorded on the Australian Securities and Investments Commission (ASIC) register as a director or shareholder.
13. In October 2012 the CFMEU entered into an enterprise bargaining agreement with Active Payroll. The agreement had a nominal expiry date of 30 June 2014.
14. In 2013 Active Payroll ran into financial difficulties and liquidators were appointed to it on 6 August 2013.⁸ Large sums of money were owed to its workers.
15. Arrangements were then made for the employees of Active Payroll to be transferred across to Active Labour. On 16 September 2013, Ms Rita Mallia, the NSW Branch President, met Mr Hourani and Mr Alex.

⁶ Parker MFI-2, 3/10/14, Tab 20, p 360.

⁷ Parker MFI-2, 3/10/14, Tab 17, p 284.

⁸ Parker MFI-2, 3/10/14, Tab 17, p 285.

It was agreed that Active Labour would meet the arrears that had been accrued under Active Payroll.⁹

16. By the end of 2013 and into the start of 2014, the promise by Active Labour to pay Active Payroll's arrears had not been honoured. Active Labour itself was falling behind.
17. An email dated 22 January 2014 from Mr Dennis Matthews of the Australian Construction Industry Redundancy Trust (ACIRT) reveals that Active Labour had made an ACIRT payment for December 2013, but the cheque had been dishonoured. He indicated that the only other payment that had been received was for July 2013. But that cheque had also been dishonoured. The email concluded with confirmation that the company had effectively made no payment since 1 July 2013.¹⁰
18. Documents produced by the CFMEU reveal that progress was only made when a factoring agency called FIFO Capital, a director of which was Mr Lindsay Kirschberg, ultimately agreed to provide financial assistance to Active Labour. On about 20 January 2014 Mr Kirschberg sent confirmation to the CFMEU, at Mr Hourani's request, of the fact that substantial payments had been made to meet some of Active Payroll's arrears.¹¹
19. The drain on Active Labour in making such a substantial payment in respect of arrears in January 2014 took a heavy toll on the company.

⁹ Rita Mallia, 25/9/14, T:443.18-35.

¹⁰ Greenfield MFI-2, 3/10/14, p 48.

¹¹ Greenfield MFI-2, 3/10/14, pp 46-47.

By the middle of June 2014 Active was again in arrears. Its position continued to deteriorate. Active Labour is now in administration.¹²

Metropolis

20. Another group of businesses in which it has been suggested that Mr Alex has had an interest were those run by Metropolis Traffic Control Pty Ltd (**Metropolis**).¹³ These are labour hire, a traffic management and security businesses.
21. Each of Mr Douglas Westerway and Mr James Kendrovski said in his evidence that Mr Alex has an ultimate stake in those businesses, even though he is not recorded on ASIC's register as being either a shareholder or director.¹⁴
22. As with Active Labour, the Metropolis businesses were under great financial stress during 2014, again to the point where moneys owed by builders to the company have had to be paid directly to the CFMEU. Metropolis ended up heavily in arrears in meeting employee entitlements, and had receivers and managers appointed to it in July 2014.¹⁵

¹² Parker MFI-2, 3/10/14, Tab 20, p 363.

¹³ Parker MFI-2, 3/10/14, Tab 38, p 605.

¹⁴ Douglas Westerway 1/9/2014 T:62-63; James Kendrovski, 1/9/2014, T:101.

¹⁵ Parker MFI-2, 3/10/14, Tab 38, p 608.

Capital

23. A new company, Capital Workforce Pty Ltd (**Capital**), arrived on the scene in 2014.¹⁶ That was a time when both Active Labour and Metropolis were struggling financially. Mr Hourani is a director of Capital.
24. Records in respect of the arrears owed by Metropolis and Active Labour demonstrate that both were obtaining financial assistance from Mr Kirschberg (who has now left FIFO Capital and established his own company Agon Enterprises Pty Ltd) and that they were pooling the companies' funds for distribution in accordance with the agreement of all concerned.
25. In this regard, Ms Keryn McWhinney (Senior Industrial Officer at the CFMEU) met with Mr Hourani and others to discuss the affairs of Metropolis and Active Labour. The notes of that meeting appear to refer to Mr Hourani saying that he wanted Active Labour's money to go to Metro superannuation and ACIRT.¹⁷ Those notes include a diagram showing arrows going from both Metropolis and Active Labour to Capital.¹⁸

¹⁶ Parker MFI-2, 3/10/14, Tab 41, p 709.

¹⁷ Mallia MFI-1, 25/9/14, p 23.

¹⁸ Mallia MFI-1, 25/9/14, p 24.

26. Mr Parker understood that the intention was for Capital to assume the business of Active Labour and Metropolis. He said so in a telephone conversation that he had with Mr Barrios on 18 August 2014.¹⁹
27. On 8 August 2014 Mr Parker signed three enterprise bargaining agreements with Capital and caused applications to be filed with the Fair Work Commission for those agreements to be approved by it.²⁰

Events involving Mr Barrios

28. Mr Barrios is a carpenter. He works for Brookfield Multiplex. He has acted as a CFMEU delegate for the last 19 years.²¹ He is a long serving member of the NSW Branch's Committee of Management, and before that the union's State Council.²² In August 2014 he was to become embroiled in the Capital/Mr Alex matter, and be vilified by Mr Parker, in a way he could not have anticipated.

18 August 2014 telephone call between Mr Barrios and Mr Parker

29. On 18 August 2014 Mr Barrios had a telephone conversation with Mr Parker. During that conversation they discussed the Capital enterprise bargaining agreements.²³

¹⁹ Parker MFI-6, 3/10/14, pp 7-8.

²⁰ Parker MFI-2, 3/10/14, Tab 47, p 802ff.

²¹ Mario Barrios, 1/9/2014, T:125.39.

²² Mario Barrios, 1/9/2014, T:126.1-12.

²³ Parker MFI-6, 3/10/14, pp 7-10.

30. During the telephone conversation on 18 August 2014 Mr Parker and Mr Barrios discussed the emergence of Capital. They discussed whether Mr Alex was associated with it. They also discussed whether Mr Parker had done the right thing in signing agreements in favour of Capital. In this context, Mr Barrios made the following statements:

I think they're just bullshitting to us.

I just think that they're just having a go at us. I just think that it's the same people involved, with the same excuses as before, and I hope you don't end up with egg on your face and in another six, seven months' time they're behind again.

You know, these – these people, they just keep rebirthing themselves with a different name, take over, take over, and they haven't fixed the problem from three companies ago, never mind the last one.

20 August 2014 communications between Mr Parker and Mr Hourani

31. A couple of days after that conversation, Mr Parker rang Mr Hourani, a director of Capital, and left a message saying that it was important that they speak.²⁴
32. Mr Hourani then rang Mr Parker back. During that conversation Mr Parker referred to the fact that a journalist had started raising questions about Capital and Mr Alex, and that 'one of my committee of management has been fucking on a tangent about this...constantly all the time. He's been saying to me that "No, George Alex is involved in all these companies"'.²⁵

²⁴ Parker MFI-5A, 3/10/14.

²⁵ Parker MFI-5B, 3/10/14

33. Mr Parker agreed that he possibly told Mr Hourani, at some point, that Mr Barrios was the committee of management member to whom he was referring.²⁶

20 August 2014 telephone call from Mr Alex to Mr Barrios

34. In the early evening of that same day, 20 August 2014, Mr Alex telephoned Mr Barrios's mobile phone. The two had never spoken or met before.

35. According to Mr Barrios, Mr Alex said words to the following effect:²⁷

It's George Alex here. I want to come and visit you. I want to know why you're talking so much shit about me. I know you're in bed with Tony Balisto. Where do you work? I'm a very patient person, Mario, but I'm running out of patience with you. Where do you work? I will see you tomorrow.

36. After receiving this call from Mr Alex, Mr Barrios contacted Ms Mallia and Mr Parker and alerted them to it. He then went to the police station and reported the incident to the police.²⁸

COM decision to withdraw the applications

37. About a week or so after this incident, and in late August 2014, the Branch Committee of Management met and decided that the application for approval of the Capital enterprise bargaining agreements that Mr Parker had initiated should be withdrawn. This

²⁶ Brian Parker, 3/10/14, T:598.8.

²⁷ Mario Barrios, 1/9/14, T:127.12-27.

²⁸ Mario Barrios, 1/9/14, T:126.29-34.

decision was made based on the complaints that Mr Barrios had raised.²⁹

Mr Parker's reactions to the COM decision

38. Mr Parker contacted Mr Hourani and reported this event to him. In that discussion Mr Parker said that he was 'devastated about pulling the EBAs'.³⁰ Mr Parker's devastation was such that he said he was in a 'heat of rage'.³¹

39. On 28 August 2014 he spoke to Mr Rob Kera, the NSW Branch Assistant Secretary. In that conversation the following exchanges took place:³²

Parker: I've just got to stop myself from fucking bashing fucking the other bloke today.

Kera: Who is that?

Parker: Barrios.

Kera: Oh okay. Fair enough.

Parker: I've got to stop meself because I will. The tension is pretty fucking high and Rita is a bit worried, you know. I said 'Well, don't be worried because it will be all over in fucking – five seconds.' I said, 'You've never seen me unleash.' I said, 'I've been building up this up for a fortnight', you know. I said, 'The problem is if I fucking end up doing it, you know, it will end up – you know, he'll end up fucking doing a stint in hospital, I'm fucking telling you, because I won't stop.'

²⁹ Brian Parker, 3/10/14 T:598.21, T:599.8.

³⁰ Brian Parker, 3/10/14 T:600.15.

³¹ Brian Parker, 3/10/14 T:585.45, T:586.28.

³² Parker MFI-3, 3/10/14, pp 3-4.

40. In his examination on 3 October 2014 – that is, only about five weeks after this explosive conversation – Mr Parker was asked whether he had ever told others that he wanted to bash up Mr Barrios, and whether he had ever said that he had to stop himself from bashing Mr Barrios otherwise he would end up doing a stint in hospital. His answer to each of these questions was ‘no’.³³
41. It is inconceivable that, when he gave this evidence, only a handful of weeks after having spoken in so violent a way about his feelings towards Mr Barrios, Mr Parker would not have had a recollection of having done so. His sworn denials were not true, and he knew that to be so when he gave the evidence. Mr Parker submitted that there was insufficient evidence to conclude that he had engaged in deliberate falsehoods.³⁴ The submission relied on Mr Parker’s own evidence.³⁵ That submission must be rejected.
42. If the position is otherwise, Mr Parker is an individual who is so accustomed to making statements about bashing up fellow officials of the CFMEU, and considers conversations of that kind to be so forgettable, that behaviour of this kind is of no moment at all.
43. Whichever the position, the conduct is not that of a person who is suitable to hold office as Secretary of a Divisional State Branch of a registered organisation.

³³ Brian Parker, 3/10/2014, T:578.32-38.

³⁴ Submissions on behalf of Brian Parker, 21/11/14, para 37.

³⁵ Brian Parker, 3/10/14, T:579.22-26.

44. This was not to be the only occasion upon which Mr Parker would speak ill of Mr Barrios.
45. Following the report that Mr Barrios made to the police of the call he had received from Mr Alex, the matter came to the attention of this Commission and Mr Barrios was summoned to give evidence. He did not volunteer. He did not provide any statement. He was compelled to attend and was obliged to provide truthful answers to questions asked of him. He gave his evidence on 1 September 2014.
46. Notwithstanding all of these matters, on 7 September 2014 Mr Parker spoke with his daughter on the telephone on Father's Day. In the course of that conversation, in reference to Mr Barrios, he made the following comments:
- ‘what a dog’
- ‘he’s a fucking dog’
- ‘he’s a fuckwit’
- ‘he makes out like he’s a great fucking trade unionist’
- ‘that fucking imbecile Mario is so gullible’
- ‘he is so fucking dumb’
- ‘the whole of the fucking team, you know, the whole of his union hate him now, think he’s a fucking dog’.³⁶
47. It was totally inappropriate to unleash this tirade of abuse about a man who had received a disturbing call from Mr Alex and reported it, who had been compelled to attend the Commission, who had honoured his oath to speak the truth, and who had raised entirely legitimate

³⁶ Parker MFI-4, 3/10/14.

questions in relation to Capital and Mr Alex (being questions consistent with the CFMEU's publicly stated position in relation to labour hire and phoenix operators).

48. It is scandalous that a Secretary of a Divisional Branch of the CFMEU would hold these views about Mr Barrios, let alone express them.

Gross misconduct by Mr Parker

49. Clause 8 of the NSW Branch published Code of Conduct for Officers provides that no officer engaged by the Union shall converse in an abusive or derogatory manner towards any person.³⁷ Clause 9 provides that officers shall not make statements that impugn the character and integrity of fellow officers.
50. Clause 51(b) of the Rules for the Construction and General Division of the CFMEU provide that any officer of a divisional Branch may be removed from office by a two thirds majority of the divisional Branch management committee where the officer has been charged and found guilty of 'gross misbehaviour'.
51. The provision of the Rules recognises, unsurprisingly, that conduct capable of being characterised as gross misbehaviour is conduct which falls below the standards of professionalism expected of a union officer.
52. By speaking about Mr Barrios in the manner described earlier in these submissions, Mr Parker may have engaged in 'gross misconduct' and

³⁷ CFMEU MFI-3, 24/10/14.

may have also breached clauses 8 and 9 of the NSW Branch Code of Conduct.

53. It is recommended that this Interim Report be referred to the Divisional Branch Management Committee of the New South Wales branch of the Construction and General Division of the CFMEU in order that consideration may be given to whether Mr Parker has conversed in an abusive or derogatory manner towards any person, has made statements which impugn the character and integrity of fellow officials, has engaged in gross misbehaviour or has grossly neglected his duty, and whether he should be removed from office.
54. Counsel for Mr Parker said that to characterise the conversations as a breach of a code of conduct went beyond the Terms of Reference.³⁸ Counsel for Mr Parker were making two points. The first was that findings should not be framed in terms suggesting that there had actually been breaches. The recommendation does not do this. The second point was that the Royal Commission was not able to put itself in the position of the Divisional Branch Management Committee. The recommendation does not seek to do that.
55. Counsel for Mr Parker also submitted that while the conversations were *about* Mr Barrios, they were not *directed at* Mr Barrios.³⁹ The CFMEU made a similar submission.⁴⁰ This point is no answer in relation to clause 9. It may arguably be an answer in relation to clause

³⁸ Submissions on behalf of Brian Parker, 21/11/14, paras 3, 4, 35.

³⁹ Submissions on behalf of Brian Parker, 21/11/14, para 36.

⁴⁰ CFMEU submissions, 14/11/14, Pt 8.5 para 5.

8. That is a controversy best left to the Divisional Branch Management Committee.

CHAPTER 8.6

CFMEU NSW BRANCH DESTRUCTION OF DOCUMENTS

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A – INTRODUCTION

1. This chapter deals with the destruction of documents by officers and employees of the NSW Branch of the Construction and General Division of the CFMEU (**Branch**). The events took place either during or shortly prior to the commencement of the Royal Commission.
2. Two case studies are considered. The first concerns the destruction of almost all of the emails of the officers and employees of the Branch in June 2014. That destruction took place during the life of the Commission. It took place at a time when the CFMEU had received, and was likely to continue receiving, Notices to Produce from the Commission calling for the production of emails. The second concerns the creation of an incomplete copy of the Branch's wage claim files in February 2014 for the purposes of passing on that incomplete copy to Mr Slevin (a barrister retained by the National Office of the CFMEU to conduct an investigation into certain matters relating to the Branch).
3. In substance the submissions of counsel assisting should be accepted. The submissions on behalf of the CFMEU, Ms Mallia, Ms Wray and Ms McWhinney, as well as those of Ms Charlson, who was separately represented from a fairly late point in proceedings, will be dealt with at appropriate places.
4. The submissions of counsel assisting were to the following effect.
5. So far as the first case study is concerned, a process was undertaken by officers and employees of the Branch in the period from 23 June 2014

to at least 25 June 2014 which resulted in the destruction of almost every electronic email held by the Branch at that time, including emails dating back to at least the start of 2013. Counsel assisting, possibly with excessive charity, submitted that the evidence does not support a finding that the documents were deliberately destroyed in order to avoid their production to the Commission, or recklessly destroyed. The submission is accepted. But the conduct of Ms Kylie Wray, Ms Rita Mallia and Ms Leah Charlson, by their respective acts and omissions in relation to this document destruction process, was extremely careless. If it had been characterised as reckless, they may have committed offences under s 6K of the *Royal Commissions Act* 1902 (Cth). The line between extreme carelessness and recklessness is difficult to draw, and reasonable minds will differ as to whether the conduct of these individuals fell on one side of the line or the other.

6. So far as the second case study is concerned, Mr Slevin asked for certain files. In February 2014, Ms Charlson gave Mr David Holmes an instruction to remove documents from the Branch's wage claim files for Active Labour and Elite Scaffolding. The instruction was to remove, and not copy for Mr Slevin, documents that Mr Holmes considered to be incriminating or unpalatable. Between 100 and 150 documents were removed from the wage claim files by Mr Holmes. He cannot recall the content of any of these documents. Neither Ms Charlson nor any other person from the CFMEU (other than Mr Holmes) has been prepared to admit these matters. No-one will say what has become of the documents that were removed from the files. Therefore, it is not possible to know what has become of the documents removed. They may not have been incriminating, but it is now impossible to say whether any of them were. In consequence, it is

not possible to be confident that all of the documents that were held by the Branch in mid February 2014 that bear upon the nature and extent of the relationship between, on the one hand, the CFMEU and its officers with, on the other hand, Active Labour, Elite Scaffolding, Mr Alex and his associates more generally have been produced to this Commission.

B – DELETION OF EMAILS IN JUNE 2014

The Notices to Produce of 30 May 2014

7. On 30 May 2014, three Notices to Produce were issued to the Proper Officer of the CFMEU. Each required documents to be produced to the Solicitor Assisting the Commission at or before 10.00am on 6 June 2014.
8. The first Notice to Produce, numbered 98, sought various ‘Documents’ recording, referring or relating to the CFMEU’s investigations into various allegations that had been made in respect of corrupt conduct by officers of the Branch.¹
9. The second Notice to Produce, numbered 103, sought ‘Documents’ of various kinds in relation to the fighting funds of the CFMEU.²
10. The third Notice to Produce, numbered 104, required the production of various categories of ‘Documents’ concerning the relationship between the CFMEU and companies associated with Mr Alex, including labour

¹ Wray MFI-1, 2/9/14, p 1.

² Wray MFI-1, 2/9/14, p 8.

hire companies called 'Active' and scaffolding companies called 'Elite'.³

11. The term 'Documents' was defined in each Notice to Produce to include anything from which images or writings can be reproduced with or without the aid of anything else. Thus it included electronic versions of emails.
12. Each Notice to Produce also contained a specific provision dealing with the production of electronic documents. It provided that

The Commissioner has published Practice Direction 1 dealing with specific and important matters concerning the production of electronic documents. If you have electronic documents to produce, you should read Practice Direction 1 carefully. A copy of the practice direction is available at the Commission's website...or if you have no internet access, by contacting office of the Commission on 1800 221 245.

13. In these circumstances, to the extent the CFMEU held email records in electronic form falling within the description of the documents to be produced in answer to the Notices to Produce, they were to be produced in accordance with the Practice Direction 1 regime for the production of electronic documents.

CFMEU's incomplete response to the Notices

14. The General Manager of the Branch is Ms Kylie Wray.⁴ Part of her role as at May and June 2014 was to ensure compliance by the Branch with Notices to Produce issued by the Commission.⁵

³ Wray MFI-1, 2/9/14, p 14.

⁴ Kylie Wray, 2/9/14, T:36.30-33.

15. Ms Wray knew, at the time the Notices to Produce were served on the Branch, that they required the production of electronic documents.⁶
16. The CFMEU gathered and produced various documents in answer to the three Notices to Produce.
17. Those documents were then received and assessed by staff at the Commission. Through that process it was observed that the CFMEU did not appear to have complied with Practice Direction 1. It required all electronic documents, such as emails, to be produced in electronic form. This was an important requirement given that not all emails are printed out and retained in hard copy form.

Correspondence on the CFMEU's incomplete response

18. In consequence, on 25 June 2014, the Solicitor Assisting the Commission wrote to Slater & Gordon, the solicitors for the CFMEU, and raised a concern about the matter. The letter indicated that the Commission required production of all electronic documents in their native form.⁷
19. On 30 June 2014, Slater & Gordon responded.⁸ The response was relatively lengthy and contained 17 numbered paragraphs. The whole of the first page of the letter and a good deal of the second page of the letter contained observations as to the time within which the CFMEU

⁵ Kylie Wray, 2/9/14, T:38.42-44.

⁶ Kylie Wray, 2/9/14, T:40.17-19, 42.10-12.

⁷ Wray MFI-1, 2/9/14, p 21.

⁸ Wray MFI-1, 2/9/14, pp 23-24.

had to respond to the Notices to Produce and the various logistical issues associated with the production of electronic documents.

20. In amongst the numerous matters raised, and in paragraph 12 of the letter, the following statement was made:

Further, on Monday 23 June 2014 the Branch became aware during the course of the afternoon that external emails were not being received. Upon investigation, it was found that the email server had effectively crashed as a result of a “disc space error”. It was subsequently found that the email server had not been backing up for a period of up to 2 years. The problem affected certain personnel’s inboxes to a lesser or greater degree. In order to fix the problem the only way to address the issue was to free up disc space with a number of emails being deleted. The branch has no way of assessing the data that has been lost as a result of this incident.

21. No previous indication had been given by the CFMEU to the Commission that the CFMEU had engaged in a deliberate process of destroying emails. It was remarkable, to say the least, that this matter would be addressed, almost in passing, in paragraph 12 of a letter which, itself, had only been sent because of a query raised by staff at the Commission about the inadequate production by the CFMEU. The matter was treated by the CFMEU and its lawyers as if it was of only passing interest, affecting only ‘a number’, ie a small number, of emails, and requiring no further consideration. The number was actually very large. The matter was actually extremely important. A letter of that kind sent in commercial litigation would have aroused the deepest suspicions.⁹

⁹ See *Registrar of Equity Division, Supreme Court of New South Wales v McPherson* [1980] 1 NSWLR 688.

22. In due course, the Solicitor Assisting the Royal Commission required the CFMEU to serve a comprehensive affidavit explaining the facts and circumstances relating to the deletion of emails.¹⁰
23. On 27 August 2014, Kylie Wray affirmed an affidavit. It gave an explanation of sorts as to what had occurred in relation to the destruction of emails. That explanation and various other items of evidence in relation to the matter are canvassed below.

The CFMEU email server

24. According to Ms Wray's evidence, on the afternoon of Monday 23 June 2014, she became aware that the Branch was not receiving any external emails. It appeared to her that this had been the case during the day, but nobody had noticed it because employees of the Branch were still able to send emails, and were still able to receive internal emails. The problem, therefore, was of a limited kind. It only prevented the receipt of emails sent from an external source.¹¹
25. An investigation into the problem revealed that there was insufficient space on the server to enable external emails to be received. The system had not 'effectively crashed', as had been reported by Slater & Gordon on 30 June 2014, and repeated by Ms Wray in paragraph 7 of her affidavit. Rather, the system was 'full' to such an extent that, whilst the email system still functioned and emails could be sent and internal emails received, external emails could not be received.

¹⁰ Wray MFI-1, 2/9/14, p 25.

¹¹ Kylie Wray, affidavit, 2/9/14, para 7 (Wray MFI-1, 2/9/14, p 28).

Instructions to delete emails

26. At some stage during the course of 23 June 2014, after having become aware of the storage problem described above, Ms Wray started telling some of the employees at the NSW Branch to begin deleting their emails.¹² That was less than four weeks after the three Notices to Produce had been issued.
27. The following day, 24 June 2014, Ms Wray sent an email to all staff at the Branch at 6.33pm.¹³
28. The recipients included Mr Parker and Mr Greenfield. Each of them was under direct consideration by the Commission in relation to their relationship with Mr Alex and companies and individuals associated with him. In fact, these were the very matters being investigated through Notices to Produce numbered 98 and 104 referred to above. That fact was apparent from the terms of those Notices.
29. A number of persons with legal qualifications who were working for the NSW Branch were also sent Ms Wray's email. They included Ms Charlson (the Senior Legal Officer of the Branch), Ms Raju (solicitor in the legal department of the Branch) and Ms Mallia (the Branch President).
30. The subject line of Ms Wray's email read 'URGENT: email cleanout'.
31. The text of the email was as follows:¹⁴

¹² Kylie Wray, 2/9/14, T:48.23, 49.25-27, 50.6-8.

¹³ Kylie Wray, affidavit, 2/9/14, annexure KW1 (Wray MFI-1, 2/9/14, p 31).

Hi everyone

I think Peter has been to see many of you today to request everyone cleans out their mailboxes. We currently are not receiving any emails at all from outside the CFMEU. This is due to the fact that the mailbox store is full.

The only way we will be able to receive external email again is if everyone puts in an effort to clean out their mail.

Some tips:

Sort them by size and delete the big ones first

Putting your email into folders in your inbox still counts them in the size total and is not going to help

Clean out your sent items

Clean out the deleted items folder.

As we are days away from the royal commission kicking off and there is a LOT going on, we need everyone to make this a priority please. If you need assistance with this please speak to myself or Peter.

32. The Commission had in fact already kicked off. The Letters Patent was issued on 13 March 2014. The opening hearing, attended by senior counsel for the CFMEU, took place on 9 April 2014. Some days of evidence in public and some days of evidence in private (including evidence from CFMEU witnesses) had been taken. On 1 May 2014, the CFMEU made an application for authorisation to appear at the hearings. The application stated:

Part 5 – Assistance to the Commission

- (a) **Will the person appearing or to be represented be in a better position to assist the Commission if authorisation to appear is granted? If so, how?**

¹⁴ Kylie Wray, affidavit, 2/9/14, annexure KW1 (Wray MFI-1, 2/9/14, p 31).

...If authorisation to appear is granted, the Commission will be assisted by having one point of contact for all Divisions and Branches of the CFMEU.

In addition, if authorisation to appear is granted, access to the Court Book will permit the CFMEU to more efficiently respond to the proceeding of the Commission and documentation under its consideration.

(b) Please specify precisely the nature and extent of any assistance that will be provided to the Commission if authorisation is granted.

The Commission will have easier access to the CFMEU, its Divisions and Branches through a single legal team. The CFMEU has already assisted the Commission in answering to date the Notice to Produce issued on 31 March 2014 (“Notice”) by coordinating the production of documents and communications with the Commission through its legal representatives.

Failure to store emails elsewhere

33. Ms Mallia read Ms Wray’s email almost immediately after it was sent on 24 June 2014. On reading it she understood that the request from Ms Wray would involve the deletion of a very large number of emails off computers operated by officers and employees of the branch.¹⁵

34. Within minutes, Ms Mallia had sent an email back to Ms Wray in the following terms:¹⁶

Any way we can save them externally I’d happily delete everything if there was a way to save them somewhere

¹⁵ Rita Mallia, 25/9/14, T:414.24-27.

¹⁶ Mallia MFI-1, 25/9/14, p 16.

35. Ms Mallia accepted that, at the time she sent this email, she was concerned to ensure that there was a complete set of emails that had been retained in pristine form on some external hard drive.¹⁷
36. Ms Charlson was also acutely aware of the undesirability of deleting emails of any importance. She took steps to have many of her own emails saved elsewhere on the system. She did that in conjunction with information technology staff at the CFMEU.¹⁸
37. Ms Charlson, a lawyer carrying out ongoing matters for the CFMEU, said she did that because she wanted to ensure that her documents in respect of ongoing matters were not deleted. The idea of deleting documents relating to matters in fact worried her. She could not give any sensible explanation as to why she took no step to ensure that the other lawyers in her team did the same.¹⁹
38. The immediate responses from Ms Mallia and Ms Charlson made it clear that they were both acutely aware that, as at 24 June 2014, it was undesirable for there to be a wholesale deletion of all emails held by CFMEU staff and officials. It is also clear that both immediately appreciated that there would be ways and means of retaining the existing records while at the same time clearing space on the server. They had communications about that very fact. This reveals that the Slater & Gordon letter of 30 June 2014 contained a further material inaccuracy for in it the CFMEU asserted that the deletion of the emails was ‘the only way’ to deal with the problem.

¹⁷ Rita Mallia, 25/9/14, T:415.7-10.

¹⁸ Leah Charlson, 24/10/14, T:1095.9-11, 26-29, 45-47.

¹⁹ Leah Charlson, 24/10/14, T:1099.25-1100.12.

39. The awareness of Ms Mallia and Ms Charlson on 24 June 2014 that the emails could be stored elsewhere, rather than being deleted, comes as no surprise. It is common knowledge that electronic data can be extracted from one source and saved on to an external storage device.
40. It is inconceivable that Ms Wray did not know and think about this at the time. Not only was she the General Manager of a Divisional Branch of the CFMEU (a substantial administrative role) but also, on her own evidence, she was given responsibility of overseeing the IT department of the Branch and playing a role in providing back-up IT services to assist the Branch's IT officer when required.²⁰
41. Ms Wray said that when she sent her email on the evening of 24 June 2014 she did not give any consideration to using such an external storage device.²¹
42. However, even if that were true (which is difficult to accept), she certainly had reason to (and did) consider such an option following receipt of Ms Mallia's email to her of the same date. Ms Mallia raised, expressly, the prospect of saving the emails externally.
43. Ms Wray gave evidence that her response to Ms Mallia's email was to ask Mr Peter Thomas from the IT department, who was referred to in the 24 June 2014 email, to give Ms Mallia a hand saving some material. She did nothing else.²²

²⁰ Kylie Wray, affidavit, 2/9/14, para 2 (Wray MFI-1, 2/9/14, p2).

²¹ Kylie Wray, 2/9/14, T:57.24-26.

²² Kylie Wray, 2/9/14, T:62.2-4.

44. The excuse Ms Wray gave for not taking any further action to ensure that the emails of all of the other CFMEU staff and officials were not saved in the same way was that she took Ms Mallia's concern 'to be solely regarding her own mailbox'.²³
45. That evidence is not credible. Ms Mallia was the Branch President. She raised through her email a matter of general application in respect of all electronic documents the subject of Ms Wray's email of three minutes before. If she had not thought of it before, Ms Mallia's email could only have raised in Ms Wray's mind the possibility of dealing with all emails in this way, particularly in circumstances where the Commission was in existence. The fact Ms Wray was aware of the existence of the Commission is apparent from the text of her own email of 24 June 2014.
46. Certainly Ms Mallia appreciated that her email was of general application in respect of all emails.²⁴ However, apart from sending her query email of 24 June 2014 to Ms Wray, she took no further action. She did not contact Ms Wray to make sure that her suggestion was taken up. She did not follow up on it at all, and, to use her words, she 'didn't take the issue any further'.²⁵ She accepted that she could have given a direction to Ms Wray and all of the other staff to stop the deletion process and ensure that no emails were destroyed. She did not

²³ Kylie Wray, 2/9/14, T:62.16-17.

²⁴ Rita Mallia, 25/9/14, T:415.7-10.

²⁵ Rita Mallia, 25/9/14, T:415.12-27.

do this, even though she knew the Commission was underway.²⁶ She provided no meaningful explanation for her inaction.

47. Ms Charlson was similarly inactive. This is so even though she was the Senior Legal Officer in the NSW Branch and knew that, at the time, the Commission was on foot.²⁷

48. Ms Charlson's evidence was that she was aware, as at 24 June 2014, that:

- (a) the Commission was on foot;²⁸
- (b) from time to time it was likely that the CFMEU would be required to produce emails to the Commission;²⁹
- (c) there were emails that were generated that were not printed out by CFMEU staff and thus unavailable in hard copy form;³⁰
- (d) a Notice to Produce was a document that required the CFMEU to produce documents to the Commission;³¹ and
- (e) officers of the CFMEU were under consideration by the Commission.³²

²⁶ Rita Mallia, 25/9/14, T:416.5-17.

²⁷ Leah Charlson, 24/10/14, T:1093.26-28.

²⁸ Leah Charlson, 24/10/14, T:1093.26-28.

²⁹ Leah Charlson, 24/10/14, T:1093.30-33.

³⁰ Leah Charlson, 24/10/14, T:1093.35-39.

³¹ Leah Charlson, 24/10/14, T:1098.27-28.

49. Notwithstanding that body of knowledge, Ms Charlson took no step to call a halt to the email deletion process that Ms Wray had initiated, other than to make arrangements for some of her own documents to be retained for other purposes.
50. At first Ms Charlson sought to explain her inaction on the basis that she thought, at the time, that the documents that were likely to be required by the Commission had already been produced because there had been a number of Notices to Produce served prior to 24 June 2014.³³
51. Counsel assisting submitted that that evidence is not credible. Ms Charlson is an experienced solicitor. She revealed herself to be a witness of considerable intelligence. She accepted that she had been aware, throughout the life of the Commission, that it would be likely that the CFMEU would be required to produce documents from time to time.³⁴ There would have been no rational basis for her to believe, as of 24 June 2014, that the CFMEU would not be called upon to produce any further documents.
52. It was put to Ms Charlson that she was not giving truthful evidence on the subject. Ms Charlson then gave evidence designed to create the impression that she had not, in fact, turned her mind to the question of whether there would be further notices issued by the Commissioner.³⁵

³² Leah Charlson, 24/10/14, T:1098.30-33.

³³ Leah Charlson, 24/10/14, T:1097.23-46.

³⁴ Leah Charlson, 24/10/14, T:1093.30-33.

³⁵ Leah Charlson, 24/10/14, T:1098.35-43.

She said she was not involved in the Royal Commission process.³⁶ But so senior a lawyer must have appreciated its importance. She must have appreciated the probability that as documents were produced new leads might emerge, to be followed by further Notices to Produce. Ms Charlson tended to seek to debate her way out of the particular proposition that confronted her at any particular moment, even if that involved some shift away from the position she had previously adopted in order to deal with an earlier problem. Unfortunately, it is not possible to accept her evidence that all the documents that were likely to be required had already been produced. But even if her evidence were accepted, her behaviour would reflect a lack of proper care and concern for the processes of the Commission.

53. Ms Charlson said that she ‘would have thought that the only emails that people were deleting would be trivial emails, not serious, not important emails’.³⁷ She also submitted that Ms Wray’s email was ambiguous.³⁸ It was not ambiguous. And it did not draw that distinction. Instead it drew a distinction between ‘big ones’ and others; the former were to be deleted first.
54. Ms Charlson also submitted that if she were to have stopped the document destruction process directed by Ms Wray, she would have had ‘to go outside the chain of command’.³⁹ Unfortunately, it is the unhappy fate of the in-house solicitor to suffer the wrath of those higher up the chain of command by intervening to point out some

³⁶ Leah Charlson, 24/10.14, T:1098.8-17.

³⁷ Leah Charlson, 24/10/14, T:1094.33-35.

³⁸ Ms Leah Charlson’s submissions, 19/11/14, para 16.

³⁹ Ms Leah Charlson’s submissions, 19/11/14, para 25.

tiresome legality. That is the whole point of in-house solicitors. And she was the head in-house solicitor.

55. The position is that neither Ms Mallia, nor Ms Charlson nor Ms Wray took any action to prevent the destruction of emails (other than some of Ms Charlson's and Ms Mallia's emails).

The deletion process

56. Ms Wray's evidence was that the email deletion process commenced on 23 June 2014, continued throughout 24 June 2014 up to the point in time in which she sent her email on the evening of that day, and then continued again on 25 June 2014.⁴⁰

57. A team of no less than nine people in the branch were charged with responsibility for going through the email accounts of a large number of organisers and officials, including Mr Parker and Mr Greenfield, and deleting all of the emails in those accounts.⁴¹

Some general observations

58. Officers and employees of the Branch engaged in a deliberate document destruction process in the period from 23 June 2014 to at least 25 June 2014.

59. The volume of emails deleted must have been vast. The quantity of emails is apparent from the fact that their existence had caused the

⁴⁰ Kylie Wray, 2/9/14, T:48-51.

⁴¹ Kylie Wray, 2/9/14, T:49.9-19.

server to become full on 23 June 2014. The emails in question dated back to at least the beginning of 2013, because that was the last occasion upon which there had been a request made for a clean out of mail boxes by CFMEU staff and officials.⁴²

60. On this point, it is to be remembered that 2013 is a critical period of time under consideration by this Commission in terms of the relationship between Mr Parker, Mr Greenfield, Mr Alex and individuals and companies associated with Mr Alex. That was well known by the officers of the Branch. The fact had been highly publicised. It had been the subject of two internal CFMEU inquiries.
61. The fact that emails, including emails from the email accounts of Mr Parker and Mr Greenfield, were deleted in this wholesale and indiscriminate fashion, during the course of the Commission, particularly in light of the matters that were actually under investigation at the time, is deeply worrying.
62. No official within the CFMEU has appreciated the serious nature of what has occurred. It was treated as a relative triviality in correspondence from CFMEU's lawyers to the Commission on 30 June 2014. No proper explanation for what had occurred was provided. The Commission had to insist upon an affidavit being provided. And even then, the subsequent public examination of the deponent of that affidavit, Ms Wray, made it clear that the affidavit was less than comprehensive, and had not dealt with a number of matters, which only raised cause for greater concern in relation to what had occurred.

⁴² Kylie Wray, 2/9/14, T:46.4-38.

Offences under s 6K of the *Royal Commissions Act 1902* (Cth)

63. Section 6K of the *Royal Commissions Act 1902* (Cth) provides as follows:

- (1) A person commits an offence if:
 - (a) the person acts or omits to act; and
 - (b) the act or omission results in a document or other thing being:
 - (i) ...destroyed...; and
 - (c) the person knows, or is reckless to whether, the document or thing is one that:
 - (i) is or may be required in evidence before a Commission; or
 - (ii) the person has been, or is likely to be, required to produce pursuant to a summons, requirement or notice under section 2.
- (2) An offence under sub-section (1) is an indictable offence and, subject to this section is punishable on conviction by imprisonment for a period not exceeding 2 years or by a fine not exceeding \$10,000.
- (3) Notwithstanding that an offence under sub-section (1) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.
- (4) Where, in accordance with sub-section (3), a court of summary jurisdiction convicts a person of an offence of sub-section (1), the penalty that the court may impose is a fine, not exceeding \$2,000 or imprisonment for a period not exceeding 12 months.

64. The sole submission of the CFMEU was that no finding should be made on the email destruction issue because of the work which Mr Solomon is undertaking. He is endeavouring to recover the deleted emails.⁴³ Ms Charlson adopts those submissions.⁴⁴ However, under s

⁴³ CFMEU submissions, 14/11/14, Pt 8.6, para 5.

⁴⁴ Ms Leah Charlson's submissions, 19/11/14, para 6(b).

6K, the question is whether a document was concealed, mutilated, destroyed or rendered indecipherable. The deletion of the emails from the inboxes fell within those words. The possibility that Mr Solomon may be able to recover the emails does not alter the fact of what happened from 23 June 2014. Ms Charlson then took a point which she said should not be seen as ‘unduly technical’. Even if it is, it is none the worse for that. Section 6K operates in the realm of criminal law. In that field, technicality is the bulwark of liberty. Ms Charlson submitted that, whatever her mental state, it had not been established that the destroyed documents might be required in evidence or were likely to be produced under a Notice to Produce. That is because it is not known what documents, or even classes of documents were destroyed.⁴⁵

65. The submission must be upheld. This conclusion reveals how narrow s 6K is. Section 6K is concerned with documents which may have been destroyed, concealed, mutilated or rendered illegible. Hence, it is concerned with documents which by definition may be incapable of specific identification. That definition tends to exclude many instances of circumstantial reasoning towards contravention of s 6K. The definition makes it impossible to take a document and say: ‘Just by looking at the document, one can see that the accused must have known that the document might be required in evidence or under a summons.’ That is because the document is non-existent or unreadable. Proof of contravention in those circumstances would depend on admissions or on secondary evidence from other witnesses

⁴⁵ Ms Leah Charlson’s submissions, 19/11/14, paras 7-12.

of the contents of the document. But these consequences cannot affect the construction of s 6K as it stands.

66. Counsel for Ms Charlson then submitted that if that conclusion were reached, it was not necessary to make any finding about Ms Charlson's mental state.⁴⁶ It was submitted that it became 'simply irrelevant'. That submission must be rejected. For reasons explained below, the document destruction process is within the Terms of Reference, and so is the mental state of those who devised it or failed to interfere with it.
67. Counsel assisting put the following submissions. Ms Wray took action that resulted in emails being destroyed. That action included deleting emails herself, instructing other staff within the Branch to delete emails on 23 June 2014, and giving a written instruction to the same effect to all officials and staff at the Branch by her email of 24 June 2014.
68. Ms Mallia and Ms Charlson each failed to take action. Those omissions resulted in emails being destroyed. Ms Mallia was the Branch President. She failed to take action to ensure that the emails were maintained and stored on an external device. The action she took in this regard was insufficient. She sent an email to Ms Wray suggesting that course. But she then failed to take any further action to ensure emails were preserved in this way. Ms Charlson, notwithstanding her position as the senior lawyer in the Branch, failed to give an instruction to all staff and officials to cease destroying their emails following receipt by her of Ms Wray's email of 24 June 2014.

⁴⁶ M Condon SC, 28/11/14, T:35.15-22, 36.37-40.

69. At the very least, at the time of acting or omitting to act, each of these individuals were very careless (and possibly reckless) as to whether one or more of the electronic documents that were deleted were ones that were to be produced in answer to one or more of the three Notices to Produce described above, or would be likely to be required to be produced pursuant to subsequent Notices to Produce.
70. When a complaint was made on 25 June 2014 about the CFMEU's failure to produce those documents in answer to the Notices, the various explanations proffered by the CFMEU as to its failure to produce included the fact that the electronic versions of emails had been destroyed on and after 23 June 2014. In that way the CFMEU admitted that documents that had been required to be produced pursuant to those Notices to Produce had been destroyed. However, it is an admission of no weight, because the destruction of documents prevented it knowing what the documents were.
71. What documents were likely to be produced in answer to subsequent Notices to Produce? As at 24 June 2014, the Commission was in its relative infancy. Officers of the CFMEU were the subject of investigation by the Commission. Some Notices to Produce had already been served on the CFMEU. It would have been obvious to any person standing in the position of any of Ms Wray, Ms Mallia and Ms Charlson that it was likely that further Notices to Produce would be served, and that such Notices would be likely to call for the production of emails. It is true to say that they could not predict, as at 24 June 2014, which particular emails would be the subject of subsequent Notices. However, there can be no serious doubt that some emails

would be called for by the Commission under future Notices. Their behaviour in the face of this reality was at least very careless.

72. In order for them to have committed an offence under s 6K of the *Royal Commissions Act* 1902 (Cth) through the acts and omissions described above, it would be necessary to conclude that their actions were more than very careless. Recklessness or deliberate wrongdoing would be required.
73. The evidence raises nagging suspicions, but it does not support a finding of deliberate wrongdoing. As counsel assisting submitted, there is no evidence, and no basis for finding, that Ms Mallia, Ms Wray and Ms Charlson knew, or were reckless as to whether, any particular email within the body of emails that was destroyed was, or was likely to be, required to be produced pursuant to a Notice to Produce.
74. As counsel assisting also submitted, the evidence does not support a finding that any of these individuals knew that a particular damaging document existed, and that by some deliberate or reckless act or omission on their part, they arranged for that document to be destroyed in order to avoid it being produced to the Commission.
75. Whether their conduct is properly characterised as very careless, or instead reckless, is a difficult question to answer. Reasonable minds will differ on the subject. These individuals behaved with a substantial lack of care and concern for the processes of the Commission. But they were not reckless. That submission of counsel assisting should be accepted. When the consequences of a finding of recklessness are

taken into account, it is not possible on the present evidence to conclude positively that the conduct is to be characterised as reckless.

76. Ms Charlson submitted that there should be no finding that she had acted with a substantial lack of care either. She submitted that no finding of that kind was within the Terms of Reference. She also submitted that that finding was a serious one for a legal practitioner.⁴⁷ The last point is correct. But given that the conduct of the CFMEU prima facie falls within the Terms of Reference, the level of care and concern for the processes of the Commission which the CFMEU applied in responding to the Commission is within para (k) of the Terms of Reference. The deliberate or reckless destruction of documents which may be caught by compulsory processes of production is a grave matter. Ms Charlson did not do that. But carelessness and an omission to have proper consideration for the possibility of compulsory processes of production (or worse, consciousness of that possibility coupled with a failure to respond accordingly) is also fairly grave. Conduct of that kind makes the processes of a body like the Commission unworkable. The very submission under consideration reveals a lack of consciousness of these important points.

⁴⁷ Ms Leah Charlson's submissions, 19/11/14, paras 34-35.

C – THE INSTRUCTION GIVEN TO MR HOLMES IN FEBRUARY 2013

The context

77. The issue raised by the second case study is whether documents were withheld from Mr Tony Slevin of counsel in mid to late February 2014. At that time Mr Slevin had been instructed by officers of the National Office of the CFMEU to conduct an investigation into various complaints that had been made by Mr Andrew Quirk. Mr Quirk was an organiser in the Branch. His complaints related to the conduct of various other officers in that Branch, including Mr Parker and Ms Mallia. The incident occurred in mid-February 2014. On 10 February 2014, the Prime Minister announced that the Commission would be created. On 13 March 2014, the Letters Patent was issued.

The investigation by Mr Slevin and call for Branch files

78. As described in Chapter 8.4, in early 2014, Mr Slevin of counsel was retained to undertake an investigation into the conduct of various officials in the Branch. He had been instructed to do so by officers from the National Office of the CFMEU based in Melbourne.
79. In October 2013, Mr Quirk had written to Mr Michael O'Connor, the National Secretary of the CFMEU, raising a series of concerns. Among them, there were three that relate to the Commission. One concern was the way in which Mr Fitzpatrick had been treated by Mr Parker and others following the receipt by Mr Fitzpatrick of a death threat from Mr Greenfield in March 2013. Another was the lack of any

proper investigation undertaken by the Branch officials in relation to such matters. A third was the nature and extent of relationships between Mr Parker, Mr Greenfield and Mr Alex (and individuals and companies associated with him).⁴⁸ There had been some media attention to the last matter.

80. Mr O'Connor sent a letter dated 20 February 2014 to Mr Parker (the Branch Secretary). Mr O'Connor referred to the fact that Mr Slevin had been retained to investigate various matters, and requested the Branch's assistance in the process.⁴⁹ To that end, he attached to the letter a list setting out the files and documents that Mr Slevin had requested.
81. The attached schedule identified a number of different categories of files and other documents. Amongst other things, the schedule included two sub-headings, one referring to a company called Elite Scaffolding, and the other to a company called Active Labour. Both companies were associated with Mr Alex. The matters Mr Slevin had been asked to investigate included the way Mr Parker and others had dealt with these companies.
82. The files and documents requested by Mr Slevin in the schedule included 'Any files...associated with any arrears in employee entitlements owed by the employer operating as [Elite Scaffolding or Active Labour] in March 2013.'⁵⁰

⁴⁸ Brian Fitzpatrick, witness statement, 15/7/14, tab 10, p 157.

⁴⁹ Roberts MFI-1, 23/09/14, tab 7.1, p 42-1.

⁵⁰ Roberts MFI-1, 23/09/04, tab 7.1, p 42-3.

Instruction from Ms Charlson to Mr Holmes

83. A copy of the schedule of files and documents requested by Mr Slevin found its way to Ms Charlson, the Senior Legal Officer in the Branch.⁵¹ Ms Charlson was responsible for co-ordinating the process by which documents were to be gathered and sent on in answer to Mr Slevin's request.⁵²
84. Mr Holmes was a legal secretary administrative assistant who worked for Ms Charlson and other lawyers in the Branch. His evidence as to what happened next is as follows.
85. Mr Holmes said that Ms Charlson asked him to come into her office. She then asked him if he was busy the next day and he said he was not. Ms Charlson then said to him words to the following effect:⁵³

I need you to do something tomorrow, which is to pull all of the files associated with these companies from the wage claim system and go through them and remove anything that is incriminating or unpalatable. You then need to make a copy of those files without those documents. Documents need to go to the National office and they need to go through me and Rita. It has to be done by the end of tomorrow.

86. As later described, within a month of receiving this instruction he recorded the fact of it in a document. That document,⁵⁴ dated 11 March 2014, is a powerful near contemporaneous indicator of the fact that such an instruction was given.

⁵¹ Leah Charlson, 24/10/14, T:1086.7-11.

⁵² Keryn McWhinney, 2/10/14, T:520.12-14.

⁵³ David Holmes, witness statement, 2/10/14, para 13.

⁵⁴ David Holmes, witness statement, 2/10/14, attachment D.

87. There is no controversy that an instruction of some sort was given to Mr Holmes in mid February 2014 to separate out some documents from the wage claim files.
88. The very fact that he was given an instruction to separate out documents from the wage claim files is, of itself, revealing. As described above, the request from Mr Slevin did not require or request anyone from the Branch to undertake a review of the contents of the Active and Elite wage claim files. The request called for the production of ‘any files... associated with any arrears in employee entitlements owned by the employer...’.
89. A wage claim file satisfied this criterion. Ms Charlson accepted this to be so.⁵⁵ She further accepted that she understood that Mr Slevin was saying that if the Branch had a file like that, he wanted someone to pull it off the shelf and give it to him.⁵⁶ As a result, there was no need for anyone to be riffling through wage claim files with a view to removing any documents. The appropriate response to Mr Slevin’s query was to take the file off the shelf and pass it on to him.
90. After giving Mr Holmes the instruction described above, Ms Charlson then provided Mr Holmes with a list which had, amongst other things, the name of Active Labour, and various other companies, written on it. He no longer has a copy of that list.⁵⁷

⁵⁵ Leah Charlson, 24/10/14, T:1087.10-22.

⁵⁶ Leah Charlson, 24/10/14, T:1087.27-31.

⁵⁷ David Holmes, witness statement, 2/10/14, para 13.

Mr Holmes's response to Ms Charlson's instruction

91. The following day, Mr Holmes said he went and saw Ms McWhinney, a Senior Industrial Officer working at the Branch.⁵⁸ Ms McWhinney worked in the wage claims area.
92. Mr Holmes then asked Ms McWhinney to produce a list of all the wage claim files that were tied to the list of employers that Ms Charlson had given him. Ms McWhinney did so.⁵⁹
93. Mr Holmes then retrieved the wage claim files from the shelves. He went through and removed about 100 to 150 documents that he thought might be considered incriminating or unpalatable. He then copied the balance of the files. He said he worked on that task for the whole of the day, starting from about 8.30am and finishing at about 5.30pm.⁶⁰
94. Mr Holmes told this Commission that when he had finished the job of removing documents from the wage claim files and copying what remained, he took the copies of the filleted files and put them outside Ms Charlson's office on a desk. He put the original documents that he had removed from the files in a separate pile. The following day he identified these materials to Ms Charlson.⁶¹
95. At that time Mr Holmes did not give much more thought to the incident. He treated it as a job that he had been asked to do, and which

⁵⁸ Keryn McWhinney, 2/10/14, T:512.35-37.

⁵⁹ David Holmes, witness statement, 2/10/14, para 14.

⁶⁰ David Holmes, witness statement, 2/10/14, para 14.

⁶¹ David Holmes, witness statement, 2/10/14, paras 15-16.

he had done. He did not regard it as a day that was particularly different from any other.⁶²

96. Mr Holmes was challenged about this during the course of cross examination by the CFMEU's counsel. It was suggested to him that if he was being asked to remove evidence of a criminal offence from a file that would have struck him as being something that was wrong (and thus out of the ordinary). Mr Holmes gave a cogent response. He said that he did not know why he was being asked to behave as he was. He said that, for all he knew, the union may have wanted to look at the documents he selected so that they could be dealt with in some appropriate way. He was not aware that the documents were being collated for the purposes of the Slevin inquiry.⁶³ Therefore, he did not consider that he was being asked to do anything wrong.
97. This is one of many occasions on which Mr Holmes demonstrated his credit in the face of vigorous attack. He did not suggest anywhere in his statement, or in his oral evidence, that he had any recollection as to the contents of any of the documents. He did not suggest anywhere in his statement, or in his oral evidence, that he could say with any degree of certainty that the author of the documents he had removed was an officer or an employee of the CFMEU. He did not seek to embellish his evidence about any of these matters. He described what he could actually recall of what he saw and did nothing more. He was not engaged in a process of seeking to justify, *ex post facto*, his own actions. He was, therefore, not faced with the temptation of

⁶² David Holmes, witness statement, 2/10/14, para 17.

⁶³ David Holmes, 2/10/14, T:501.30-35.

consciously or subconsciously reconstructing events in a manner that would cast him in the best possible light.

98. Ms Charlson and Ms McWhinney each gave very different accounts from Mr Holmes of what occurred in mid-February 2014, and who said what to Mr Holmes in relation to the wage claim file exercise. In turn, Ms Charlson's and Ms McWhinney's accounts are not the same.
99. For reasons that will be explained subsequently, the evidence of Mr Holmes should be preferred to that of Ms Charlson and Ms McWhinney. In short, Mr Holmes presented as a more credible witness, and there were fewer difficulties associated with his evidence and credit.

Ms Charlson's credibility

100. As earlier indicated, Ms Charlson was highly intelligent and capable. She was also quick-witted and eloquent. But she adopted a somewhat *de haut en bas* tone towards the junior counsel assisting who conducted her examination. Unfortunately, it is necessary to say that the virtues referred to at the start of this paragraph also became testimonial vices, for they tended to demonstrate a lack of credibility in dealing with unpleasant circumstances. She was mercurial and unconvincing in adapting her answers to whatever forensic necessity she perceived.

Events of 10 March 2014

101. Mr Holmes gave evidence that from 18 September 2013 up to 10 March 2014, he had been bullied by Ms Sherri Hayward, a solicitor in

the Branch who worked for Ms Charlson.⁶⁴ Ms Hayward and Ms Charlson are more than mere work acquaintances. For example, they have been out to dinner together on a number of occasions. Ms Hayward has minded Ms Charlson's house when the latter went on holidays.⁶⁵ Their relationship was certainly much closer than the relationship either of them had with Mr Holmes.

102. Mr Holmes said that Ms Hayward's behaviour towards him was such that he had begun to experience an increased state of anxiety and stress. This led him to submit a formal bullying complaint in writing to Ms Charlson, Ms McWhinney and Ms Mallia on 10 March 2014.⁶⁶
103. The letter ran to a little over 7 pages. It set out Mr Holmes's complaints in respect of Ms Hayward's behaviour in some detail. Indeed the letter included a table in which Mr Holmes not only identified the various different categories of behaviour he had experienced, but also gave examples of behaviour falling within each of those categories.
104. In her evidence, Ms Charlson was reluctant to accept the proposition that Mr Holmes's complaint set out his concerns in some detail. She avoided answering the question twice, as if wanting to leave room for manoeuvre, before ultimately accepting that Mr Holmes had, in fact,

⁶⁴ David Holmes, witness statement, 2/10/14, para 4.

⁶⁵ Leah Charlson, 24/10/14, T:1068.23-1069.1.

⁶⁶ David Holmes, witness statement, 2/10/14, para 5 and attachment A.

detailed his complaints in that letter.⁶⁷ Mr Holmes did not behave this way when giving evidence.

105. Shortly after Mr Holmes provided his letter to Ms Charlson, he observed Ms Charlson and Ms Hayward talking together in Ms Charlson's office with the door closed. The meeting lasted for about 30 minutes. He suspected, correctly, that the meeting was about his bullying complaint that had just only been submitted.⁶⁸
106. Later that day, an email alert came up on Mr Holmes's computer screen indicating that Ms Hayward had sent Ms Charlson an email. Mr Holmes, like all the other staff in the legal team, had access to the emails of everyone else in the team.⁶⁹
107. Mr Holmes suspected that the email may have concerned his complaint. He was curious to find out what it said. He read the email. He noticed that it attached a list of issues that Ms Hayward had prepared in respect of Mr Holmes's work performance.
108. The email was entitled 'List' and commenced, without any preamble or explanation, 'I have attached my list of issues.'⁷⁰
109. That email was sent by Ms Hayward to Ms Charlson at 12.36pm.

⁶⁷ Leah Charlson, 24/10/14, T:1068.3-19.

⁶⁸ David Holmes, witness statement, 2/10/14, para 6.

⁶⁹ David Holmes, witness statement, 2/10/14, paras 6-7.

⁷⁰ David Holmes, witness statement, 2/10/14, attachment B.

110. Later that same day, Ms Hayward sent an email to a friend of hers in which she indicated that Mr Holmes made a formal complaint of bullying against her. She made the following statement:⁷¹

We have to go through a whole process now which is fucked and exactly what I need at the moment. **Leah says I have nothing to worry about** but its [sic] really screwing me up. (emphasis added)

111. Ms Charlson did not deal with this matter in her statement. She must have appreciated it was not something which a person involved in an investigation of Mr Hayward's conduct should have said before it was complete. It prejudged the matter.

Ms Charlson's version of the events of 10 March 2014

112. Ms Charlson said in paragraph 9 of her statement that she had a conversation with Ms Hayward on the morning of 10 March 2014. In it Ms Hayward said that she had had a really bad weekend. She then volunteered, without having yet heard of Mr Holmes's bullying complaint, that she could understand how her conduct towards Mr Holmes could be perceived by him as bullying. This, according to Ms Charlson, gave her the entrée into telling Ms Hayward that Mr Holmes had just made a formal complaint of bullying. Ms Charlson says that, at this point, her discussion with Ms Hayward simply ended, with Ms Hayward asking her nothing about Mr Holmes's complaint, Ms Charlson not telling her anything about the substance of that complaint, and the two of them not discussing the preparation by Ms Hayward of a list of concerns about Mr Holmes. This was a remarkably short conversation.

⁷¹ David Holmes, witness statement, 2/10/14, attachment C.

113. That version of events is an unlikely one.
114. It would be a remarkable coincidence if, just after Ms Charlson received a formal and detailed complaint of bullying from Mr Holmes on 10 March 2014, Ms Hayward would suddenly present herself in Ms Charlson's office, have a chat about the weekend, and happen to volunteer (against her own interests) that she had been considering whether she had been bullying Mr Holmes.
115. Ms Charlson's evidence did not demonstrate that, prior to this meeting on 10 March 2014, Ms Charlson had told Ms Hayward that Mr Holmes had accused her of bullying him. That makes the coincidence all the more difficult to accept.
116. According to Ms Charlson, there had been some communications on the previous Friday, 7 March 2014. However, even on her own account of those conversations, Ms Hayward was not told that Mr Holmes thought that she was bullying him.
117. The relevant alleged prior conversation is set out in paragraph 6 of Ms Charlson's statement. That evidence is that on 7 March 2014:⁷²
- (a) Mr Holmes said to Ms Charlson that Ms Hayward's stress was affecting him;
 - (b) Ms Charlson, Ms Wray and Ms Hayward later discussed a number of matters relating to Mr Holmes's performance;

⁷² Leah Charlson, witness statement, 24/10/14, para 6.

- (c) in that conversation, Ms Charlson told Ms Hayward in passing that Mr Holmes had said that Ms Hayward's stress was affecting him; and
- (d) Ms Charlson asked Ms Hayward to prepare a list of complaints about Mr Holmes.

118. On no view of this evidence could the alleged passing comment from Ms Charlson to Ms Hayward on 7 March 2014 have been taken by Ms Hayward as an indication that Mr Holmes had complained that she was bullying him. On Ms Charlson's own account, it was no more than an indication that Ms Hayward's stress was affecting Mr Holmes. That is an entirely different proposition from a proposition that Ms Hayward was bullying Mr Holmes.

119. When the implausibility of the version of events set out in paragraph 9 of Ms Charlson's statement was put to her, particularly given the content of paragraph 6 of her statement,⁷³ Ms Charlson then began to shift her emphasis and suggest that, whilst she did not recall using the word 'bullying' in this conversation of Friday 7 March 2014, she may well have done so,⁷⁴ and that as a result, it might have been the case that on that Friday Mr Holmes had spoken to Ms Charlson in terms that he had indicated that he had a concern about being bullied by Ms Hayward.⁷⁵

⁷³ Leah Charlson, 24/10/14, T:1069ff.

⁷⁴ Leah Charlson, 24/10/14, T:1070.22ff, .

⁷⁵ Leah Charlson, 24/10/14, T:1071.34-37, 1074.7-13.

120. If that is right, the sequence of events is that Mr Holmes first complained about bullying and asked Ms Charlson to help him, that subsequently Ms Hayward complained about Mr Holmes's performance and was immediately warned by Ms Charlson that Mr Holmes had been complaining about her, and that there then followed a request from Ms Charlson to Ms Hayward to put her concerns about Mr Holmes in writing.
121. On this basis, regardless of whether that sequence of events occurred on Friday 7 March 2014 or Monday 10 March 2014, the position would be that Mr Holmes's bullying concerns were raised first in time, and that when Ms Hayward was put on notice of it by Ms Charlson, the idea of Ms Hayward preparing a list of concerns about Mr Holmes was discussed between Ms Charlson and Ms Hayward. This was the very impression that Ms Charlson had been seeking to avoid by setting matters out in the sequence she did in her statement. However, by changing emphasis in the manner described above in order to deal with the implausibility of paragraph 9 of her statement (as described above), that impression was again emerging.
122. When that was put to Ms Charlson during her examination, she sought to retreat from the proposition that there may have been a conversation about bullying on Friday 7 March 2014, and that instead his complaint had been 'much, much milder'.⁷⁶ By retreating in this way, she was again exposing the inherent implausibility of the conversation as described in paragraph 9 of her statement.

⁷⁶ Leah Charlson, 24/10/14, T:1072.31.

123. Although she was not prepared to accept it, in the witness box, Ms Charlson was seeking to shift the emphases in her evidence over time, in order to deal with the immediate problem that confronted her in relation to any question.⁷⁷
124. A further difficulty with Ms Charlson's evidence as to her conversation with Ms Hayward on 10 March 2014 is that she invites acceptance of the proposition that, when she did tell Ms Hayward that Mr Holmes had lodged a formal complaint of bullying, Ms Hayward did not even ask her what the complaint was about, and the entire conversation on that subject came to an end.⁷⁸
125. According to Ms Charlson, on the morning of 10 March 2014, Ms Hayward was more composed, did not appear to be distraught about the fact of the complaint and asked no more about it.⁷⁹ This was, apparently, in contrast to her condition on the previous Friday, 7 March 2014, when, in respect of precisely the same individual (Mr Holmes), Ms Hayward was described as crying and being very upset.⁸⁰
126. It was then put to Ms Charlson that there must have been more to her conversation with Ms Hayward on 10 March 2014 because only shortly after that conversation, Ms Hayward had sent an email to one

⁷⁷ Leah Charlson, 24/10/14, T:1072.38-45.

⁷⁸ Leah Charlson, 24/10/14, T:1078.34-1079.9.

⁷⁹ Leah Charlson, 24/10/14, T:1078.14-28.

⁸⁰ Leah Charlson, witness statement, 24/10/14, para 6.

of her friends telling her that ‘Leah says I have nothing to worry about’.⁸¹

127. Ms Charlson’s answer was to say that she thought there may have been another conversation on the same day where she said to Ms Hayward ‘I don’t think you need to be overly concerned’.⁸² She did not mention this conversation in her statement.
128. Ms Charlson was not prepared to accept that, having seen from Ms Hayward’s email of 10 March 2014 recording Ms Charlson having told her she had nothing to worry about in relation to Mr Holmes’s complaint, Mr Holmes would have been concerned about whether his complaint was going to be dealt with properly and fairly.⁸³ This was an illuminating illustration of Ms Charlson’s inability to deal openly and credibly with the events the subject of her evidence.
129. Ms Charlson was then asked whether she thought it was appropriate for her to be saying to Ms Hayward, the subject of a bullying complaint, that she, who was responsible for investigating that complaint, did not seem to be overly concerned, before any investigation into the complaint had been undertaken. She endeavoured to justify her behaviour by saying that she spoke to Ms Hayward in this way because she was very unstable and very upset.⁸⁴

⁸¹ Leah Charlson, 24/10/14, T:1079.14; David Holmes, witness statement, 2/10/14, attachment C, p 3.

⁸² Leah Charlson, 24/10/14, T:1079.17-18.

⁸³ Leah Charlson, 24/10/14, T:1081.31-1082.16.

⁸⁴ Leah Charlson, 24/10/14, T:1079.20-23.

130. Again, Ms Charlson's evidence had begun to move about and modify itself in order to suit the particular question in front of her. Having explained away the remarkably short conversation in paragraph 9 of her statement on the grounds that Ms Hayward was not distraught, she then endeavoured to excuse her own behaviour in providing an assurance to Ms Hayward about Mr Holmes's bullying complaint on that same morning on the ground that Ms Hayward was very upset.
131. Ms Charlson's evidence on these matters was unsatisfactory. The probabilities are that the relationship between Ms Hayward and Mr Holmes prior to 10 March 2014 was not a particularly happy one. For his part, Mr Holmes felt that he was being bullied, and on 10 March 2014 made a formal complaint about that matter and provided with Ms Charlson with a copy of it. Ms Charlson's reaction to the receipt of that complaint was to have a private meeting with Ms Hayward during which she told Ms Hayward about the fact of the complaint and said to Ms Hayward that she had nothing to worry about, and the two of them then discussed the preparation of a list by Ms Hayward setting out a series of performance concerns with respect of Mr Holmes.

Mr Holmes's document of 11 March 2014

132. Regardless of the precise sequence of events on 10 March 2014, there is no doubt that Mr Holmes intercepted and read a copy of Ms Hayward's email of that day to Ms Charlson, and the attached list of concerns about his performance.

133. Mr Holmes took that matter seriously. He set about preparing a document with his responses to each of the grounds of concern set out in Ms Hayward's list.⁸⁵
134. Mr Holmes completed that document on 11 March 2014. On that day he attended a meeting with Ms Mallia, Ms Wray and Mr Kesby during which his bullying complaint and his performance were discussed.⁸⁶ At that meeting, Mr Holmes handed over a copy of the document prepared in response to Ms Hayward's list of concerns.⁸⁷
135. One of the matters Ms Hayward raised in her list of concerns was that Mr Holmes was accused of having extended absences away from his desk. Mr Holmes endeavoured to deal with that in his responsive document. Mr Holmes set out in his document examples of occasions where he had been required to be away from his desk for extended periods of time.
136. One of the occasions was the occasion in mid-February 2014 where he had been called upon by Ms Charlson to go through the wage files, remove certain documents and photocopy the balance.
137. In relation to that matter, he stated in his document of 11 March 2014 as follows:⁸⁸

In or about mid-February 2014 ... I was required to drop all other tasks for the entire day to search, copy and remove any incriminating or unpalatable

⁸⁵ David Holmes, witness statement, 2/10/14, paras 10-11.

⁸⁶ David Holmes, witness statement, 2/10/14, para 19.

⁸⁷ David Holmes, witness statement, 2/10/14, para 20.

⁸⁸ David Holmes, witness statement, 2/10/14, attachment D, p 3, item d.

material from the Wage Claim files relating to Active Labour and the legal manifestations of same.

This entailed taking the entire day away from my desk, both for privacy with respect to the task and because the photocopier unit in the level 1 print room was being repaired.

138. As earlier pointed out, the fact that he recorded this in his document of 11 March 2014 is a powerful near contemporaneous indicator of the fact that such an instruction had been given.
139. Mr Holmes's account of this matter in this document was not intended to damage the union in any way. He was responding, in a fairly mechanical fashion, to a range of concerns that had been raised in relation to his performance. He was doing no more than explaining why it was he had been away from his desk on a particular day. The actual activity he conducted at that time was not a matter of particular concern to him.

The lack of response to the 11 March 2014 document

140. At an early stage in the evidence there appeared to be a three week delay in Ms Charlson's response to Mr Holmes's 11 March 2014 document – for it was not until 2 April that she had a discussion with Ms McWhinney about it. When Ms Mallia received Mr Holmes's 11 March 2014 document, she read through it. She then had a discussion with Ms Wray and Ms Charlson about how to resolve the issue. She regarded the allegation in relation to what Mr Holmes had been asked to do in mid-February 2014 as a serious one. She gave clear evidence in her statement that Ms Charlson's attention was drawn to the

allegation on 11 March 2014.⁸⁹ She said she gave Ms Charlson a copy of Mr Holmes's document on 11 March 2014 and asked Ms Charlson to follow it up.⁹⁰ In her oral evidence, Ms Mallia confirmed that she left the matter with Ms Charlson to deal with.⁹¹

141. At the same time Ms Mallia's statement to the above effect was delivered to the Commission, the CFMEU also delivered a statement from Ms Charlson. In paragraph 18 of that statement Ms Charlson said that to the best of her recollection, it was during the week commencing 10 March 2014 that she became aware of Mr Holmes's response and the allegation about the instruction of mid-February 2014.⁹² This is entirely consistent with Ms Mallia's evidence. It also creates the three week delay problem.

142. Ms Charlson was overseas when Ms Mallia was examined at the Commission. One of the serious matters raised for Ms Mallia's attention during that examination was the fact that no action appeared to have been taken in respect of Mr Holmes's allegation in his 11 March 2014 document in relation to the February 2014 instruction for some three weeks.⁹³

143. On 24 October 2014, when Ms Charlson came to be examined, she immediately indicated a desire to change her witness statement by altering the date 10 March 2014 to 25 March 2014, thus reducing that

⁸⁹ Rita Mallia, witness statement, 2/10/14, para 8.

⁹⁰ Rita Mallia, 2/10/14, T:549.16-552.3; Rita Mallia, witness statement, 2/10/14, para 8.

⁹¹ Rita Mallia, 2/10/14, T:551.1-20.

⁹² Leah Charlson, witness statement, 24/10/14, para 18.

⁹³ Rita Mallia, 2/10/14, T:550.43ff.

three week delay to a smaller (albeit still revealing) lapse in time between her alleged discovery of the allegation and the taking of any action.

144. She attempted to explain this change in position by reference to a photocopy of one of the many copies of Mr Holmes's 11 March 2014 document which contained upon it handwriting to the effect that the document had been received on 25 March 2014.
145. Ms Charlson's revised evidence (which conveniently narrowed the three week delay by a significant period) is entirely at odds with Ms Mallia's evidence on this matter as set out above.
146. The most likely explanation is that Ms Mallia did provide Ms Charlson with a copy of Mr Holmes's document on or about 11 March 2014. In this regard, Ms Charlson was the Senior Legal Officer of the Branch. It is thus likely that Ms Mallia would have provided her with a copy of the document straight away. Ms Mallia indicated that she was, at the time, going to be interstate for the next two weeks.⁹⁴ This makes it more likely that she would have given the document to Ms Charlson to deal with in her absence.
147. It may well be that Ms Charlson received more than one copy of the document. She may have received a copy on 25 March 2014 and made a notation on it. That does not mean that she did not also receive a copy on 11 March 2014.

⁹⁴ Rita Mallia, 2/10/14, T:551.1.

148. On balance, Ms Charlson's evidence to the effect that she received Mr Holmes's document on 25 March 2014 should not be preferred to the evidence of Ms Mallia. Ms Charlson was endeavouring to reconstruct what must have occurred with the aid of a document that had the handwritten date on it. However that clashed with her own initial independent recollection of what occurred, as set out in paragraph 18 of her statement as produced. She was overly anxious to accept a reconstruction of events in which the date of paragraph 18 was 25 March 2014 and not 10 March 2014 because she was aware of the difficulties created by the three week delay.
149. In any event, whether the date she first received Mr Holmes's document was 10 March 2014 or 25 March 2014, it appears that Ms Charlson did nothing about it until, by chance, she had a discussion with Ms McWhinney on 2 April 2014.⁹⁵ This period of delay on Ms Charlson's part, whether that delay be one of three weeks or some shorter period, suggests that she preferred to sit on the matter rather than undertake any real investigation into it. This is consistent with her recognition of the fact that she had given the instruction to Mr Holmes in mid-February 2014.
150. According to Ms Charlson, when she received the document she was 'very concerned' and later said to Ms McWhinney and Mr Holmes 'My heart stopped when I read this and I'm sure Keryn's did too'. That evidence is inconsistent with the fact that Ms Charlson did not, in fact, take action when she received the document. Her evidence as to these matters should not be accepted. The only thing that concerned

⁹⁵ Leah Charlson, witness statement, 24/10/14, para 19; Leah Charlson, 24/10/14, T:1084.18-20.

Ms Charlson when she read Mr Holmes's document of 11 March 2014 was that he had recalled the instructions she had given him in mid-February 2014.

151. This was put to Ms Charlson at a time when she had already changed her evidence as to the date of receipt of Mr Holmes's 11 March 2014 document, though she had to pay the price of giving evidence conflicting with Ms Mallia on the point. Ms Charlson then attempted to go even further by raising some doubt as to whether she even read the document on 25 March 2014, and suggesting the possibility that she did not read it until some later date.⁹⁶

152. Ms Charlson was a highly professional and experienced solicitor. It is most unlikely that the 11 March 2014 document would have been provided to Ms Charlson, with its serious allegation about file alteration, in a manner which would have led Ms Charlson to be unaware of its contents on the date she received it. The document raised a serious matter that was troubling the Branch President. It is inherently unlikely that this would not have been drawn to Ms Charlson's attention either at or before the time when the document was given to her. Ms Charlson's own statement constitutes evidence that she was aware of the issue on *receipt* of the document.⁹⁷ Again, the shifting nature of Ms Charlson's evidence was unimpressive.

⁹⁶ Leah Charlson, 24/10/14, T:1092.7-16.

⁹⁷ Leah Charlson, witness statement, 24/10/14, para 18.

The 2 April 2014 conversation

153. The next significant event took place on about 2 April 2014. On that day Mr Holmes, Ms Charlson and Ms McWhinney discussed Mr Holmes's claim about the instruction he received in February 2014.
154. According to Mr Holmes, at this meeting, Ms Charlson tried to suggest that she had not given the instruction. She raised for consideration the possibility that Ms McWhinney may have done so. Mr Holmes's evidence is that he then said to Ms Charlson 'The instruction came from you. Keryn had nothing to do with it'. To this, Ms Charlson said 'We'll have to sort this out later'.⁹⁸
155. Ms Charlson was prepared to accept that, during this conversation, they did talk about the fact that Mr Holmes had been asked to 'separate out the documents which we needed to look at more closely'.⁹⁹ Similarly, in paragraph 20 of her statement, Ms Charlson accepted that Mr Holmes said at this meeting that his instruction was to remove documents from the files and put them in a separate pile.¹⁰⁰
156. The fact that Ms Charlson was prepared to accept that there were conversations in which reference was made to Mr Holmes being asked to separate out the documents supports a finding that that is, in fact, what Mr Holmes was told to do.

⁹⁸ David Holmes, witness statement, 2/10/14, para 21.

⁹⁹ Leah Charlson, witness statement, 24/10/14, para 19.

¹⁰⁰ Leah Charlson, witness statement, 24/10/14, para 20.

157. There is, in fact, little in the way of difference between Mr Holmes's account of the 2 April 2014 conversation and that of Ms Charlson, save that Ms Charlson's version is worded to create the impression that the instruction given to Mr Holmes in mid-February 2014 had come from Ms McWhinney (and not Ms Charlson). Ms Charlson's account of this conversation of 2 April 2014 cannot be preferred to that of Mr Holmes. It is probable that the instruction was given by Ms Charlson, not Ms McWhinney.
158. Ms McWhinney gave a substantially different version of the 2 April 2014 conversation, thus immediately raising concerns as to its reliability. According to Ms McWhinney, Ms Charlson said that Mr Holmes had already told her (prior to this conversation) that Ms McWhinney had instructed him to 'remove and destroy' documents from the wage claim files.¹⁰¹ This should not be accepted. No other witness suggested that Mr Holmes had been instructed to destroy documents, or had told anyone that he had been asked to destroy documents. Indeed Ms McWhinney's own email correspondence of the time does not indicate it was ever suggested that Mr Holmes had been instructed to destroy documents.¹⁰² Ms McWhinney's evidence embellished the contemporary record.
159. Ms McWhinney endeavoured to advance the proposition that Mr Holmes remained mute during the whole of this conversation, even

¹⁰¹ Keryn McWhinney, witness statement, 2/10/14, para 20.

¹⁰² Keryn McWhinney, witness statement, 2/10/14, annexure KMW2 (p 9).

though the matter concerned a significant statement that he had made that was now under consideration.¹⁰³ This is not credible.

160. For these reasons, Ms McWhinney's account of the 2 April 2014 meeting should not be accepted.

The 2 April 2014 email and the related conversation

161. Ms McWhinney, Ms Charlson and the CFMEU place reliance upon an email dated 2 April 2014 from Ms McWhinney to Ms Charlson.¹⁰⁴

162. The polite characterisation of this email is that in it Ms McWhinney asserted that Mr Holmes had said various things in a private discussion between the two of them. The blunt characterisation is that she verballled him. According to that email, Mr Holmes told Ms McWhinney that her instruction was not about financial arrangements and, in his opinion, 'my instruction' was about copying relevant wage claims and internal file notes and identifying any areas of bad behaviour like robust or offensive language.

163. The email sets out an over-decorated version of the conversation of Ms McWhinney and Mr Holmes. It was prepared by Ms McWhinney for the purpose of protecting the position of the CFMEU. The fact that she had no confidence in its accuracy is evident from her decision not to copy Mr Holmes in on the email or not to ask him, ever, whether he agreed that the email accurately recorded what he had said.

¹⁰³ Keryn McWhinney, witness statement, 2/10/14, paras 20-23.

¹⁰⁴ Keryn McWhinney, witness statement, 2/10/14, annexure KMW2.

164. It is quite likely that Mr Holmes did say to Ms McWhinney that he had been instructed to remove offensive documents from the wage claim files, and in this respect, what is set out in the email of 2 April 2014 is not controversial.
165. However, the adornments include matters such as the assertion that the instruction came from Ms McWhinney and not Ms Charlson, and the suggestion that the instruction would not have extended to ‘financial arrangements’. Indeed the statement in the email ‘my instruction was not about financial arrangements’ does not make much sense. It is not at all clear what this means. Nor is at all clear how it could be that the alleged instruction from Ms McWhinney could have ever been understood to have had that carve out.
166. Whatever the purpose of the 2 April 2014 email, it would seem that neither Ms McWhinney nor Ms Charlson wanted Mr Holmes to consider and assess its accuracy or otherwise. This may be inferred from the fact that neither of them were prepared to send it to Mr Holmes for his consideration. It was simply filed away.

Incomplete records observed by Mr Slevin and others

167. On 4 March 2014, Taylor & Scott, the solicitors acting on instruction from officers of the NSW Branch, sent Mr Michael O’Connor and Mr Thomas Roberts of the CFMEU’s National Office a copy of the documents that they had retrieved in response to Mr Slevin’s

request.¹⁰⁵ This included the incomplete copy of the wage claim files that Mr Holmes had prepared for Ms Charlson.

168. Further, documents were then provided by Taylor & Scott to Mr O'Connor on 18 March 2014. None of those documents were documents from any wage claim file.¹⁰⁶
169. On 10 April 2014, Mr O'Connor wrote back to Taylor & Scott noting the limited information that had been provided in relation to the wage claims and asking if there were any other documents available.¹⁰⁷ Taylor & Scott responded by letter of 24 April 2014 noting that the Branch had not been able to find any other documents of that kind.¹⁰⁸
170. In his report, Mr Slevin made various observations in relation to the incomplete state of certain wage claim records.¹⁰⁹

¹⁰⁵ Roberts MFI-1, 23/9/14, p 47.

¹⁰⁶ Roberts MFI-1, 23/9/14, p 75.

¹⁰⁷ Roberts MFI-1, 23/9/14, p 166.

¹⁰⁸ Roberts MFI-1, 23/9/14, p 168.

¹⁰⁹ Roberts MFI-1, 23/9/14, p 213.

Returning to the competing evidence as to the February 2014 instruction

171. Earlier it was concluded that Mr Holmes's evidence in relation to the events of mid-February 2014 should be preferred to that of Ms Charlson and Ms McWhinney. The additional reasons for this advanced by counsel assisting are set out below. Then the submissions of persons other than Mr Holmes will be considered.

Mr Holmes

172. The Holmes version of events has already been described.
173. Mr Holmes presented as a witness of truth. He did not prevaricate in the witness box. He did not seek to give overly clever, contrived, lengthy, or non-responsive answers to the questions he was asked. He did not present an embellished account of events. For example, he did not pretend that he could recall the contents of any of the documents he removed from the files. His version of events was corroborated by a near contemporaneous record, being his document of 11 March 2014. That document was not created to harm the union, and the record he made of the instruction served no great purpose at the time. It merely recorded one of a large number of occasions where he had been required to do work away from his desk.

Ms Charlson

174. Ms Charlson's evidence was that she did not give any instruction to Mr Holmes, and merely asked him to give Ms McWhinney whatever help she required in responding to Mr Slevin's request.¹¹⁰
175. Ms Charlson's evidence and performance in the witness box was unsatisfactory. As explained at various different points above, Ms Charlson presented as a talented but not particularly credible witness. Her evidence appeared contrived. Under examination she continually sought to change the shade of her evidence to suit the immediate question before her. Examined as a whole, the tone and tint of these shades are clashing, not harmonious.

Ms McWhinney

176. Ms McWhinney said in paragraph 14 of her statement that she said to Mr Holmes:¹¹¹

I'm going to take you through what you need to do concerning the request for production of documents. The two companies are Elite Scaffolding and Active Labour. We want only the types of documents from the files that I have marked in yellow on the documents request, for example, spreadsheets, anything relating to Cbus and ACIRT, correspondence and emails, company searches, any other type of calculations, employee lists and receipts. This will be just about all the documents in a wage claim file. You will need to keep the documents in two separate bundles being the original files and the copy files. Do you understand?

177. Ms McWhinney said that Mr Holmes indicated he understood this request, but that after a couple of hours she found that Mr Holmes was

¹¹⁰ Leah Charlson, witness statement, 24/10/14, paras 16-17.

¹¹¹ Keryn McWhinney, witness statement, 2/10/14, para 14.

confused and not doing the task properly. As a result, she just asked him to photocopy the files.¹¹²

178. There are a number of problems associated with Ms McWhinney's evidence. Some have already been described in earlier parts of these submissions. Additional difficulties are set out below.
179. First, as earlier noted, Mr Slevin's request was simple enough. It was a call for the wage claim files for Active Labour and Elite Scaffolding. Ms Charlson understood that. All that it required was for the files to be pulled from the shelves and sent to Mr Slevin. There was no need for the elaborate instruction Ms McWhinney claims she gave.
180. The alleged instruction to Mr Holmes described in paragraph 14 of Ms McWhinney's statement, if made, was quite bizarre. According to her, the specific kinds of documents she says she listed out to Mr Holmes were, in essence, all of the documents that she expected the wage claim files would contain. If that were so, why give an instruction in those terms in the first place? Why not just get the files and pass them on? Ms McWhinney did not offer any explanation in her statement as to why she would have said what she alleges she said.
181. When examined, Ms McWhinney changed her evidence as to the terms of the alleged conversation with Mr Holmes. She asserted that her instruction was to remove anything from the files that did not relate to

¹¹² Keryn McWhinney, witness statement, 2/10/14, para 16.

Active and Elite and which had been accidentally included in the wage claim files for those companies.¹¹³

182. This new version in Ms McWhinney's oral evidence was unimpressive.

183. First, it represented a different account of the alleged conversation to that set out in paragraph 14 of Ms McWhinney's statement. The conversation described in her statement was to the effect that she had highlighted particular kinds of documents on Mr Slevin's list of documents and only wanted Mr Holmes to copy those documents. However, now she described a different kind of conversation, in which Mr Holmes was effectively instructed to copy the contents of the wage claim files, save for any document that might have been misfiled.

184. Secondly, the new version is not believable. In the ordinary course of events, the file would be expected to contain the appropriate records. The fact that there might be a rare misfiling of a document would be a matter of no real consequence. It would not have given rise to any concern. It certainly would not have given rise to a concern that would have led Ms McWhinney to think it necessary to task anyone to sift through all of the files in search of a piece of paper that just might have been misfiled.

185. There were other problems with Ms McWhinney's evidence.

186. One example is that the version of the instruction set out in her statement proceeded on the basis that she gave Mr Holmes a copy of

¹¹³ Keryn McWhinney, 2/10/14, T:515.19-24.

Mr Slevin's document request with certain kinds of documents highlighted, and that he was only to search for those highlighted documents in the wage claim files (even though that was not what Mr Slevin had asked for). The highlighted categories included emails and audits. She also said that, in her oral instruction, she told Mr Holmes to locate correspondence, emails and other categories of documents from the wage claim files.

187. However, in her examination, Ms McWhinney said that wage claim files were just clerical or administrative files that would only contain spreadsheets,¹¹⁴ and would not contain emails from the officers who were working on the files.¹¹⁵ She was not able to give a credible explanation as to why she would have asked Mr Holmes to locate and copy documents in the wage claim files of a kind which, according to her, would not be on those files.¹¹⁶ This suggests that the conversation Ms McWhinney described in her statement did not take place.
188. From time to time Ms McWhinney showed discomfort in having to answer questions, and displayed a strong desire to refer back to and rely on her statement in lieu of giving a direct answer to the questions.¹¹⁷ This indicated her lack of confidence in her ability to stick to the version of events that had been put in her statement. It indicated her fear that she would say something inconsistent.

¹¹⁴ Keryn McWhinney, 2/10/14, T:519.20-24.

¹¹⁵ Keryn McWhinney, 2/10/14, T:519.24-26.

¹¹⁶ Keryn McWhinney, 2/10/14, T:536.30-39.

¹¹⁷ Keryn McWhinney, 2/10/14, T:514.1, 515.35.

189. There was another unimpressive aspect of Ms McWhinney's evidence. She stated that Mr Holmes had allegedly been given a very simple instruction to take out of the wage claim files documents that did not relate to the companies in question. But she stated that that instruction was 'a bit too difficult for him to understand'. She said Mr Holmes had been confused about what he was supposed to be doing.¹¹⁸
190. Mr Holmes gave evidence in a calm and considered way. He expressed himself in terms which indicated reasonable intelligence. The fact of his intelligence is also obvious from the terms of the documents he prepared on 10 and 11 March 2014. Ms Charlson attacked these propositions by contending that Mr Holmes was in poor physical and mental health.¹¹⁹ That contention does not refute them. The suggestion by Ms McWhinney that Mr Holmes is someone who would not be capable of understanding a simple request of the kind Ms McWhinney says she gave is not credible. The event she described did not occur. Her evidence on this particular topic was condescending, and unpleasant. It was untrue.

¹¹⁸ Keryn McWhinney, 2/10/14, T:517.28, 518.45-46.

¹¹⁹ Ms Leah Charlson's submissions, 19/11/14, para 52.

The submissions of the CFMEU and Ms Charlson

191. The CFMEU submitted that this matter is outside the Terms of Reference.¹²⁰ Ms Charlson supported the submission.¹²¹ The CFMEU submitted that the question of what occurred in February 2014 is at best tangential to the Alex case study referred to in Chapter 8.5. The conduct is at least within para (k), as reasonably incidental to the Alex case study, which it is accepted is within the Terms of Reference.
192. The CFMEU also submitted that even if the matter were within the Terms of Reference, it should be left for resolution at the same time as the Alex issue.¹²² However, factually the February 2014 inquiry seems to be complete from the evidentiary point of view. Hence, it may as well be dealt with now.
193. Turning to factual questions, Mr Holmes, not surprisingly, supported the submissions of counsel assisting.¹²³
194. Ms Charlson began her submissions by relying on *Briginshaw v Briginshaw*.¹²⁴ It is understandable that she did so. It is a serious thing for a solicitor to suppress documents. Ms Charlson also relied on

¹²⁰ CFMEU submissions, 14/11/14, Pt 8.6, paras 14-18.

¹²¹ Ms Leah Charlson's submissions, 19/11/14, paras 2, 113.

¹²² CFMEU submissions, 14/11/14, Pt 8.6, para 18.

¹²³ Mr Holmes's submissions, 13/11/14, paras 1-3.

¹²⁴ (1938) 60 CLR 336.

Wilson v Foxman in support of the proposition that human memory of conversations is fallible.¹²⁵

195. The CFMEU's written submissions¹²⁶ boil down to four points. One is that Mr Holmes has a motive to make accusations against Ms Charlson because she criticised his work on 28 August 2014.¹²⁷ Although this charge was specifically denied by Mr Holmes,¹²⁸ Ms Charlson also supported this.¹²⁹ The second point is that, when considered alongside other witnesses, Mr Holmes is 'simply unreliable'¹³⁰ and 'vague'.¹³¹ The third is that Mr Holmes's evidence that he spent a day removing 100-150 documents, but cannot recall one of them is incredible.¹³² The fourth is that it is:¹³³

inherently unlikely that people in the position and with the standing of Ms McWhinney and Ms Charlson, a senior lawyer, would have taken Mr Holmes into their confidence and asked him to remove documents from files in circumstances where he would have to exercise his judgment about the nature and import of the documents and where that activity was designed to deceive the person who had sought the files and documents.

196. To those considerations, Ms Charlson added another – Mr Holmes's distress, deteriorating health and lack of ability to function normally,

¹²⁵ (1995) 49 NSWLR 315 at 318.

¹²⁶ Various oral submissions made by the CFMEU correspond with some of those made by Ms Charlson: J Agius SC, T:15.29-21.14.

¹²⁷ CFMEU submissions, 14/11/14, Pt 8.6, para 21.

¹²⁸ David Holmes, 2/10/14, T:508.21-27.

¹²⁹ Ms Leah Charlson's submissions, 19/11/14, paras 47-50.

¹³⁰ CFMEU submissions, 14/11/14, Pt 8.6, para 34; see also para 29.

¹³¹ CFMEU submissions, 14/11/14, Pt 8.6, para 35.

¹³² CFMEU submissions, 14/11/14, Pt 8.6, paras 30, 34.

¹³³ CFMEU submissions, 14/11/14, Pt 8.6, para 35.

putting in doubt his ability to record accurately oral statements, and leading to the conclusion that he is the victim of a misunderstanding.¹³⁴

197. There is a tension between these five points. Unreliability, vagueness and ill health fall into one category. Motives to accuse, lack of credibility and inherent unlikelihoods fall into another. There is no reason at all to conclude that Mr Holmes was lying, whether because motivated by hatred or any other considerations. That leaves unreliability. It is necessary to compare Mr Holmes's reliability with that of others. That comparison is favourable to Mr Holmes.
198. Ms Charlson's submissions, incidentally, exaggerated Mr Holmes's health difficulties. The submissions quoted the following words about himself from his letter of 10 March 2014 to the effect that he had been 'unable to complete basic work tasks, spelling simple words and have even had trouble remembering [his] own name'.¹³⁵ The submission then spoke of Mr Holmes's 'profound problems'.¹³⁶ But the submissions omitted the words preceding that quotation from the 10 March 2014 letter: 'On receipt of information I have felt so humiliated; undermined and unwanted that I have been'. In the words quoted in Ms Charlson's submissions, Mr Holmes was not offering a general description of himself. He was describing only his reaction to particular incidents. The documents he wrote on 10 and 11 March 2014, and the evidence he gave, are quite inconsistent with the words quoted selectively by Ms Charlson's submissions.

¹³⁴ Ms Leah Charlson's submissions, 19/11/14, para 39.

¹³⁵ Ms Leah Charlson's submissions, 19/11/14, para 39.

¹³⁶ Ms Leah Charlson's submissions, 19/11/14, para 39.

199. Ms Charlson's submissions did not explain her tardiness, and that of the CFMEU generally, in responding to the 11 March 2014 document. She said she was not responsible for that matter, but that is contrary to Ms Mallia's very precise evidence on this point.¹³⁷
200. Ms Charlson's submissions stress the absence of any contemporary record of the February conversation between herself and Mr Holmes.¹³⁸ They attack Mr Holmes for his lack of recollection independently of his document of 11 March 2014.¹³⁹ But they do not adequately explain why that document is to be discounted. It is true the document does not name Ms Charlson, but there is other evidence that she issued the instruction to Mr Holmes. Ms Charlson drew attention to the following words in that document: 'I was required to drop all other tasks for the entire day to search, copy and remove any incriminating or unpalatable material.' Ms Charlson submitted:¹⁴⁰

It is difficult to understand why any employee of the CFMEU, such as Ms Charlson, might wish, simultaneously, to withhold documents whilst procuring a copy of them. In the normal course a person who desires to cover up documents does not first create additional copies.

201. This supposed *reductio ad absurdum* seeks to construe the 11 March 2014 email remorselessly. It construes it to mean that the instruction was first to copy the whole of the wage claim files and then remove incriminating or unpalatable material. But Mr Holmes was speaking informally and not necessarily describing events chronologically. It is clear that the task was to search the files, remove some material and

¹³⁷ Rita Mallia, witness statement, 2/10/14, para 8; Rita Mallia, 2/10/14, T:549.22-551.20.

¹³⁸ Ms Leah Charlson's submissions, 19/11/14, paras 41, 72.

¹³⁹ Ms Leah Charlson's submissions, 19/11/14, paras 45, 75.

¹⁴⁰ Ms Leah Charlson's submissions, 19/11/14, para 73.

copy the balance. Ms Charlson's submissions about the 11 March 2014 document continued:¹⁴¹

It is equally improbable that the task of selecting "incriminating" documents ... was entrusted to someone who had not the training to determine what was, or was not, incriminating; *a fortiori* when his performance was under review. The far more likely reason why a junior employee was tasked with reviewing the files was that he was engaged upon what ought to have been the comparatively undemanding task of removing documents that had nothing to do with Elite or Active (as Ms McWhinney contends).

202. Mr Holmes may have been a junior employee, and he was, unlike Ms Charlson and others, not a solicitor. But it takes no legal skill to decide what was unpalatable. And he had legal training – a fact which Ms Charlson, rather inconsistently, seeks to invoke to her advantage elsewhere.¹⁴² That legal training would have been of some assistance in guiding him to decide what was incriminating.
203. Ms Charlson made some specific attacks on Mr Holmes's credit. She submitted that he fell into a contradiction. In his oral evidence he said that because of Ms Charlson's request in February he had to look at 'a lot of documents in a very short amount of time'.¹⁴³ But in his list of complaints¹⁴⁴ he said this 'entailed taking the entire day away from my desk'. Ms Charlson submitted that an entire day is not a 'very short period of time'. She attacked his testimony as wrong.¹⁴⁵ Attacks of this level of pedantry tend to support the victim, not the attacker. The

¹⁴¹ Ms Leah Charlson's submissions, 19/11/14, para 74.

¹⁴² Ms Leah Charlson's submissions, 19/11/14, para 83.

¹⁴³ David Holmes, 2/10/14, T:502.1-2.

¹⁴⁴ David Holmes, witness statement, 2/10/14, Annexure D, para 2(d).

¹⁴⁵ Ms Leah Charlson's submissions, 19/11/14, paras 43-44.

two statements are not inconsistent. As counsel assisting submitted in reply.¹⁴⁶

The first statement is a relative one. It depends upon a variety of factors. One obvious factor is how many files and documents he was given to deal with in the time. Other factors include how long he had [actually to] review them relative to the other tasks to be attended to in order to carry out the job assigned to him, including arranging for lists of files to be obtained, getting those files located, working his way through the files, copying portions of them, organising the different piles of materials and arranging for files to be returned.

204. The next inconsistency Ms Charlson alleges is that in his statement Mr Holmes said that he ‘had been raising complaints [about bullying] informally since October 2013’.¹⁴⁷ In his written complaint of 10 March 2014, Mr Holmes said he failed to address bullying.¹⁴⁸ Ms Charlson submitted:¹⁴⁹

These two versions are directly contradictory; either Mr Holmes had been complaining for a number of months, (which is denied by Ms Charlson), or he had “failed to address” the matter. Both cannot be true.

205. But the first proposition relates to the informal complaints he made, the second to the formal complaints he did not make. No inconsistency was ever suggested in cross-examination.
206. Ms Charlson’s submissions attacked Mr Holmes on the ground that in the witness box he could not remember what Ms Charlson said to him in February 2014.¹⁵⁰ That evades the point: what could he remember on 10 March 2014? And the submission misrepresents the effect of

¹⁴⁶ Counsel assisting’s written submissions in reply to Ms Charlson, 25/11/14, para 30.

¹⁴⁷ David Holmes, witness statement, 2/10/14, para 4.

¹⁴⁸ David Holmes, witness statement, 2/10/14, Annexure A (p 2).

¹⁴⁹ Ms Leah Charlson’s submissions, 19/11/14, para 46.

¹⁵⁰ Ms Leah Charlson’s submissions, 19/11/14, para 49.

David Holmes's evidence by referring to only a sliver of it. Read as a whole, his evidence strongly supports the conclusion that he was told to delete whatever was 'incriminating or unpalatable'.¹⁵¹

207. The competing submissions on the factual aspects of this case study were very detailed. There was no crucial issue decisive of the whole case study. It is a matter of assessing the total effect of the submissions. In all the circumstances, the submissions of counsel assisting preferring Mr Holmes's version are to be accepted.

Conclusions

208. It is more probable than not that Ms Charlson gave Mr Holmes an instruction in February 2014 to remove documents from wage claim files that Mr Slevin had asked for. The instruction was to remove, and not copy for Mr Slevin, documents that Mr Holmes considered to be incriminating or unpalatable.
209. The purpose of this instruction was to ensure that Mr Slevin and the National Office were given a sanitised version of the Branch's records. The purpose was to reduce the prospect of Mr Slevin finding materials that might be harmful to the Branch and its officers and employees.
210. Between 100 and 150 documents were removed from the wage claim files on this basis. Ms Charlson has not been prepared to admit this, or say what has become of these documents. Nor has any other person from the CFMEU, except Mr Holmes.

¹⁵¹ David Holmes, 2/10/14, T:499.44-500.24.

211. It is, therefore, not possible to know what has become of the removed documents, and whether any of them were, in fact, incriminating, or otherwise evidenced conduct by officers of the CFMEU falling within the Terms of Reference.
212. In these circumstances, and particularly given that the wage claim files concerned Active Labour and Elite Scaffolding, it is not possible to be confident that all of the documents that were held by the Branch in mid-February 2014 that bear upon the nature and extent of the relationship between the CFMEU and its officers with these companies (and with Mr Alex and his associates more generally) have been provided to this Commission.
213. This can only be determined when the Branch, through Ms Charlson or otherwise, identifies the documents that were removed.

UNIVERSAL CRANES

CHAPTER 8.7

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A – SUMMARY

1. This chapter concerns the conduct of officers of the Queensland Branch of the Construction and General Division of the CFMEU towards companies in a group headed by the Smithbridge Group Pty Ltd. A reference to **Smithbridge Group** is a reference to one or more companies in this group.
2. The officers in question are Mr Michael Ravbar (Branch Secretary) and organisers Mr Peter Close, Mr Shane Treadaway, Mr Andrew Sutherland, Mr Michael Robinson and Mr Ben Loakes.
3. Counsel assisting's submissions to the following effect are accepted.

4. Mr Ravbar and the others pursued a campaign against Smithbridge Group in order to force companies in that group to enter into enterprise agreements with the CFMEU on terms which required the companies to make payments to BERT, BEWT and CIPQ. The campaign involved CFMEU officials (i) dictating to customers of the Smithbridge Group that Smithbridge Group be removed from their sites, and otherwise applying pressure designed to turn those customers away from Smithbridge Group, and (ii) threatening to kill off Smithbridge Group through such action unless they signed the union's form of enterprise agreement and arranged for all employees to become union members. In the course of that conduct Mr Ravbar and Mr Close engaged in a deliberate and protracted campaign of industrial blackmail and extortion. By so acting, Mr Ravbar and Mr Close may have committed offences under s 359 and s 415 of the *Criminal Code* 1899 (Qld). In addition, Mr Ravbar and the other CFMEU officers referred to above may have contravened s 228, 340 and 343 of the *Fair Work Act* 2009 (Cth) and s 45D and s 45E of the *Competition and Consumer Act* 2010 (Cth).

B – RELEVANT FACTS

Smithbridge and Universal Cranes: the background

5. Smithbridge Group is managed by Albert Smith. It is owned by the trustees of his family trust. The company owns shares in various other corporations that operate in the mobile crane and construction industries.

6. In relation to the crane businesses, the largest company is Universal Cranes Pty Ltd (**Universal Cranes**). It is a wholly owned subsidiary of Smithbridge Group. The other crane companies in the group are part-owned by Smithbridge Group and part-owned by the local managers of those companies. They include Gold Coast Cranes Pty Ltd, Universal Cranes (Townsville) Pty Ltd, Universal Cranes (Sunshine Coast) Pty Ltd, Universal Cranes Ballina Pty Ltd and Universal Mini Cranes Pty Ltd.
7. The construction work of the Smithbridge Group is carried on by Smithbridge Australia Pty Ltd (**Smithbridge**).
8. Mr Smith is the managing director of Smithbridge. He is the sole director of Universal Cranes. He has over 30 years' experience in owning and operating businesses in the construction and crane industries in Australia, New Zealand, Guam, Papua New Guinea and New Caledonia. His long career in these industries has been successful.
9. Since 2007 Mr Smith has sat on the National Board of the Crane Industry Council of Australia, the national peak body for the industry. He was President of the Queensland branch of that organisation from 2007 to 2011.
10. Mr Smith's experience in the industry extends to owning and operating a training school in Queensland. In this regard, he established Lifting Skills Pty Ltd in 2004 to provide training for crane drivers. That company is a registered training organisation.

11. Mr Smith was raised and educated in New Zealand. He obtained a Bachelor of Engineering degree from the University of Canterbury in 1980. After that he moved to Brisbane and worked as a design engineer on the Gateway Bridge and on the Dalrymple Coal Terminal. He then worked as an employee of a small construction company. He started his own construction business in 1982. In the mid 1980's his father wished to retire from his crane and construction business in New Zealand. Mr Smith returned to New Zealand and commenced managing that business in his father's place.¹
12. At that point the New Zealand business had about 50 employees. Mr Smith built up the business, and within 3 or 4 years it had more than 100 employees. By early 2001 that number had doubled again. Mr Smith, despite his relocation to Australia in about April 2002, continues to operate the crane rental division of that business.²

Purchase of Universal Cranes in 2002

13. Not long after moving to Australia in about April 2002, Mr Smith purchased the Universal Cranes business from its then owners. By that time – 2003 – the Universal Cranes business had been in operation for about 10 years. Mr Smith's purchase of that business was completed on 1 October 2003.³
14. Following this purchase, Mr Smith added some additional employees of his own to the employees of the business. The business has

¹ Albert Smith, 4/8/14, T:22.6-24.1.

² Albert Smith, 4/8/14, T:23.41-44.

³ Albert Smith, witness statement, 4/8/14, para 16.

operated continually in the industry, and the number of workers employed by it has grown over time. There are now over 300 employees in the various Universal Cranes companies. Universal Cranes itself has become one of the largest operators in the Queensland crane market.⁴

15. Mr Smith and his companies are not ‘fly by night’ operators. They are genuine and established players in the industry. They have provided substantial long term employment for a large number of workers.
16. Mr Smith’s unchallenged evidence is that he has taken regular steps to ensure that employees understand their rights.⁵ He provides them with copies of, and explains, proposed employment agreements. He corresponds with them on a reasonably regular basis to ensure that they are familiar with their rights. In addition, he organises a weekly meeting, held every Monday morning, with all employees at every site. The meeting typically starts as a safety meeting, and then turns to address any matters concerning employment terms, workplace rights and workloads.⁶
17. Mr Smith came to learn, after purchasing the business, that the previous owners had orally agreed with the CFMEU that the company would enter into an enterprise agreement with the union and the company’s employees.⁷

⁴ Albert Smith, witness statement, 4/8/14, para 23.

⁵ Albert Smith, 4/8/14, T:24.42-25.39.

⁶ Albert Smith, 4/8/14, T:24.42-25.39.

⁷ Albert Smith, witness statement, 4/8/14, para 19.

18. As Mr Smith was new to the Australian industry and had no experience with the way in which the CFMEU operated, he did not oppose the company entering into the EBA. Therefore, in early 2004 Universal Cranes entered into an EBA with the CFMEU to cover the period from 8 February 2003 to 31 October 2005 (**2003 EBA**).⁸

BERT and CIPQ

19. The 2003 EBA obliged Universal Cranes to contribute set amounts per week per employee into a redundancy scheme called the Building Employees Redundancy Trust operated by B.E.R.T Pty Ltd (**BERT**).⁹ It also contained a term which gave Universal Cranes the option of either paying particular forms of sick leave or alternatively paying a premium to CIPQ (an operator of a sick leave and income protection insurance business) for each employee.¹⁰
20. Mr Smith was not familiar with either BERT or CIPQ at the time the 2003 EBA was executed. In due course, however, he came to understand more about their workings. He formed the view that it was not in the interests of his business and its workers for payments to be made to BERT and CIPQ.¹¹
21. Mr Smith undertook some research into the schemes. As part of that process, he contacted Bill Wallace, the General Manager of BERT. They met in late 2005 or early 2006. As a result of those discussions

⁸ Albert Smith, witness statement, 4/8/14, para 20.

⁹ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 1, p 37.

¹⁰ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 1, p 37.

¹¹ Albert Smith, witness statement, 4/8/14, paras 21, 25, 28.

and his own research and consideration, Mr Smith decided that he did not want to make contributions to the BERT redundancy scheme or pay premiums to CIPQ.¹²

22. Amongst other things, Mr Smith did not approve of the fact that the interest earned on the BERT members' redundancy funds was not added to the members' accounts. Instead, the earnings of the fund were taxed at the highest rate in the hands of the fund manager. Much of what was left over was distributed to the CFMEU to undertake training. A significant portion of the money so distributed was spent on administration costs rather than actual training activity.¹³ All of his observations were accurate.¹⁴

23. He calculated that it was much more cost effective for an employer of his size to offer a self-funded benefit than to contribute to CIPQ. He developed an in-house self-funded two year extended sick leave entitlement scheme. He worked out that he could offer the same benefits to his employees at a lower cost to the company. His evidence was: 'I did my own calculations. All I was trying to do was establish value for money from the [CIPQ] fund and what I understood to be the real cost of the benefit and the fee to pay via that, via the [CIPQ] fund, it was obvious to me it was more economically viable to self insure'.¹⁵

¹² Albert Smith, witness statement, 4/8/14, paras 25-28.

¹³ Albert Smith, witness statement, 4/8/14, paras 27-28.

¹⁴ See Chapter 5.2 concerning BERT, BEWT, CIPQ and QCTF.

¹⁵ Albert Smith, 4/8/14, T:55.41-46; Albert Smith, witness statement, 4/8/14, para 30.

Discussions following expiry of 2003 EBA term

24. When the 2003 EBA expired, he had decided that he did not want either a BERT clause or a CIPQ clause.
25. Towards the end of the express term of the 2003 EBA, Mr Smith held various discussions with representatives of the CFMEU about the possibility of entering into a new EBA with the CFMEU on terms that did not include these provisions. The union however, would not agree.
26. During this process Mr Smith also spoke with his workers about his attitude towards BERT and CIPQ, and the alternative self-funded schemes he wished to put in place. On one occasion he organised an early morning breakfast meeting that was attended by all of the workers. He invited representatives from the CFMEU to attend so that they could present their alternative position to employees. During that meeting the union representatives became vocal and derogatory towards Mr Smith. He thought the meeting was degenerating. As a result, he left the meeting and allowed the union representatives to speak to his employees about the advantages of having a BERT and CIPQ clause in their employment terms. On a separate occasion Mr Smith arranged for someone from the BERT fund to come and speak to employees.¹⁶

Introduction of workplace agreement in 2006

27. Following these information sessions, Mr Smith decided to introduce a workplace agreement to Universal Cranes employees. That workplace

¹⁶ Albert Smith, 4/8/14, T:26.3-29.36.

agreement matched the 2003 EBA terms, but did not include BERT or CIPQ clauses. Instead it provided for redundancy and sick leave to be self-funded within the business. The redundancy obligation sat as a liability on the balance sheet of Universal Cranes. Extended sick leave was treated as a cost at the time it was incurred. The workplace agreement also included an innovative shiftwork allowance, greater RDO flexibility, and a different employee classification system from that set out in the form of agreement proposed by the CFMEU.¹⁷

28. The differences between the CFMEU form of EBA and the workplace agreement prepared by Universal Cranes were drawn to the attention of the company's employees. As noted above, there had been a series of meetings attended by Mr Smith, CFMEU representatives and a BERT fund representative for this very purpose.
29. During these meetings and discussions, one of the key points of difference identified to the employees was the fact that redundancy payments made into the BERT scheme would be preserved in the hands of BERT and remain available to employees in the event that Universal Cranes was wound up in insolvency. By way of contrast, employees were made aware that this same level of security would not be available through the redundancy scheme proposed by Universal Cranes.¹⁸
30. Mr Smith offered personal guarantees to his employees in respect of redundancy entitlements, but the employees were not particularly interested in taking him up on that offer. He then discovered that the

¹⁷ Albert Smith, witness statement, 4/8/14, para 31.

¹⁸ Albert Smith, 4/8/14, T:39.10-41.40.

Federal Government provided a guarantee for employees in respect of, amongst other things, their redundancy entitlements if their employer was wound up. The employees' position was therefore protected, even under the Universal Cranes scheme.¹⁹

31. There was debate amongst the employees and then with Universal Cranes, the CFMEU and others about the various advantages and disadvantages of the BERT scheme on the one hand and the Universal Cranes scheme on the other.²⁰
32. It is to be remembered that Mr Smith and Universal Cranes were long term players in the industry. Mr Smith was not a phoenix operator. He had a successful track record. For its part, Universal Cranes was an asset rich business with a large fleet of cranes and other equipment, and had a balance sheet capable of supporting the redundancy and sick leave scheme implemented by Mr Smith.²¹ The business did carry debt, but was only geared to about 50%.²²
33. Having drafted the workplace agreement, Mr Smith then informed workers of its existence and that they would have the choice of working under its terms or instead remaining employed under the terms of the expired 2003 EBA. New employees would be employed on the terms set out in the workplace agreement.

¹⁹ Albert Smith, 4/8/14, T:39.10-41.40.

²⁰ Albert Smith, 4/8/14, T:41.6-29.

²¹ Albert Smith, 4/8/14, T:40.1-15.

²² Albert Smith, 4/8/14, T:45.7-28.

34. At the time of the introduction of the workplace agreement there were about 100 employees in the Universal Cranes workforce. Of those, approximately 20 moved across to the workplace agreement immediately, on the day it first came available.²³ Over time, almost all of the balance of the existing employees elected to transfer away from the 2003 EBA terms and take up the workplace agreement conditions. By the end of 2007 there were only about 6 or 7 employees who remained employed under the terms of the 2003 EBA.²⁴

2008 Collective Agreement

35. After 2007, an alternative industrial relations regime was introduced under which an employer could enter into a collective agreement with its employees. As a result, Mr Smith took steps to introduce a collective agreement at Universal Cranes.
36. Mr Smith made the CFMEU aware that Universal Cranes wished to introduce a collective agreement and embark upon a negotiation process with its employees. The CFMEU and the AWU each gave notice of their desire to negotiate on behalf of employees, and the employees were notified of this fact. No employee indicated that he or she wished for the CFMEU to negotiate the terms of the collective agreement on their behalf.²⁵
37. As with the earlier workplace agreement, prior to the employees deciding whether or not to accept the terms being offered by Universal

²³ Albert Smith, 4/8/14, T:26.41-27.7.

²⁴ Albert Smith, 4/8/14, T:27.9-13.

²⁵ Albert Smith, witness statement, 4/8/14, paras 33-34.

Cranes in 2008, there was debate involving the employees, Mr Smith and CFMEU representatives about the advantages and disadvantages of the form of agreement being proposed by Universal Cranes. The debate included the differences between the BERT and CIPQ schemes and the self-funded redundancy and sick leave schemes of Universal Cranes.²⁶

38. Universal Cranes proceeded to enter into a collective agreement with its employees. That agreement was approved by the Australian Government Workplace Authority in about July 2008 (**2008 Collective Agreement**).²⁷ The 2008 Collective Agreement remained in force for a period of about 4 years.

2012 non-union EBA

39. At the expiry of the term of the 2008 Collective Agreement, and in about mid-2012, Universal Cranes sought to negotiate a new form of enterprise agreement with its employees. A copy of the draft form of agreement was provided to the CFMEU. Mr Smith invited the CFMEU to join in the discussion and talk to employees.²⁸
40. Invitations of this kind were nothing new. Since 2004, Mr Smith had always welcomed the CFMEU to the Universal Cranes premises. He permitted them to talk to Universal Cranes employees, one on one, in company time. He invited union officials to call meetings with the workers using the company's facilities. Union representatives also had

²⁶ Albert Smith, 4/8/14, T:41.6-40.

²⁷ Albert Smith, witness statement, 4/8/14, para 35.

²⁸ Albert Smith, witness statement, 4/8/14, para 39.

an open invitation to attend the company's Monday morning weekly team meetings.²⁹

41. The workers at Universal Cranes did not elect for the CFMEU or any other union to act on their behalf in the negotiation of the new enterprise agreement. The employees dealt directly with Universal Cranes. The result was a non-union enterprise agreement voted in by a majority of the employees, and approved by Fair Work Australia in August 2012 (**2012 EBA**).³⁰
42. As with the workplace agreement in 2006 and the 2008 Collective Agreement, the 2012 EBA followed discussion and debate between the employees of Universal Cranes, Mr Smith and CFMEU representatives about the differences between the BERT and CIPQ schemes and the self-funded redundancy and sick leave schemes offered by Universal Cranes.³¹
43. The 2012 EBA did not contain a BERT, or CIPQ clause. Instead, like the 2008 Collective Agreement and the workplace agreement that preceded it, the 2012 EBA contained different provisions regulating matters such as redundancy, sick leave and income protection.

²⁹ Albert Smith, witness statement, 4/8/14, para 41.

³⁰ Albert Smith, witness statement, 4/8/14, para 43; Annexure AS-1 Tab 4.

³¹ Albert Smith, 4/8/14, T:41.6-40.

CFMEU campaign in response

44. At around the time the workers of Universal Cranes voted in the 2012 EBA which made no reference to BERT or CIPQ, the CFMEU retaliated by applying pressure to Universal Cranes in the marketplace.
45. There is a factual contest as to the nature and extent of the CFMEU's response. One particular question is: did the CFMEU's campaign include seeking to apply pressure to customers of Universal Cranes and other companies in the group so as to have them removed from work sites?
46. There are some relevant background matters. The CFMEU wanted Universal Cranes to enter into an EBA with the CFMEU on terms that included the BERT clause, the CIPQ clause, and a further clause that required the employer to make payments into a welfare fund managed by B.E.W.T Pty Ltd (**BEWT**). Under the BERT, BEWT and CIPQ schemes, substantial monies flowed out of those schemes and into the CFMEU for various purposes. The CFMEU thus had a motive to take action that would lead to Universal Cranes signing an EBA obliging it to make payments to BERT, BEWT and CIPQ. In and after 2012, the CFMEU deliberately pursued a 'campaign' to have Universal Cranes and the companies in the group enter into the CFMEU form of EBA in place of the 2012 EBA the employees had voted for.³² The creation of the 2012 EBA which did not contain the BERT, BEWT and CIPQ clauses that the CFMEU had been pressing on Universal Cranes was contemporaneous with the commencement of actions on work sites

³² Michael Ravbar, witness statement, 6/8/14, para 47.

which led to Universal Cranes being removed from those sites. There is much contemporaneous material making repeated reference to the fact and nature of a CFMEU 'ban' or 'boycott' on Universal Cranes. This includes a series of direct emails of complaint to CFMEU officers. There is not a single written record through which any of those CFMEU officers denied the existence of the ban or boycott complained of. The CFMEU criticized these as lengthy, discursive and self-serving, and submitted that its failure to reply to them was not an acceptance of their contents.³³ Unfortunately for the CFMEU, its silence must be treated in the same way as the silence of any commercial or industrial participant in a chain of correspondence.

47. The 'campaign' the CFMEU waged against Universal Cranes involved two steps. One was the officers of the CFMEU threatening to apply pressure to customers of Universal Cranes to stop dealing with Universal Cranes unless and until the Union's demands that Universal Cranes and others enter into the Union's form of EBA were satisfied. The other involved the CFMEU acting on those threats when its demands were not satisfied by entering work sites and shutting down the operations of Universal Cranes or Smithbridge on those sites.

Indooroopilly project

48. In the period leading up to the creation of the 2012 EBA, Gold Coast Cranes (one of the companies in the Universal Cranes group) undertook work at the Indooroopilly Shopping Centre site. The builder on the site was Multiplex. Multiplex had sub-contracted various works

³³ CFMEU submissions, 14/11/14, Pt 8.7, para 39.

to Bastemeyers Earth Moving, and in turn Bastemeyers had engaged Gold Coast Cranes.

49. Mr Smith was only one of the three directors of Gold Coast Cranes. The other directors were Mr Paul McCormack and Mr Ian Bourner.
50. Mr McCormack and Mr Bourner met with Mr Shane Treadaway, a CFMEU organiser, at the CFMEU's office in Bowen Hills on 4 May 2012. At that meeting, Mr Treadaway agreed that Gold Coast Cranes would not be able to sign the union form of EBA because the rates in that form of agreement would put the company at a disadvantage in the Gold Coast market. He indicated that a different form of EBA, in terms that would mirror the EBA of another crane company (Metro Lift Cranes) would be acceptable to the CFMEU. That form of agreement would not make provision for BERT, BEWT or CIPQ.³⁴
51. Not long after that meeting, and on 22 May 2012, Mr Bourner received a telephone call from an operator of a crane on hire from Gold Coast Cranes to Bastemeyers at the Indooroopilly site. He was told that the union representative on site had stopped the crane, and had said that they were not allowed to continue on site because the company did not have a union EBA. Mr Bastemeyer received a call to the same effect. He was told that the union officials who had taken this action included Shane (Treadaway).³⁵

³⁴ Ian Bourner, witness statement, 3/9/14, paras 14-15; Paul McCormack, witness statement, 3/9/14, para 20.

³⁵ Ian Bourner, witness statement, 3/9/14, paras 17-18; John Bastemeyer, witness statement, 22/9/14, para 19.

52. Mr Bastemeyer's company had prior experience of union intimidation on the site. Mr Treadaway and Mr Mike Davies had met him and Ms Julie McKee (a Bastemeyer employee) to discuss signing a CFMEU form of EBA. Ms McKee gave the following evidence about what Mr Mike Davies, a BLF organiser, said:³⁶

In response to our questions Mike told us how wonderful the unions are and how they could benefit the business. I was angry that they were demanding Bastemeyer sign the Union Agreement during the meeting so I responded to Mike "yeah right, what a joke".

Mike then said to me: "You think it's fucken funny, if you don't fucken sign this I guarantee you won't be working on the Indooroopilly shopping centre site".

53. Ms McKee's evidence was that she was 'shocked and outraged at the bullying, intimidation and threats by the unions ... to sign the Union Agreement during the meeting'.³⁷ In her oral evidence Ms McKee said she had a clear recollection of the words used. She then gave the following evidence:³⁸

Q. You have been at many business meetings where people have talked in those terms?

A. No.

Q. Do you regard that as unusual?

A. I was quite offended.

Q. And it was directed towards you, in the sense that it was in response to something you had just said?

A. That's correct, sir.

³⁶ Julie McKee, witness statement, 3/9/14, paras 11-12.

³⁷ Julie McKee, witness statement, 3/9/14, para 16.

³⁸ Julie McKee, 3/9/13, T:569.17-31, 37-45.

- Q. How did you feel when that was said?
- A. Horrified and, to be totally honest, I turned to the side – (witness demonstrates) – and just looked the other way.
- ...
- Q. I am asking you this because it has been put, I think, that those statements were not said In any event, as you sit here today, you have a very clear recollection do you?
- A. I have never been spoken to so horribly by someone I do not know and I felt this – (witness demonstrates) – big. It was – the man leaned across. The way we were sitting at the table, he leaned across and intimidated me completely.

54. The second demonstration of the witness involved her placing the end of her thumb a very small distance away from the end of her index finger. Ms McKee was a very impressive witness. Her evidence was completely credible. Beyond one question formally complying with the rule in *Browne v Dunn*, counsel for the CFMEU made no attempt to shake Ms McKee in cross-examination.³⁹ That was the product of a wise and skilful exercise of professional judgment. The CFMEU did not provide a statement from either Mr Davies or Mr Treadaway contradicting the evidence of Ms McKee. It only provided a statement from Mr Doug Spinks, who was not present during the whole of the meeting and agreed that there may well have been things said that day that he did not hear.⁴⁰ Ms McKee's evidence is to be accepted independently of Mr Bastemeyer's evidence to the same effect.⁴¹ It is therefore unnecessary to resolve a conflict between Mr Bastemeyer and another witness going only to credit, and which, since

³⁹ Julie McKee, 3/9/14, T:570.7-11.

⁴⁰ Douglas Spinks, 4/9/14, T:709.22-29.

⁴¹ John Bastemeyer, witness statement, 22/9/14, para 13.

Mr Bastemeyer's credit is immaterial, is outside the Terms of Reference.⁴²

55. Returning to the Gold Coast Cranes incident on 22 May 2012, when Mr Bastemeyer received the call that a union representative had shut down Gold Coast Cranes on site, he went down to the site and heard a union representative yelling and screaming, saying 'fucking stop you cunts, you're not working, you're not allowed on site, you don't have an EBA so fuck off' and 'they have been banned from all sites in Brisbane and you will be next'. They said to Mr Bastemeyer: 'You can't use Gold Coast Cranes, they haven't signed an EBA. You need to use one of these companies [handing a list across]...Read your EBA you dickhead'.⁴³ This evidence was not contradicted. It was not the subject of cross-examination. There is no reason not to accept it.
56. Mr Bourner received a call from Mr Bastemeyer at this time and was asked what the situation was with the company's EBA. Mr Bourner said that the company was in discussions with the CFMEU and the company was waiting for a document. That was a reference to the 4 May meeting referred to above and the fact that the CFMEU had not yet sent the Metro Lift form of EBA to Gold Coast Cranes. Mr Bastemeyer then handed his phone to Mr Treadaway, and Mr Treadaway spoke to Mr Bourner. Mr Bourner reminded Mr Treadaway about the 4 May meeting. Mr Treadaway said he had to talk to Mr Ravbar and that the crane could not restart.⁴⁴

⁴² Mark O'Brien, witness statement, 4/9/14, para 5.

⁴³ John Bastemeyer, witness statement, 22/9/14, paras 20, 22.

⁴⁴ Ian Bourner, witness statement, 3/9/14, paras 21-23.

57. The attack on Universal Cranes was a co-ordinated one. Mr Treadaway's conduct on the day is evidence that he was not acting alone, and was taking direction from Mr Ravbar. The telephone records indicate that Mr Close, a senior CFMEU organiser who worked closely with Mr Ravbar on this matter, had various telephone conversations with Mr Treadaway and with the CFMEU delegate on site ('Scoob') on the day of the incident.
58. On 1 June 2012 Mr McCormack, a director of Gold Coast Cranes, sent Mr Smith an email.⁴⁵ In that email Mr McCormack said that Gold Coast Cranes had been removed from the Indooroopilly site. He also reported that there had been discussions with the union in the context of that removal, during which Mr Ravbar had indicated that Gold Coast Cranes had to sign a full CFMEU form of enterprise agreement.
59. Mr Smith obtained further information about this matter in an email on 20 June 2012 from Ian Bournier.⁴⁶
60. As Gold Coast Cranes was no longer permitted on site by the CFMEU, it had to cross-hire the job to Metro Lift in order to meet the contract it had with Bastemeyers.⁴⁷ Gold Coast Cranes lost about 3 months of work as a result.⁴⁸

⁴⁵ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 5.

⁴⁶ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 6.

⁴⁷ Ian Bournier, witness statement, 3/9/14, para 24.

⁴⁸ Paul McCormack, witness statement, 3/9/14, para 25.

Attacks in July 2012

61. On 26 July 2012 Mr Smith received an email from a Universal Cranes employee called Adam Courtney.⁴⁹ In that email Mr Courtney recounted a few examples of some of the union problems Universal Cranes had experienced on sites.
62. One site referred to by Mr Courtney was at Longland Street, Newstead, where Universal Cranes was performing work for FKP Constructions. Mr Courtney reported that he had received a telephone call from Peter Scott (the crane operator). Mr Scott said that the site foreman Scott Houston had instructed him to 'boom the crane right down' because they were getting asked questions by union representatives about the name on the side of the crane. The email indicated that subsequently, Matt Parker (project manager) had told Mr Courtney that the crane had been off-hired and should be demobilised and taken off site.
63. Another project referred to by Mr Courtney in his email was the Transcity JV project, where a crane was on 'dry hire' to Bauer Foundations. The term 'dry hire' signifies that a crane is being hired out as a piece of machinery alone, and without any operating staff. Bauer employees reported to Mr Courtney that Transcity had instructed that all work stop because the crane belonging to Universal Cranes had to be off-hired. The Bauer employees reported that the rumour was that the unions were making it too hard for Transcity because of Universal Cranes' name being on the machinery.

⁴⁹ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 7.

64. A third example given by Mr Courtney in his email concerned cranes that were on hire to Brady Marine and Civil for the Port Connect project. Mr Courtney reported that Paul Bolger had indicated that the union representative on site on 24 July 2012 had made it quite difficult for Mr Bolger because a crane from Universal Cranes was being used.
65. The problems on site at the Transcity project were also raised by Mr Schalck, the General Manager of Universal Cranes, in an email he sent to Transcity JV on 26 July 2012.⁵⁰ He reported that he had been advised by supervisors working for Transcity and Bauer that Universal Cranes were no longer to be used as the CFMEU had put a ban on the use of Universal Cranes. He recorded that the ban had even resulted in cranes on 'dry hire' being demobilised from project sites. He referred to the last demobilisation being on the Victoria Park Road project, a 'dry hire' job, where Bauer employees had been stopped in the middle of a lift. Mr Schalck had said Universal Cranes had received very clear verbal communication that this was due to the union ban on Universal Cranes.
66. That email of 26 July 2012 was sent by Mr Smith to the Fair Work Building Commission. Through the email Mr Smith also informed Mr Hogan that the CFMEU had banned Universal Cranes from the Transcity site and that the union was also pushing those on the Port Connect project to ban Universal Cranes.

⁵⁰ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 8.

Threats by Mr Close to Mr Smith in July 2012

67. In July 2012 Mr Smith had a conversation with Mr Close, a senior CFMEU organiser. In that conversation Mr Close advised Mr Smith that he understood Mr Smith was ‘nearly on his knees’ and that Mr Close would keep his campaign against Universal Cranes up until it signed an agreement with the CFMEU on Mr Close’s terms. Mr Close admitted that his actions were ‘illegal’, but stated that the CFMEU would continue to do ‘what they need to do’ in order to make Universal Cranes support the union and the BERT Fund.
68. Mr Smith recorded this conversation in an email dated 26 July 2012.⁵¹ He confirmed in his evidence that it accurately recorded what Mr Close had said to him at about this time.⁵²
69. Mr Close denied having spoken to Mr Smith in these terms. Those denials cannot be accepted. During his examination Mr Close demonstrated on a number of occasions that he was not a witness of truth, and was prepared to make wild statements about Mr Smith that could not be justified. He denied matters that were obvious on the documents. He said on his oath that Mr Smith was ‘demented’.⁵³ He repeated that absurd allegation when given the opportunity to retract it.⁵⁴ In a rare moment of candour Mr Close made an admission that was destructive of his credit – he accepted that he was prepared to say anything he liked, regardless of whether or not it was true, at least in

⁵¹ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 9.

⁵² Albert Smith, 4/8/14, T:30.19-21.

⁵³ Peter Close, 4/9/14, T:647.28-30.

⁵⁴ Peter Close, 4/9/14, T:647.32-34, T:648.8-10.

regard to ‘the questions that are put to me and Mr Smith’s statement’.
He accepted this proposition four times.⁵⁵

Attacks in August 2012

70. The contemporaneous email records demonstrate that the position deteriorated further in August 2012.
71. Westfield Design and Construction was carrying out works at the Westfield Carindale site. It had sub-contracted some of those works to a landscaper called Scape Shapes, who intended to use Universal Cranes on the job. However on 1 August 2012 Mr Noumann sent an email to Universal Cranes indicating that Westfield Design and Construction had advised that Scape Shapes was not permitted to use Universal Cranes.⁵⁶ Mr Noumann said that he had asked the Westfield staff why that was so, and the Westfield staff would not give him an answer. Had there been a legitimate reason for the position adopted by Westfield, an explanation would have been forthcoming.

August 2012 meeting with Mr Ravbar and others

72. Against this background, in August 2012 Mr Smith attended a meeting at the Bowen Hills office of the CFMEU with Mr Ravbar, Mr Ingham, Mr Sutherland and Mr Close.⁵⁷

⁵⁵ Peter Close, 4/9/14, T:648.12-31.

⁵⁶ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 12.

⁵⁷ Albert Smith, witness statement, 4/8/14, para 69.

73. At that meeting Mr Ravbar said he wanted Universal Cranes to sign up to the CFMEU pattern agreement. Mr Ravbar asserted that Mr Smith had been ‘playing games’ for long enough, and it was time for him to stop. Mr Ravbar also stated that the CFMEU would make it very hard for Universal Cranes to operate if it did not come across to the CFMEU pattern agreement.⁵⁸

Mr Smith bows to union pressure

74. In the face of the large number of reports – all to the effect that officers of the CFMEU had pressured Universal Cranes’ customers into removing Universal Cranes from worksites – and having heard Mr Close’s and Mr Ravbar’s threats to keep the CFMEU campaign against Universal Cranes up until the company signed a CFMEU form of EBA, Mr Smith bowed to the pressure and agreed to accept the principal clauses the CFMEU had been insisting on – in particular the BERT clause.
75. To this end, Mr Smith sent Mr Close an email on 14 August 2012.⁵⁹
76. In that email Mr Smith referred to ‘our recent conversations regarding the CFMEU boycott of Universal Cranes’. Mr Smith complained that that action was having significant effect on the Universal Cranes business and would result in the company being forced to terminate employees in the near future. Mr Smith confirmed that ‘you have previously indicated that you would lift the ban on us if we force our employees to join the BERT Fund and the BEWT Fund.’

⁵⁸ Albert Smith, witness statement, 4/8/14, paras 69-72.

⁵⁹ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 13.

77. In this and various subsequent emails Mr Smith used the expression 'ban'. That was an appropriate and convenient short-hand description of how the CFMEU was treating (and threatening to treat) Universal Cranes. As Mr Smith stated in his evidence, the CFMEU officials with whom he dealt took care to avoid using this precise language in the discussions they had, and probably did not use the word 'ban'.⁶⁰
78. The threat was, in substance in the nature of a 'ban', even though this word might not have been stated. If they were not using the word, they were doing the thing. That is very clear from the way in which the CFMEU had conducted itself and continued to conduct itself on sites where Universal Cranes was to be found. It is also clear from the actual language that Mr Ravbar was recorded as using through this period, which as later described, includes phraseology such as 'kicking' companies off sites and 'killing' companies, and statements that the CFMEU 'had its ways' and that Mr Smith would 'feel the effects of the applied pressure'.⁶¹
79. Mr Smith indicated that he was prepared to put to the vote of his employees an amended form of EBA providing for payments to BERT and BEWT. He added that employees were well aware of the fact that Universal Cranes would be forced to reduce its workforce significantly if the union would not lift its 'ban' and that, as such, he was confident that the employees would support the amended agreement.

⁶⁰ Albert Smith, 4/8/2014, T:50.31-51.6.

⁶¹ See Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tabs 34, 51; Albert Smith, 4/8/14, T:33.26-35.47.

80. He asked Mr Close to advise whether ‘the CFMEU will lift its *ban* on Universal Cranes if we proceed with this modified agreement’.⁶² He also indicated that if there were any further changes the CFMEU required to get the issue resolved, Mr Close should advise him so that Universal Cranes could consider the matter further.

Mr Close’s rejection of the proposal

81. Mr Close responded to Mr Smith’s request that the CFMEU lift its ban if Universal Cranes proceeded with the proposed modified agreement by saying that the union ‘will also want you to fix the membership if we are to move forward. After all you killed the membership off’.⁶³
82. The substance of Mr Close’s response, then, was not to deny the ban referred to in Mr Smith’s email. It was to indicate that the ban would continue unless Universal Cranes not only signed a form of EBA acceptable to the union, but also ‘fixed the membership’. Mr Close was adding to the list of demands that would have to be satisfied before the ban could be lifted.
83. Mr Smith’s response to Mr Close’s aggressive riposte was to suggest a side deal where he would guarantee either a number of members or a percentage of employees to have membership. He asked what percentage or number the CFMEU would accept.⁶⁴

⁶² Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 13 (emphasis added).

⁶³ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 13.

⁶⁴ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 14.

84. Mr Close sent an email back stating that Mr Ravbar and he needed to meet with Mr Smith to discuss and that he 'would want all workers as members like I used to have under the previous Universal regime'.⁶⁵
85. Mr Smith answered saying that he could not get all employees to join and suggested that a fair target be set. Mr Close's response was '90% I reckon that's fair for me'. Mr Smith replied saying that he thought that 50% would be doable. Mr Close then stated again that they would need to meet with Mr Ravbar. He asked how many workers would become CFMEU members if 50% of the Universal Cranes' workforce joined the union.⁶⁶
86. Mr Ravbar was aware of the interchanges. Through his email of 14 August 2012, Mr Smith was asking Mr Close to end the CFMEU campaign against Universal Cranes. Mr Ravbar admitted that Mr Close would come to him to get approval to end any 'campaign' against the company, and any decision in that matter would come 'via' him.⁶⁷
87. It is probable that Mr Ravbar was made aware of Mr Smith's request of Mr Close, and approved Mr Close's response. Mr Ravbar admitted that it looked as though that had occurred.⁶⁸
88. On 20 August 2012 Mr Smith wrote to Mr Close in relation to a potential meeting between the two and Mr Ravbar. Mr Smith again

⁶⁵ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 14.

⁶⁶ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 14.

⁶⁷ Michael Ravbar, 7/8/14, T:395.21-35.

⁶⁸ Michael Ravbar, 7/8/14, T:402.4.

asked Mr Close to advise prior to the anticipated discussion ‘what else you require from Universal Cranes above my proposed agreement changes to get the *ban* on us lifted’.⁶⁹ Mr Close did not write back denying there was any ban.

89. Later the same day Mr Smith sent a further email to Mr Close in relation to making arrangements for a further discussion.⁷⁰ Yet again he noted that ‘our objective is to get you to lift the current CFMEU *ban* on Universal Cranes, but to retain as much as possible of our current agreement. Once we know exactly what you require we will either modify the agreement to meet your needs, and put it to the vote with our employees, or we will choose to accept the consequences of your ban on Universal Cranes and not seek work on the sites that you control’. Again, there was no response from Mr Close to suggest the position was anything other than as Mr Smith had described.

90. The discussion planned between Mr Close and Mr Smith proceeded by telephone on 20 August 2012. After that call Mr Smith sent Mr Close an email to confirm various matters.⁷¹ As the email describes, during the call Mr Close indicated that the union was only interested in considering its own pattern agreement with some possible minor adjustments, and that the draft modified agreement that Universal Cranes had prepared (and which made provision for BERT and BEWT) would not be good enough. Mr Smith stated in his email that ‘in the interests of getting the *ban* lifted on Universal Cranes and our sister companies’ he had asked for a copy of the CFMEU pattern

⁶⁹ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 15 (emphasis added).

⁷⁰ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 16 (emphasis added).

⁷¹ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 17.

agreement to be prepared and marked up showing changes that Universal Cranes had proposed. He added 'please also advise if we can get an interim lift of the Universal Cranes and Gold Coast Cranes *ban* while we try to resolve this issue. It is causing significant financial issues for our company and our employees and soon have negative effects on us all here at Universal Cranes if you cannot give us a break'.⁷²

91. Mr Close did not write back denying the existence of the CFMEU ban. He did not write back denying or challenging Mr Smith's recount of what the CFMEU had insisted upon.
92. On 21 August 2012 Mr Smith wrote to Bechtel indicating that he wished to speak to them about industrial relations policies before deciding on a strategy to deal with the dispute he was having with the CFMEU.⁷³ He stated that Universal Cranes was currently the target of a CFMEU ban on many sites in the greater Brisbane area and the company was deciding whether to stand up to the union and suffer the resulting loss or whether it should simply bow to the union's demands.
93. On 24 August 2012 Mr Smith wrote again to Mr Hogan of the FWBC 'in relation to the CFMEU boycott on Universal Cranes'.⁷⁴ He said it was extremely unlikely that Universal Cranes would accept the union demands and that he would call on the FWBC when the company got to the wire.

⁷² Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 17 (emphasis added).

⁷³ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 21.

⁷⁴ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 19.

Request and further threat in September 2012

94. The next correspondence of significance took place on 31 August 2012.⁷⁵ On that date Mr Schalck of Universal Cranes wrote to Mr Jade Ingham of the CFMEU. In that email Mr Schalck said that ‘We are still very keen in doing a deal so that we can have this *ban* lifted’. He set out various proposed terms for an EBA with the union. Again, the proposed terms included Universal Cranes making payments to BERT, the establishment of policies and procedures to encourage employees to become union members and the direct payment of union membership fees. Mr Schalck added ‘we simply cannot agree to the 100% employee membership with the CFMEU’. The email concluded ‘please confirm that you will lift the *ban* on Universal Cranes if we continue on the Universal Cranes agreement with the change to participate in the BERT fund and the union right of entry as per above.’⁷⁶
95. Mr Ingham did not write back to Mr Schalck denying the existence of a union ban on Universal Cranes. He would have done so if the position was not as Mr Schalck had described.
96. Mr Schalck’s email found its way to Mr Close who, on 3 September 2012, stated ‘Unless we have our 2 hour clause untouched NO DEAL. Balls in your court. I was in Sydney on the weekend and had a look to see if your cranes were at Bangaroo????’ (sic).⁷⁷

⁷⁵ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 20.

⁷⁶ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 20.

⁷⁷ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 20.

97. This email is revealing. First, the deal that Mr Schalck had proposed - namely a lift of the union's ban if Universal Cranes agreed to a modified form of an EBA - was rejected. To use Mr Close's language, there was 'no deal'. Mr Close did not suggest in any way in his response that there was no ban. To the contrary, the tenor and language of his email provides positive confirmation that a ban was in place. Mr Close was threatening to advance the scope of the ban to include Universal Cranes at the Barangaroo site. This is how Mr Smith took the comment.⁷⁸ He was right to do so.
98. When giving evidence Mr Close tried to pretend that his reference to Barangaroo was 'of a passing nature only, that is general chit chat'.⁷⁹ Even before his repeated admissions that he was prepared to say whatever he liked, whether or not it was true, this statement was not believable. His explanation does not account for the four question marks that he placed at the end of his email. Those question marks are not in the nature of general chit chat. They signal a threat as to the future of Universal Cranes on the site. Further, none of Mr Close's emails contain 'chit chat' - they are extremely short and punchy.

Further attacks in October 2012

99. For so long as Universal Cranes withstood the demands of the CFMEU, its woes continued.
100. On 16 October 2012 a CFMEU organizer rang Mr Jason Zoller, of BMD Constructions (one of the joint venturers on the Port Connect

⁷⁸ Albert Smith, witness statement, 4/8/14, para 80.

⁷⁹ Peter Close, witness statement, 4/9/14, para 65.

project). He said that he had an issue with Universal Cranes and he was going to stop the cranes from working on site.⁸⁰

101. Shortly after that call, employees of Universal Cranes drove a crane from the company's depot to the Port Connect site. After they arrived at the site and were about to start work, they were approached by two officers of the CFMEU who had followed them in a car. They parked their car so as to block the gate and cause a safety issue.⁸¹

102. Mr Zoller went to the gate to investigate. On his arrival he saw two CFMEU officials. The CFMEU was holding up work and preventing the crane from working. One official replied that that was his intention. Another union official said that they had followed the crane from the yard, and that similar action was intended to be taken on a number of other sites. Mr Zoller said that the CFMEU officials had no right to be there. He asked them to leave. They did not leave. It was clear to Mr Zoller that they intended to remain for as long as the Universal Cranes equipment was there.⁸²

103. The action of these officials was causing congestion on the site. This raised safety issues. As a result Mr Zoller was forced to tell the Universal Cranes employees to head back to the depot. Mr Zoller did not want to take this action, but he needed to clear the area so that other works could continue.⁸³ The CFMEU submitted that: 'It was Mr Zoller who asked Universal Cranes to leave the site. He clearly had an

⁸⁰ Jason Zoller, witness statement, 3/9/14, para 11.

⁸¹ Jason Zoller, witness statement, 3/9/14, para 12.

⁸² Jason Zoller, witness statement, 3/9/14, paras 13-18.

⁸³ Jason Zoller, witness statement, 3/9/14, para 20.

interest in blaming the CFMEU for his decision.’⁸⁴ This is a total distortion of the evidence. Further, Mr Zoller was available to be cross-examined by counsel for the CFMEU, but was not requested to attend.

104. These events were subsequently recorded in a right of entry report dated 17 October 2012.⁸⁵
105. On 17 October 2012, Mr Schalck and other Universal Cranes employees met with staff on the Port Connect project. They were informed that an Andrew Sutherland and another CFMEU organiser had threatened to come back to the site and stop work again unless Universal Cranes were removed for good.
106. Mr Schalck recorded these events at the time in a written statement which he signed.⁸⁶
107. In that statement Mr Schalck noted that, as a result of the union pressure, Port Connect had ‘off-hired’ the Universal Cranes on 19 October 2012 and that Port Connect had informed Mr Schalck that it would not engage Universal Cranes on day shifts but would continue to take the services of Universal Cranes on night shifts because it did not believe the CFMEU would be ‘out’ on the night shifts.
108. On 27 October 2012 Mr Smith sent an email to Mr Schalck and Mr Jones (of Bechtel).⁸⁷ Mr Smith reported that Leightons (a contractor

⁸⁴ CFMEU, written submissions, 14/11/14, Pt 8.7, para 54.

⁸⁵ Jason Zoller, witness statement, 3/9/14, para 27 and Annexure B.

⁸⁶ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 22.

on a project) had been visited on site by the CFMEU, who had threatened to shut down the project if Universal Cranes' machinery or people were still on site on 29 October 2012.

109. Mr Smith recorded in his email that the threat in relation to the Curtis Island project was the last straw for Universal Cranes, who could no longer continue to stand up against the union action. Therefore the union pattern EBA for crane drivers and riggers would be signed. He also recorded that Mr Close had advised him that, in the circumstances, there would be no action against Universal Cranes or its clients that week.

Rejected offer to sign CFMEU pattern agreement

110. On October 2012 Mr Schalck sent an email to Mr Close and Mr Ingham stating that he had 'really noticed the pressure that you guys have applied to our clients lately; especially Legacy Way, Port Connect, Barangaroo and lately Curtis Island'.⁸⁸ He said that the company had been evaluating its options and had 'concluded that we have no other option than to sign the CFMEU pattern agreement'.
111. The CFMEU did not accept that position. Instead, Mr Close told Mr Schalck that unless all associated entities of Universal Cranes, including Smithbridge, signed the CFMEU pattern agreement, there would be 'no deal'. In addition, the union demanded 100% employee membership from all branches and associated entities. Mr Schalck

⁸⁷ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 25.

⁸⁸ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 24.

confirmed these matters in an email of the same day to Mr Hogan and Mr Smith.⁸⁹

112. The decision Mr Smith had made to buckle to the union pressure and have Universal Cranes agree to sign a CFMEU pattern agreement was made under very considerable economic duress. The CFMEU attack on the company had caused substantial loss for the company and the workers. Universal Cranes' equipment was sitting in the yard because the company could not get onto sites. The company's workers were 'scratching to get 40 hours a week work' with a consequence that the company was having to start putting workers off.⁹⁰ Mr Smith's view was that he had no alternative but to sign the agreement.⁹¹

113. The union's demand for an increase in membership amongst Universal Cranes employees also placed great pressure on the workers. As Mr Smith indicated, his workers were used to doing 50 to 55 hours per week and getting paid overtime but, as a result of the union boycott activity, the same workers were struggling to get 40 hours work a week. In this environment, the workers were prepared to do anything to keep their jobs and to get their work hours back up, including becoming union members. Mr Smith was appreciative of this fact and, in a memorandum he issued to his employees, he passed on his thanks and indicated that he would increase their pay by \$1 per hour to cover

⁸⁹ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 24.

⁹⁰ Albert Smith, 4/8/14, T:31.43-47.

⁹¹ Albert Smith, 4/8/14, T:32.20-22.

the cost of the CFMEU membership fees that they would have to pay.⁹²

114. The conduct of the CFMEU in the course of its dealings with Mr Smith does not make pleasant reading. It cannot be regarded as the 'legitimate use of industrial muscle'. It cannot be regarded as bona fide negotiation – for every move by Mr Smith towards consensus was met by the introduction of an entirely fresh demand. It cannot be regarded as justified in the interests of employees – for many of the benefits generated by BERT do not flow to the employees whose employer provides BERT with its funding. It would be kind to call the CFMEU's conduct paltering. It was nothing but a brutal and ruthless drive for complete capitulation.

Threats in July 2013

115. In that fashion Universal Cranes eventually capitulated to the 2012 CFMEU campaign against it and ultimately agreed to sign the CFMEU form of EBA. But the other crane hire companies in the Smithbridge Group were reluctant to do so. For example, Gordon Willocks, a shareholder and Managing Director of Universal Cranes Townsville, was not prepared to sign the CFMEU form of EBA. As Mr Smith recorded in his email of 31 October 2012, Universal Cranes Townsville could not afford to enter into the Agreement because market prices in Townsville were significantly lower than both the CFMEU rates and the Universal Cranes rates.⁹³ The Rockhampton branch of Universal Cranes was in a similar position, as recorded in an email of 25

⁹² Albert Smith, 4/8/14, T:32.31-47.

⁹³ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 28.

November 2012 from the Rockhampton Manager Mick Smith to Mr Schalck and Mr Smith.⁹⁴

116. This reluctance on the part of entities in the group other than Universal Cranes to sign a union form of EBA resulted in further pressure being applied by the CFMEU. So the 2012 campaign of the CFMEU against Universal Cranes was succeeded by a 2013 campaign of the CFMEU against entities in the group other than Universal Cranes.
117. In May 2013 Mr Ravbar of the CFMEU advised Mr Smith that the union would continue to apply boycotts to all Universal Cranes operations unless it arranged for all the branches and subsidiaries to become parties to a union agreement.
118. Mr Smith recorded this fact in a letter of 8 July 2013 to Mr Ravbar.⁹⁵ In that letter Mr Smith asked for a written assurance from Mr Ravbar that the CFMEU would cease all boycotts and other interference in the business. Mr Smith added 'Michael I appeal to you to work with us... we have loyal employees who have great respect for our business and for your organization and we plan to be long term participants in the crane industry in Queensland'.
119. Mr Ravbar gave no such written assurance. Indeed he did not supply any written response at all. Mr Ravbar did not write back denying the existence of the ban and boycott that Mr Smith described in his letter. Yes he surely would have done had the position not been as Mr Smith described.

⁹⁴ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 31.

⁹⁵ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 33.

120. Mr Smith then met with Mr Ravbar on 8 July 2013 at the union's office in Bowen Hills. Mr Smith prepared a written record of what was said at this meeting within an hour of its conclusion.⁹⁶ The fact he did so is established by his oral evidence.⁹⁷ It is also established by an email of 8 July 2013 which attaches a copy of his notes.⁹⁸
121. The notes of the meeting taken by Mr Smith record that Mr Ravbar said that if Universal Cranes Townsville did not enter into a union form of enterprise agreement, the union would 'kick' the company off the Darwin and Townsville sites and would 'kill' them in Darwin.
122. Further, the note recorded that two union organisers, Michael Robinson and Andrew Sutherland, were planning to have a discussion the following morning in order to confirm the plan to ban the company in Townsville by making sure the company was kicked off any jobs in the area. Mr Ravbar said that Universal Cranes Townsville needed to sign up 'now'.
123. Mr Smith further confirmed these matters were raised at the meeting in an email of 8 July 2013 to an industrial relations adviser and other staff members.⁹⁹ He recorded that Mr Ravbar's position was that unless Universal Cranes Townsville signed up to the CFMEU Agreement the union would recommence bans, including in Darwin and Townsville.

⁹⁶ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 34.

⁹⁷ Albert Smith, 4/8/14, T:33.26-38.47.

⁹⁸ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 34.

⁹⁹ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 34.

124. Mr Ravbar denied that he had said the matters that were recorded in Mr Smith's notes and emails of the day. Mr Ravbar's evidence is rejected for the following reasons.

- (a) Mr Ravbar's recollection of the meeting was poor. He thought the meeting had taken place at Murarrie. In fact, it had taken place at the head office of the union at Bowen Hills.¹⁰⁰
- (b) There is no reason to conclude that Mr Smith's contemporaneous record of the conversation, and his email shortly after the conversation, do not constitute an accurate record of what was said. There is no basis for thinking that the notes he made on the day were mistaken or fabricated. There is no basis for thinking that Mr Smith had taken it upon himself to write out a note of the meeting which bore no resemblance to what had actually transpired
- (c) There are significant portions of the file note taken by Mr Smith which are not disputed by Mr Ravbar. They must be accepted as accurately recording those parts of the meeting. That being so, the suggestion that Mr Smith somehow misunderstood what happened or fabricated the content of other parts of the notes becomes all the more difficult to accept.
- (d) The language used at the meeting and recorded in Mr Smith's file note is consistent with the language that had been used in

¹⁰⁰ Michael Ravbar, 7/8/14, T:421.9-22.

various other complaints made through the relevant period by Mr Smith and others from Universal Cranes. It had been an ongoing source of complaint. Not one of those written complaints and allegations was ever denied by Mr Ravbar, Mr Close, Mr Ingham and others in any written answer given to those complaints. Indeed, in many cases, the written responses implicitly accepted that the position that had been outlined by Mr Smith and others in their emails was accurate.

- (e) Mr Ravbar did not have any notes of the meeting.¹⁰¹ He acknowledged understanding the importance of keeping a written record of events.¹⁰² The fact he did not keep a written record on this occasion is consistent with the fact that the matters he was discussing were ones that he did not wish to be recorded because a written record would be harmful to him and the CFMEU.
- (f) For reasons set out later, Mr Ravbar was not a witness of credit. His evidence cannot be preferred to that of Mr Smith.

125. On Mr Smith's evidence, the CFMEU's subsequent attempts to impose bans on Universal Cranes Townsville have been largely unsuccessful due to the fact that Townsville is a small market and not many projects are CFMEU based.¹⁰³

¹⁰¹ Michael Ravbar, 7/8/14, T:421.42-47.

¹⁰² Michael Ravbar, 7/8/14, T:418.47-419.2.

¹⁰³ Albert Smith, witness statement, 4/8/14, para 128.

Attacks concerning Smithbridge

126. More recently, there have been communications between the CFMEU and Mr Smith in relation to the Smithbridge arm of Mr Smith's enterprise.
127. Smithbridge was awarded work by Hutchinson Builders on their project at the Gladstone Harbour boardwalk. The contract between the two was negotiated in about August 2013 and Smithbridge began work on the project in the following month. Mr Smith's unchallenged evidence was that from October 2013 through to December 2013, and for two weeks in January 2014, Smithbridge worked on the project without any significant issues (other than the pressure that was being applied on site by CFMEU organisers for employees to become members of the union).¹⁰⁴
128. In late 2013 Mr Moses, a CFMEU organiser based in Gladstone, had a conversation with Mr Swift, Hutchinson's Site Manager for the project. Mr Moses referred to the fact that the CFMEU was in discussions with Smithbridge in relation to an EBA, but those discussions were not going the way the CFMEU wanted. He told Mr Swift that if things did not work out there 'might be a storm coming'.¹⁰⁵
129. On 7 January 2014 Mr Smith received a text message from Mr Schalck informing him that Mr Ravbar had told Mr Close that he was going to

¹⁰⁴ Albert Smith, witness statement, 4/8/14, para 157.

¹⁰⁵ Robert Swift, witness statement, 3/9/14, para 5.

start banning Universal Cranes again because Smithbridge did not have a concluded enterprise agreement with the CFMEU.¹⁰⁶

130. This led Mr Smith to send an email to Mr Ravbar on 7 January 2014. He stated that he understood that ‘the CFMEU have advised somebody that you intend to re instate (sic) the bans on Universal Cranes working on CFMEU controlled job sites because we have not signed up an agreement with the CFMEU for Smithbridge’.¹⁰⁷
131. Mr Ravbar did not respond to this email denying his intention to reinstate bans on Universal Cranes. He would have done if Mr Smith’s email did not reflect the truth.
132. Later in February 2014 Mr Smith received a telephone call from Mr Schalck. Mr Schalck informed him that Mr Sutherland of the CFMEU had visited Universal Cranes and advised that secondary boycotts of Universal Cranes would recommence if Smithbridge did not sign the CFMEU’s form of EBA.¹⁰⁸ Mr Sutherland told Mr Schalck that Mr Smith’s failure to agree to an EBA for Smithbridge on the terms the CFMEU wanted was ‘jeopardising Universal Cranes relationship with the union’.¹⁰⁹
133. Although Mr Sutherland did himself no credit by refusing to admit this,¹¹⁰ he was intimating through these words that unless Smithbridge

¹⁰⁶ Albert Smith, witness statement, 4/8/14, para 158.

¹⁰⁷ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 50.

¹⁰⁸ Albert Smith, witness statement, 4/8/14, para 162.

¹⁰⁹ Andrew Sutherland, 4/9/14, T:691.33-692.12.

¹¹⁰ Andrew Sutherland, 4/9/14, T:694.10-33.

signed the EBA there would be trouble for Universal Cranes. There is no other sensible explanation. Mr Schalck was the general manager of Universal Cranes. Mr Sutherland got on well with him. There was no reason why that would change.¹¹¹ Smithbridge was an entirely different company. Whatever Mr Smith did at Smithbridge could have no logical impact on the relationship between the CFMEU and Universal Cranes. The question as to how the CFMEU related to Universal Cranes was a matter for the CFMEU, not Smithbridge.

134. On 27 February 2014 Mr Loakes, another CFMEU organiser, and Mr Churchman, a CFMEU delegate, came on to the Gladstone site to ‘shut down’ Smithbridge. This involved demanding that the Smithbridge employees stop working.¹¹² This led to the Smithbridge employees and Mr Loakes and Mr Churchman discussing the matter with Mr Swift, Hutchinson’s Site Manager for the project. The venue was Mr Swift’s office.
135. In that discussion Mr Loakes said that he had spoken to the Smithbridge employees about not getting the entitlements that workers got under the Hutchinson EBA. The Smithbridge employees responded saying that they were happy with what they were being paid and wanted to get back to work. Mr Loakes told them that they would not be going back to work and might as well go home.¹¹³

¹¹¹ Andrew Sutherland, 4/9/14, T:693.3-5, T:693.38-47.

¹¹² Robert Swift, witness statement, 3/9/14, paras 8-12; Brent Dowton, witness statement, 3/9/14, paras 7-10; Leanne McLean, witness statement, 3/9/14, paras 9-14; Nicolas Navarrete, witness statement, 3/9/14, paras 76, 77 and 79.

¹¹³ Robert Swift, witness statement, 3/9/14, para 8.

136. The Smithbridge employees then repeated that they were happy with the entitlements they were receiving and wanted to get back to work. Mr Loakes said that this would not happen and they might as well buy their tickets back to Brisbane.¹¹⁴
137. One of the Smithbridge employees asked Mr Swift for a formal direction to leave the site. Mr Swift refused, for the simple reason that he did not want them to go. He said it was not his decision to stop them from working; it was the union's decision. Mr Swift did not want to stand in the way of the CFMEU. He expected that if he put his foot down he would get aggravation from the CFMEU and Hutchinson's relationship with the union would have soured, resulting in trouble and delays on the Gladstone site and potentially other Hutchinson sites.¹¹⁵
138. Mr Loakes gave curious evidence on this matter. According to him, he merely 'requested' the Smithbridge employees to 'stop work pending the resolution of the dispute concerning non-compliance', that the workers said they wanted to keep working and finish the job, but then decided of their own volition to do as Mr Loakes had 'requested'.¹¹⁶ He was inviting belief in the proposition that, after he made a request to workers who (i) were happy with their conditions, (ii) had nearly finished their job and (iii) wanted to keep working, the workers decided to do as requested and stop working rather than carry on with their duties to their employer and Hutchinson. This proposition is not believable. Mr Loakes told them they had to stop and leave the site. Mr Swift's evidence was accurate.

¹¹⁴ Robert Swift, witness statement, 3/9/14, para 9.

¹¹⁵ Robert Swift, witness statement, 3/9/14, paras 10-11.

¹¹⁶ Ben Loakes, witness statement, 22/9/14, paras 4 - 7.

139. On 28 February 2014 Mr Smith sent Mr Ravbar an email complaining about the union's conduct towards Smithbridge and Universal Cranes at the Gladstone Boardwalk site.¹¹⁷ In that email he reminded Mr Ravbar that all of the Smithbridge and Universal Cranes employees on site were members of the CFMEU. He also said that all of the Universal Cranes employees onsite had been employed under the terms of the CFMEU's form of EBA. As such they were paid up members of BERT, BEWT and CIPQ.
140. The email indicates that Mr Smith and Mr Ravbar had discussed the matter over the telephone that morning. During the discussions Mr Ravbar had:
- (a) demanded that the non-union EBA between Smithbridge and its employees be terminated and replaced with the CFMEU form of agreement;
 - (b) indicated that the CFMEU may commence a campaign of bans against Smithbridge and Universal Cranes similar to those applied in 2012; and
 - (c) said that he 'had his ways' and that while the union would not be 'openly' banning Smithbridge or Universal Cranes, those companies would feel the effects of the union's 'applied pressure'.
141. Mr Ravbar did not write back denying any of the matters that Mr Smith had outlined in his email. He did not deny what the CFMEU was

¹¹⁷ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 51.

reported to have done on the Gladstone site. He did not deny having said any of the things outlined in Mr Smith's email. He did not deny that the CFMEU had imposed bans. He did not deny that he had threatened to continue those bans unless Smithbridge signed the EBA.

142. Further, Mr Smith was not cross-examined about his version of the conversation as set out in his email of 28 February 2014. Mr Ravbar's statement of evidence did not deny these contemporaneously recorded events. That was so even though Mr Ravbar had satisfied himself that he had been able to address everything that Mr Smith had raised in his statement.¹¹⁸

143. On 1 March 2014 there was a further email from Mr Smith to Mr Robinson and Mr Moses of the CFMEU.¹¹⁹ Mr Smith made the same series of complaints. He added that he had recently spoken with Mr Moses who had indicated that there would be no union approval for either Smithbridge or Universal Cranes to do any work on the Gladstone site until he received instructions otherwise from 'higher up in the union organisation'. Neither Mr Moses nor Mr Robinson responded to that email denying any of the matters raised in it.

144. A couple of days later, on 3 March 2014, Mr Smith sent Mr Ravbar and Mr Robinson an email. That email recounted the difficulties that were being experienced on the Gladstone site.¹²⁰ Mr Smith said Mr Easterbrook of Hutchinson had indicated that neither Smithbridge nor

¹¹⁸ Michael Ravbar, 6/8/14, T:309.11-13.

¹¹⁹ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 52.

¹²⁰ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 54.

Universal Cranes would be allowed back on site until the CFMEU directly advised Hutchinson of its approval.

145. Mr Smith also recorded the fact that he had spoken to Mr Robinson, who had told him that neither Universal Cranes nor Smithbridge employees would be allowed back on the project until Mr Smith had agreed to sign an EBA with the CFMEU which covered the whole of the Smithbridge business over all of Australia. Mr Smith added 'please advise me as soon as possible if I have misunderstood the situation'.¹²¹
146. Mr Ravbar gave no such advice in response. He did not write back denying any matters raised in Mr Smith's email.
147. Mr Robinson gave evidence in which he vehemently denied having spoken with Mr Smith on 3 March 2014.¹²² He alleged that Mr Smith had not just given false evidence about the conversation, but had gone so far as to make up the conversation in his email of 3 March 2014. He alleged that even though Mr Smith actually copied Mr Robinson into the email, and specifically asked for advice in that very email as to whether he had misunderstood the position. Mr Robinson said, on the basis of these assertions, that Mr Smith was not an 'honourable person'.¹²³

¹²¹ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 54.

¹²² Michael Robinson, 4/9/2014, T:602.4-7; 605.18-20.

¹²³ Michael Robinson, witness statement, 4/9/14, para 11; Michael Robinson, 4/9/14, T:605.28-32.

148. Since Mr Robinson brought up the subject of dishonourable persons, it must be questioned whether it was Mr Robinson rather than Mr Smith who fits that description. Mr Smith's telephone records reveal that he did have a telephone conversation with Mr Robinson on 3 March 2014.¹²⁴ Mr Robinson dissembled and suggested this may have been a voice mail message. That, of course, was inconsistent with the evidence he had previously given that Mr Smith had not rung him.¹²⁵ Other phone records revealed that, despite Mr Robinson's assertions that he had nothing to tell Mr Smith and was too busy with domestic duties on 1 or 2 March 2014 to speak to Mr Smith,¹²⁶ he had a conversation with Mr Ravbar on 1 March 2014 which ran for more than 7 minutes.¹²⁷ Mr Robinson was quite unreliable on these issues.
149. The ban on the Gladstone project continued. On 8 March 2014 Mr Smith sent a further email to Mr Ravbar and Mr Robinson.¹²⁸ He recorded the fact that Mr Sutherland had told Mr Schalck that he had been instructed to recommence the previous campaign against the Universal Cranes business in order to pressure Mr Smith into signing an agreement with the CFMEU for the Smithbridge business. Mr Smith observed that this was consistent with Mr Ravbar's earlier oral advice that action would begin soon if Mr Smith did not agree to his demands regarding a CFMEU agreement for the Smithbridge employees. Mr Smith pleaded with Mr Ravbar not to proceed with the proposed bans

¹²⁴ Robinson MFI-2, 4/9/14, p 1.

¹²⁵ Michael Robinson, 4/9/2014, T:602.4-10; 605.18-20; Michael Robinson, witness statement, 4/9/14, para 11.

¹²⁶ Michael Robinson, witness statement, 4/9/14, para 9.

¹²⁷ Robinson MFI-3, 4/9/14, p 1.

¹²⁸ Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 56.

on Universal Cranes in support of his dispute with Smithbridge as it would unnecessarily hurt Universal Cranes employees, most of whom were CFMEU members.

150. Again, Mr Ravbar did not respond to that email denying any of the matters raised. Counsel assisting submitted that he said he deliberately chose not to read it. The evidence referred to¹²⁹ said: ‘I had long since stopped reading Mr Smith’s emails or responding to them.’ This is not an efficient way of dealing with employers. In those circumstances failure to deny a proposition can often, as here, be taken as acceptance of it.
151. Fortuitously for Smithbridge and its contracting party, it was able to complete its sub-contract work on 8 March 2014 by undertaking the work at a time unknown to the CFMEU.¹³⁰
152. Most recently, John Hanna, the Managing Director of Universal Cranes Sunshine Coast, has indicated to Mr Smith that the company has been taken off a Mirvac project and replaced by another crane company as a result of pressure being applied to Mirvac from the CFMEU because of the union’s dispute with Universal Cranes.¹³¹

¹²⁹ Michael Ravbar, witness statement, 6/8/14, para 79.

¹³⁰ Robert Swift, witness statement, 3/9/14, para 14; Albert Smith, witness statement, 4/8/14, para 181.

¹³¹ Albert Smith, witness statement, 4/8/14, para 184; Annexure AS-1 Tab 58; John Hanna, witness statement, 3/9/14, para 16.

Dealing with the credit of Mr Ravbar and his denials

153. Mr Ravbar gave evidence that the CFMEU never applied pressure to have Universal Cranes removed from sites. He testified that there was never a ban imposed by the CFMEU on Universal Cranes.¹³²
154. Mr Ravbar's evidence was expressed in these absolute terms.
155. It became clear at an early point in Mr Ravbar's examination that he did not know whether those statements were true. As a result, the fact that Mr Ravbar was prepared to give (and maintain) evidence of this kind reflects poorly on his credit.
156. Although willing to state in absolute terms that the CFMEU had never banned Universal Cranes or applied pressure to have Universal Cranes removed from work sites, he admitted that, in the case of the very first matter the subject of complaint, namely the removal of Gold Coast Cranes from the Indooroopilly site, he was not aware that Gold Coast Cranes had been on the site.¹³³ He also had to concede that he had '*no knowledge*' about what had happened to Gold Coast Cranes on that site.¹³⁴
157. He ultimately accepted that, on the question of whether the union had put pressure on Bastemeyers to remove Gold Coast Cranes from the site, he could not 'say yes or no'.¹³⁵ That evidence was fundamentally

¹³² Michael Ravbar, 6/8/14, T:366.2-368.46.

¹³³ Michael Ravbar, 6/8/14, T:370.33-47.

¹³⁴ Michael Ravbar, 6/8/14, T:372.4-374.43 (emphasis added).

¹³⁵ Michael Ravbar, 7/8/14, T:381.40-44.

different from the sworn positive evidence he had previously given to the effect that there had never been pressure applied.

158. Indeed, Mr Ravbar's evidence on this topic deteriorated further. Having admitted that he was not in a position to say one way or another whether a union representative had applied pressure to Bastemeyers to remove Gold Coast Cranes from the Indooroopilly site, Mr Ravbar then returned to saying that '*based on my knowledge*' the statement that Gold Coast Cranes had been kicked off the site was 'false'.¹³⁶ However he was then immediately forced to concede, again, that he had 'no knowledge' of the facts.¹³⁷
159. The examination then proceeded to the next project about which a complaint had been made in the contemporaneous correspondence, being the FKP Project at Longland Street, Newstead. Again, although being prepared to swear in absolute terms there had been no ban imposed by the CFMEU on Universal Cranes, it emerged that Mr Ravbar did not know whether or not there had been any ban at this site.¹³⁸
160. The next project about which complaint had been made in 2012 was one involving Bauer and Transcity at the Legacy Way Tunnel project. Contrary to his initial evidence, Mr Ravbar had to concede that he did

¹³⁶ Michael Ravbar, 7/8/14, T:382.30-34.

¹³⁷ Michael Ravbar, 7/8/14, T:382.36-45.

¹³⁸ Michael Ravbar, 7/8/14, T:385.43-386.20.

not know whether representatives of the unions had applied pressure on that site.¹³⁹

161. The position was the same in relation to work that was being conducted by Universal Cranes for Brady Marine & Civil at the Port Connect project. The complaint made at the time of the incident was that a union representative had made it difficult for Brady Marine & Civil due to the fact that the cranes on hire were from Universal Cranes. Mr Ravbar claimed he did not even know who the union representative at the Port Connect site was.¹⁴⁰ If that questionable evidence was correct, it would follow that it was not possible for him to deny (as he did) that the union had applied pressure to Universal Cranes' contractor on that site.
162. The next project that had been the subject of complaint at the time was the Westfield site at Carindale, where Universal Cranes' customer was a company called Scape Shapes. Again, Mr Ravbar had 'no knowledge' of anything associated with Scape Shapes at the Westfield Carindale site.¹⁴¹
163. It therefore appears that Mr Ravbar, from a position of alleged ignorance as to the relevant events, was prepared to make a series of absolute denials. This cavalier approach reflected poorly on Mr Ravbar's credit.

¹³⁹ Michael Ravbar, 7/8/14, T:386.30-43.

¹⁴⁰ Michael Ravbar, 7/8/14, T:388.17-18.

¹⁴¹ Michael Ravbar, 7/8/14, T:393.25-28.

164. While Mr Ravbar was a courteous witness, other aspects of his evidence were equally unsatisfactory.
165. He did not give candid evidence in relation to the fact that the CFMEU had made a demand upon Universal Cranes to increase the number of its employees who were members of the union.
166. As earlier observed, Mr Close's response to Mr Smith's request that the CFMEU cease the ban on Universal Cranes on the basis Universal Cranes would agree to enter into an EBA that included the BERT and CIPQ clauses, was to say 'will also want you to fix the membership'. Mr Ravbar was aware of and approved this response.
167. When examined about this, Mr Ravbar went so far as to deny that the expression 'fix the membership' was a reference to increasing membership numbers. He argued that the expression simply meant having Mr Smith 'go out there and have a productive, cooperative relationship and ...talk to your workers'.¹⁴² This statement bore no resemblance to the true position known to Mr Ravbar, and obvious from the documents.
168. It was put to Mr Ravbar that what the CFMEU wanted, and what was being sought through the email correspondence of August 2012, was to have all Universal Cranes employees as CFMEU members. Mr Ravbar said 'that has never been a position of ours'.¹⁴³ But later he admitted that 'in any workplace you want 100% membership that's what unions

¹⁴² Michael Ravbar, 7/8/14, T:399.20-400.33.

¹⁴³ Michael Ravbar, 7/8/14, T:400.9-14.

seek to do'.¹⁴⁴ Indeed Mr Close's own email of 14 August stated 'would want all workers as members like I used to have under the previous Universal regime'.¹⁴⁵

169. Having been given unsatisfactory evidence on these matters, Mr Ravbar then dissembled further. He tried to allege that it was Mr Smith who was offering '*blood money*' in the form of union membership fees. Mr Ravbar said that 'at the end of the day as long as we have access, we have good relationships' with employees, the union would be happy.¹⁴⁶
170. These statements should be rejected. It is plain from Mr Close's own emails of 2012 that the union was demanding that Mr Smith bring more employees to the union. Mr Smith's unchallenged and uncontradicted evidence was that he gave representatives of the CFMEU regular and open access to employees.¹⁴⁷
171. Mr Ravbar also tried to pretend that it was Mr Smith who had been offering the CFMEU 100% membership.¹⁴⁸ That was not true. Its untruth is demonstrated by the email exchanges of 14 August 2012 in which Mr Smith made it plain on various occasions that he would be

¹⁴⁴ Michael Ravbar, 7/8/14, T:400.9-14.

¹⁴⁵ See above para 84; Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 14.

¹⁴⁶ Michael Ravbar, 7/8/14, T:401.17-35.

¹⁴⁷ See above paras 26 and 40; Albert Smith, 4/8/14, T:26.3-29.36; Albert Smith, witness statement, 4/8/14, paras 39, 41.

¹⁴⁸ Michael Ravbar, 7/8/14, T:402.39-41.

unable to achieve anything of the order demanded and that all he would be able to do would be to set a target of the order of 50%.¹⁴⁹

172. There is another significant matter counting against Mr Ravbar, Mr Close and other CFMEU officials. Not one of them ever wrote back to Mr Smith or Mr Schalck to deny the serious allegations that they were making to the effect that the CFMEU was banning Universal Cranes and applying pressure to its customers. Mr Ravbar was someone who had been involved with business for a long time and he admitted that he well understood the importance of reducing communications to writing so there is a clear record.¹⁵⁰

173. If the position was not as Mr Smith and Mr Schalck had described in their various emails and letters of complaint to the CFMEU, these experienced union campaigners would have responded in writing to make clear that the allegations were denied. No one ever did this.

174. Mr Ravbar's treatment of this issue during the course of his examination was unimpressive.

(a) At first he admitted that there was not one response at any time from the CFMEU denying the allegations of boycotts and bans that have been made by Universal Cranes.¹⁵¹

¹⁴⁹ Michael Ravbar, 7/8/14, T:402.43-47; Albert Smith, witness statement, 4/8/14, Annexure AS-1 Tab 14.

¹⁵⁰ Michael Ravbar, 7/8/14, T:418.39-419.2.

¹⁵¹ Michael Ravbar, 7/8/14, T:425.12-14.

- (b) He then refused to accept an obvious proposition, namely that it would have been easy to do a one line email back to Mr Smith or Mr Schalck stating that the allegations made were denied.¹⁵²
- (c) He then went back on his earlier evidence that he did not know of one response denying the allegations, and said that there had been ‘verbal’ denials.¹⁵³ By the time of this reversal in his evidence he had appreciated that the absence of any denial of Mr Smith’s allegations throughout the whole of 2012 and 2013 was harmful to the CFMEU.
- (d) Mr Ravbar’s evidence later stated that he had actually given instructions to the CFMEU employees not to respond to Mr Smith’s written allegations, because he had heard rumours that Mr Smith was working with the FWBC.¹⁵⁴ If he was concerned that Mr Smith’s emails were inaccurate and that Mr Smith was trying to trap the CFMEU, it would have been all the more important to write back, clearly stating the position.¹⁵⁵
- (e) When this was put to Mr Ravbar he changed his evidence again, and said that he did not respond to Mr Smith’s emails

¹⁵² Michael Ravbar, 7/8/14, T:425.16-18.

¹⁵³ Michael Ravbar, 7/8/14, T:425.20-33.

¹⁵⁴ Michael Ravbar, 7/8/14, T:430.8-13.

¹⁵⁵ Michael Ravbar, 7/8/14, T:431.19-23.

in which complaints and allegations were made because he
'did not have time'.¹⁵⁶

175. The matters pertaining to Mr Ravbar's credit as set out in the submissions concerning the BERT funds are also of relevance (as to which see Chapter 5.2).
176. For these reasons Mr Ravbar was not a witness of credit. His evidence cannot be preferred to that of Mr Smith.

Rejection of CFMEU's theories as to customers' behaviour

177. The CFMEU advanced various theories to seek to explain why it was that the many different contractors with whom Universal Cranes and Smithbridge dealt in 2012 and 2013 removed those companies from the sites they were working on.
178. The evidence given by witnesses from Smithbridge Group and its customers demonstrates that those theories are wrong. However, for the sake of completeness, it is worth describing what the CFMEU theories were and why they were misconceived in any event.
179. One theory put forward by the CFMEU concerned the existence of a 'sub-contractor clause' in some of the EBAs that the CFMEU has with some builders.
180. The clause in question reads as follows:

¹⁵⁶ Michael Ravbar, 7/8/14, T:431.25-36.

35 EMPLOYMENT SECURITY, STAFFING LEVELS, MODE OF RECRUITMENT AND REPLACEMENT LABOUR

35.1 The employer recognises that in certain circumstances the use of contractors and labour hire may effect the job security of employees covered by this agreement.

The use of contractors and the use of supplementary labour hire requirements in this clause shall not apply to projects currently under construction before the signing of this agreement.

The application of these requirements shall recognise geographical and commercial circumstances that may result in a competitive disadvantage to the employer and its capacity to secure the project. In these circumstances the Employer and the Union(s) agree to vary these requirements on a project by project basis. Negotiations are to be conducted in good faith and agreement will not be unreasonably withheld.

35.2 Use of Contractors

If the company wishes to engage contractors and their employees to perform work in the classifications covered by this agreement, the company must first consult in good faith potentially affected employees and their union. Consultation will occur prior to the engagement of sub-contractors for the construction works.

If, after consultation, the company decides to engage bona fide contractors, these contractors and their employees will receive terms and conditions of engagement (or terms no less favourable) as they would receive if they were engaged as employees under this agreement performing the same work. The use of sham sub-contracting arrangements is a breach of this agreement.

181. CFMEU's theory proceeded on the basis that because this clause existed, and because neither Universal Cranes nor Smithbridge had a CFMEU form of EBA, contractors on projects would have been obliged to refuse to engage Universal Cranes and Smithbridge, and would have decided not to use them for this reason.

182. There was no evidence advanced by the CFMEU to support this theory. It ran counter to the evidence of the witnesses from Smithbridge Group and its customers.
183. Further, the theory was fundamentally misconceived.
184. First, taking the case of the Multiplex project at the Indooroopilly shopping center, the EBA between the CFMEU and Multiplex was not entered into until late 2012.¹⁵⁷ This was over 6 months *after* the period when Gold Coast Cranes were removed from that site. As such, the sub-contractor clause in that EBA could have had nothing to do with the treatment of Gold Coast Cranes in May 2012. The CFMEU's questioning of Mr Smith therefore proceeded on the incorrect basis that the Multiplex EBA bound that company to act in a particular way towards Universal Cranes.¹⁵⁸
185. Secondly, in many cases, the Universal Cranes or Smithbridge company in question was not engaged by a head contractor who may have had a union form of EBA with the 'sub-contractor clause' in it. Rather, the Universal Cranes or Smithbridge company was retained by a sub-contractor.
186. As such, even if the Multiplex EBA with the CFMEU had existed at the relevant time (which it did not), the sub-contractor clause in that EBA was irrelevant to the position of Gold Coast Cranes. This is because the sub-contractor clause would only have related to the

¹⁵⁷ Michael Ravbar, witness statement, 6/8/14, Annexure Tab MR04. The CFMEU later sought to tender an earlier EBA with a Multiplex company. That is not relevant, because it is an EBA with a different Multiplex company.

¹⁵⁸ See for example, Albert Smith, 4/8/14, T:68.3-69.26.

position as between the builder and contractor. It did not purport to regulate, in any way, the position as between the contractor and Gold Coast Cranes.

187. Thirdly, at around the very time when Universal Cranes and Gold Coast Cranes experienced the difficulties Mr Smith described, the sub-contractor clause had been the subject of litigation between Multiplex and the CFMEU. Multiplex and the CFMEU were, at that time, in the middle of negotiations that ultimately led to the EBA executed by them in late 2012. In the course of those negotiations, Multiplex had contended that the sub-contractor clause had no operation where Multiplex did not have its own employees to carry out the works to be sub-contracted. That contention was well founded in circumstances where section 172 of the *Fair Work Act 2009* (Cth) provides that an enterprise agreement must concern matters pertaining to the relationship between an employer and its employees, where the clause was concerned with the ‘employment security’ of Multiplex’ own employees, and where the machinery in clause 35.2 required consultation with ‘affected employees’ (of which there could be none if Multiplex did not have employees for the sub-contract works).

188. Multiplex’s contentions about the limited scope of operation of the sub-contractor clause were accepted by Fair Work Australia on 16 May 2012 in *Construction, Forestry, Mining and Energy Union v Brookfield Multiplex Australasia Pty Ltd*.¹⁵⁹

¹⁵⁹ [2012] FWA 4051.

189. As a result of this published decision, Multiplex and other head contractors would have been well aware that the sub-contractor clause had no application where the sub-contractor to be retained by the head contractor would carry out work which the head contractor did not have its own staff to perform.
190. There is no suggestion in any evidence that any of the head contractors employed their own crane operators. That being so, in light of the published decision of the day, no contractor would have considered the sub-contractor clause in the EBA to be relevant to Universal Cranes or Gold Coast Cranes performing work onsite. Multiplex was, at this very time, acutely aware that the clause was irrelevant. It had championed that view. Hence it is not correct to suggest that the clause motivated Multiplex (or any other head contractor) to treat Gold Coast Cranes in a particular way.
191. Fourthly, Universal Cranes and Smithbridge were already working on the sites in question. Indeed, in some cases, they had been working for many months. They had not been excluded from the site or working on the project by reason of the employment terms of the company. That would surely have been a matter addressed at the outset of the project. Indeed Mr Ravbar confirmed this in his oral evidence, noting that to the extent conversations between the union and contractors take place, they occur ‘when these projects are started’ and once undertaken by contractors to ensure they ‘get the right subbies’.¹⁶⁰

¹⁶⁰ Michael Ravbar, 7/8/14, T:384.16-20.

192. Fifthly, there is no evidence to demonstrate that any head contractor or sub-contractor considered that the terms of the 2012 EBA between Universal Cranes and its employees were less favourable than those enjoyed by the head contractor.
193. The proposition that simply because the 2012 EBA made provision for a self-funded redundancy and sick leave scheme rather than for contributions to BERT and CIPQ, Universal Cranes' employees were receiving terms and conditions no less favourable than those of any given head contractor does not follow. And there is no evidence to indicate that head contractors believed that it followed.
194. In the case of sick leave and income protection, for example, as Mr Smith succinctly explained: 'I offered my employees exactly the same benefits as the CIPQ fund but because I have to minimise my costs to stay in business, I devised a way to do it at a lower cost'.¹⁶¹ That evidence was not challenged.
195. A consideration of whether the terms and conditions of engagement of an employee by Universal Cranes were no less favourable would involve an analysis of all of the integers of the employment contract including, for example, rates of pay, flexibility of working hours and so on. In this sense, the sub-contract clause appears to be almost unworkable save for the most obvious of cases where all of the employment terms of a given sub-contractor are worse than those enjoyed by employees of the head contractor.

¹⁶¹ Albert Smith, 4/8/14, T:58.7-9.

196. Yet another problem with the CFMEU theory is that, on occasion, the contract under which Universal Cranes was operating was for ‘dry-hire’ – that is, Universal Cranes was simply hiring cranes without providing any workers. Yet even here, a space in which the sub-contractor clause could have no possible scope for operation, Universal Cranes was refused access to worksites. Mr Ravbar admitted this to be so,¹⁶² thus admitting the CFMEU theory to be one incapable of acceptance, at the very least in respect of the ‘dry hire’ incidents.
197. For each and all of these reasons, the CFMEU ‘sub-contractor clause’ theory is quite untenable. It is an attempt by the CFMEU to explain away the on-site treatment of Universal Cranes and Smithbridge in circumstances where every contemporaneous record and the evidence of many witnesses points to the conclusion that the treatment of these companies was the result of a deliberate banning campaign launched by the CFMEU.
198. Perhaps aware of the shortcomings in the sub-contractor clause theory, the CFMEU appeared to offer up an alternative explanation through Mr Ravbar. That explanation was that, ‘when asked’, CFMEU officials would inform persons retaining Universal Cranes that Universal Cranes refused to pay into BERT.¹⁶³
199. This alternative explanation is no more plausible than the sub-contractor theory.

¹⁶² Michael Ravbar, 7/8/14, T:387.16-32.

¹⁶³ Michael Ravbar, witness statement, 6/8/14, para 45.

200. To begin with, there is no evidence of any occasion upon which any contractor made such an inquiry of the CFMEU. The fact Mr Ravbar and others were unable to provide a single example of such an occurrence is telling. There is no substance to the union position. It ran counter to the evidence of the witnesses from Smithbridge Group and their customers.
201. Further, the explanation makes no sense. As earlier indicated, in most cases Universal Cranes and Smithbridge had been working on the site for many months. Any inquiry made by a head contractor of the CFMEU would have been made at the outset of the project and certainly before Universal Cranes was engaged. The theory is also illogical given the fact some of the contracts were 'dry hire' only.

The CFMEU's submissions

202. The primary approach of the CFMEU's written submissions was to complain about instances where witnesses had not been called, where hearsay was relied on and where counsel assisting was 'unbalanced'. In general it may be said that none of these points descends to any grappling with the detail of what counsel assisting submitted. Even if these points had been correct, how did they invalidate the reasoning in counsel assisting's submissions? In any event, they were not correct. The witnesses not called were either non-essential or non-traceable. The limited amount of hearsay relied on was almost always first-hand. And counsel assisting were not unbalanced. The greater part of the CFMEU's submissions merely advocated adoption of whatever evidence was against the evidence on which counsel assisting relied, without explaining why the evidence it favoured should be preferred.

203. On more than one occasion the CFMEU submissions misrepresented the evidence. It would be odious to multiply examples. But one may be given. The CFMEU submitted, in accordance with Mr Ravbar's evidence, that 'the CFMEU did not approach Universal Cranes customers'.¹⁶⁴ With that may be compared the evidence that a CFMEU official came onto the Indooroopilly site and ejected Gold Coast Cranes. In doing so he said that the company had been banned from all sites in Brisbane. He acted in this way contrary to the wishes of the customer of Gold Coast Cranes (who actually suffered losses as a result). Multiple witnesses gave firsthand (not hearsay) evidence that the CFMEU official on the Gladstone project came onto the site and unilaterally determined that the Smithbridge workers would not continue work, even though Smithbridge's customer wanted them to stay and continue the work.
204. The CFMEU submitted that procedurally it suffered unfairness because of the speed with which evidence had to be prepared from 25 July 2014 before a hearing in Brisbane commencing on 4 August 2014 and because of a lack of notice to some witnesses of findings that might be made against them. The contention about the first item of supposed unfairness is rejected. The submission is not linked to the position of any particular witness or any particular evidence. The second contention culminates in the submission that no findings that Messrs Loakes, Cradden or Toyer acted contrary to law be made. Counsel for the CFMEU does not act for Mr Cradden or Mr Toyer. However, no findings of that kind are made against Mr Cradden or Mr Toyer. If the submission is that no finding should be made against Mr Treadaway

¹⁶⁴ CFMEU submissions, 14/11/14, Pt 8.7, para 36.

either, who did not give evidence and for whom the CFMEU's counsel do not act, the position is that no findings of breaches of the law are made against Mr Treadaway. But his role in the unfolding of events is dealt with independently of its legal character. Mr Loakes is in a different position. He is employed by the CFMEU, who was represented before this Commission. The CFMEU gave Mr Loakes copies of the statements that affected him, and its lawyers appeared throughout the course of Mr Loakes' evidence. The CFMEU admits¹⁶⁵ that he supplied a statement prepared by the CFMEU lawyers working on the Commission's inquiry responding to the material put on by the Royal Commission, and gave oral evidence. It may be inferred that he had been informed of all the statements having an impact on his position. The CFMEU submits: 'He was not forewarned that submissions would be made that his actions were contrary to the law'.¹⁶⁶ But the CFMEU's legal advisers were in a position to put before him all the material from which a conclusion that his conduct may have been against the law is available, and it appears they did so. The CFMEU also submits that he was 'entitled to be heard in opposition to any potential adverse finding'.¹⁶⁷ The submissions of counsel assisting fulfilled any requirement of notice sufficient to enable him to claim that entitlement.

205. Accordingly the submissions of counsel assisting set out above are accepted.

¹⁶⁵ CFMEU written submissions, 14/11/14, Pt 8.7, para 43.

¹⁶⁶ CFMEU written submissions, 14/11/14, Pt 8.7, para 23.

¹⁶⁷ CFMEU written submissions, 14/11/14, Pt 8.7, para 23.

C – CONCLUSIONS

What does Australian law have to say about the CFMEU's behavior?

Extortion

206. Section 415 of the *Criminal Code Act 1899* (Qld) provides as follows:

- (1) A person (the demander) who, without reasonable cause, makes a demand –
 - (a) with intent to –
 - (i) gain a benefit for any person (whether or not the demander); or
 - (ii) cause a detriment to any person other than the demander; and
 - (b) with a threat to cause a detriment to a person other than the demander;commits a crime.

Maximum penalty –

- (a) if carrying out the threat causes, or would be likely to cause serious personal injury to a person other than the offender – life imprisonment; or
 - (b) if carrying out the threat causes, or would be likely to cause substantial economic loss in an industrial or commercial activity conducted by a person or entity other than the offender (whether the activity is conducted by public authority or is a private enterprise) –life imprisonment; or
 - (c) otherwise – 14 years imprisonment.
- (2) It is immaterial that –

- (a) the demand or threat is made in a way ordinarily used to inform the public rather than a particular person; or
 - (b) the threat does not specify the detriment to be caused; or
 - (c) the threat does not specify the person to whom the detriment is to be caused or specifies this in a general way; or
 - (d) the detriment is to be caused by someone other than the demander.
- (3) A reference to making a demand includes causing someone to receive a demand.
- (4) A reference to a threat to cause a detriment to any person other than the demander includes the statement that gives rise to a threat of detriment to the other person.
- (5) A prosecution for an offense in which it is intended to rely on a circumstance of aggravation mentioned in paragraph (a) or (b) of the penalty can not be commenced without the consent of the Attorney-General.
- (6) In this section – threat includes statement that may reasonably be interpreted as a threat.

207. Mr Ravbar and Mr Close may have committed various offences under section 415 of the *Criminal Code*.

Count 1 for Mr Ravbar – 8 July 2013

208. As earlier described, on 8 July 2013 Mr Ravbar said to Mr Smith that the CFMEU would kick Universal Cranes off Darwin and Townsville sites and would kill the company's operations in Darwin if Universal Cranes (Townsville) did not enter into an EBA with the CFMEU on terms acceptable to the CFMEU.

209. This communication contained a demand accompanied by a threat, the terms of which are self-evident from the express terms of the communication. The demand was for Universal Cranes (Townsville) to enter into the CFMEU's form of EBA. The threat was that, if this did not occur, the CFMEU would take action that would have the effect of removing Universal Cranes off sites they worked on in Darwin and Townsville and kill off the company's operations in Darwin. Such action would obviously be detrimental to Universal Cranes companies.
210. The capacity for the CFMEU to take such action, and the nature of that action, is apparent from the evidence of witnesses such as Mr Zoller, Mr Swift, Mr Bastemeyer, Mr Bournier and others, and the fact that the CFMEU could and did act in this way was well known to each of Mr Smith and Mr Ravbar at the time of this conversation. The threat was specific and real.
211. Did Mr Ravbar intend to gain a benefit or cause detriment to someone by making the demand and threat? He was motivated to act as he did by a strong desire to have Smithbridge Group companies sign EBAs in terms which obliged them to make payments they would not otherwise have to make to BERT, BEWT and CIPQ, a substantial portion of which would, in due course, flow through to the CFMEU itself for various purposes.¹⁶⁸ He was, therefore, in making the demand and threat, intending to benefit each of those entities.

¹⁶⁸ See Chapter 5.2.

212. Hence an offence against s 415 of the *Criminal Code* may have been committed.
213. The penalty for extortion varies depending on a number of factors. One of those factors is whether carrying out the threat would be likely to cause substantial economic loss in an industrial or commercial activity. In such a case, the maximum penalty is life imprisonment (that is, greater than the 14 year maximum sentence in most other cases).
214. It is recommended that this Interim Report be referred to the Queensland Director of Public Prosecutions in order that consideration may be given to the prosecution of Mr Ravbar in respect of an offence under s 415 of the *Criminal Code*. There was no close consideration to the economic loss to Universal Cranes in the event Mr Ravbar's threat was carried out. It is not possible to make a finding about what the precise loss was. But it may well have been substantial. It would certainly be loss in an industrial or commercial activity. These issues ought to be and doubtless will be explored further by the Queensland Director of Public Prosecutions.

Count 2 for Mr Ravbar – 28 February 2014

215. On 28 February 2014 Mr Ravbar and Mr Smith had a telephone conversation earlier described. Its substance was recorded in an email of the same date from Mr Smith to Mr Ravbar.
216. Mr Ravbar demanded that Smithbridge enter into the CFMEU form of EBA, and said to Mr Smith that while he would not be openly banning

Smithbridge if the EBA was not signed, the CFMEU 'had its ways', Smithbridge and Universal Cranes would feel the effects of the CFMEU's pressure, and the pressure would be of the same kind that Universal Cranes had previously experienced.

217. Again, the elements of an offence under s 415 of the *Criminal Code* are made out.
218. First, there was a demand, namely for Smithbridge to enter into the CFMEU form of EBA.
219. Secondly, there was a threat to cause detriment to Smithbridge and Universal Cranes. Having regard to what Mr Ravbar said to Mr Smith as described above, it is clear that he was communicating to Mr Smith that the CFMEU would have organisers attend on sites where Smithbridge and Universal Cranes were working and stop their operations, just as they had done in the past (as demonstrated by evidence from Mr Zoller, Mr Swift, Mr Bastemeyer, Mr Bournier and others). This would be obviously detrimental to these companies.
220. Thirdly, for reasons previously given, it is clear that Mr Ravbar acted in this way in an attempt to gain advantages for BERT, BEWT and CIPQ, and in due course, the CFMEU, in the form of the payments that would flow to those entities (directly or indirectly) if the CFMEU form of EBA was signed by Smithbridge.
221. An offence may have been committed under s 415 of the *Criminal Code* in relation to the incident on 28 February 2014. What was said

of the penalty provisions in relation to the 8 July 2013 incident is repeated here.

222. It is recommended that this Interim Report be referred to the Queensland Director of Public Prosecutions in order that consideration may be given to the prosecution of Mr Ravbar for an offence against s 415 of the *Criminal Code*.

Count 1 for Mr Close – July 2012

223. In July 2012 Mr Close telephoned Mr Smith. He told him that he understood that Universal Cranes was nearly on its knees. He told him he would keep his campaign against Universal Cranes up until it signed an agreement with the CFMEU on CFMEU's terms. Mr Close was making a demand on Universal Cranes that it sign the CFMEU's form of EBA.
224. He coupled that demand with a threat, namely that he would keep his campaign against Universal Cranes up. The 'campaign' to which Mr Close was referring was one under which CFMEU officials had been, up to that point, attending at worksites such as Indooroopilly, Newstead, and the Transcity tunnel and stopping Universal Cranes from operating. This is evident from the fact that such activity had actually been occurring up to that point. It is also evident from the fact that in this conversation Mr Close referred to Mr Smith being nearly on his knees, and also said that he understood that the action being taken by the CFMEU was illegal.

225. Plainly the threat was to cause detriment to Universal Cranes, and equally clearly, Mr Close's intention was to secure a benefit for BERT, BEWT, CIPQ and the CFMEU.
226. In these circumstances, Mr Close may have committed an offence under s 415 of the *Criminal Code* in July 2012.
227. It is recommended that this Interim Report be referred to the Queensland Director of Public Prosecutions in order that consideration may be given to the prosecution of Mr Close for an offence under s 415 of the *Criminal Code*.
228. What was said above at paragraphs 213 and 214 on the question of penalty is repeated.

Count 2 for Mr Close – 14 August 2012

229. On 14 August 2012 Mr Smith sent Mr Close an email asking him to advise whether the CFMEU would lift its ban on Universal Cranes if the company signed an EBA with the union on certain terms. Mr Close responded 'Will also want you to fix the membership if we are to move forward...'.
230. By responding to Mr Smith's particular request in these particular terms, in the general context in which the response was written, Mr Close was communicating to Mr Smith two demands. One was that the CFMEU's attack on Universal Cranes would continue until an acceptable form of EBA had been signed. The other was that it would

continue until Mr Smith had arranged for a larger number of employees of Universal Cranes to become members of the CFMEU.

231. That communication necessarily also conveyed both and a threat to cause detriment to Universal Cranes (the continuation of the CFMEU treatment of Universal Cranes on work sites). Given the history of the dealings between the individuals and the fact that the attack was centered on securing an EBA on terms that included the BERT, BEWT and CIPQ clause, and was now further expressly centered on increasing CFMEU's membership base, it is clear that Mr Close was intending, by the communication, to gain a benefit for the CFMEU, BERT, BEWT and CIPQ.
232. In these circumstances, Mr Close may have committed an offence under s 415 of the *Criminal Code* on 14 August 2012.
233. It is recommended that this Interim Report be referred to the Queensland Director of Public Prosecutions in order that consideration may be given to the prosecution of Mr Close for an offence under s 415 of the *Criminal Code*.
234. What was said above at paragraphs 213 and 214 on the question of penalty is repeated.

Count 3 for Mr Close – 3 September 2012

235. On 3 September 2012 Mr Schalck sent to Mr Close a copy of an email he had previously sent to Mr Ingham, in which he proposed 'a deal so that we can have this ban lifted', in which he set out a proposal for

entering into an EBA on particular terms, and in which he had asked whether 'you will lift the ban on Universal Cranes' if Universal Cranes agreed to enter into such an EBA. Amongst other things, the proposed form of EBA did not contain the CFMEU's standard 2 hour clause.

236. Mr Close responded by email of 3 September 2012 saying 'unless we have our 2 hour clause untouched NO DEAL. Balls in your court. I was in Sydney over the weekend and had a quick look to see if your cranes were still at Bangaroo???? (sic)'.

237. By communicating in those terms, Mr Close conveyed a number of things to Universal Cranes.

238. First, he demanded that Universal Cranes enter into an EBA on particular terms.

239. Secondly, he indicated that unless that demand was satisfied, the CFMEU's attack on Universal Cranes would continue, and specifically at the Barangaroo site. This is evident from the following combination of matters.

(a) The background to this email: the CFMEU had been attacking Universal Cranes on worksites because of its refusal to enter into the union's EBA.

(b) The 'deal' that Mr Close was rejecting in his email was the one that Mr Schalck had proposed, namely the lifting of the ban in return for an EBA in particular terms.

- (c) The reference to the Barangaroo site and the use of four question marks, in the last sentence of Mr Close's email, constituted a veiled threat that if Universal Cranes did not conform to the CFMEU's demand, the next site affected would be Barangaroo.
240. By behaving in this way, Mr Close was intending to gain an advantage for the CFMEU, in the form of an EBA in the terms it wanted.
241. In these circumstances, Mr Close may have committed an offence under s 415 of the *Criminal Code* on 3 September 2012.
242. It is recommended that this Interim Report be referred to the Queensland Director of Public Prosecutions in order that consideration may be given to the prosecution of Mr Close for an offence under s 415 of the *Criminal Code*.
243. What was said above at paragraphs 213 and 214 on the question of penalty is repeated.

Breach of s 359 of the *Criminal Code Act 1899* (Qld)

244. Section 359 of the *Criminal Code* (Qld) provides that any person who threatens to cause any detriment to another with intent to compel him to perform an act which he is lawfully entitled to abstain from doing is guilty of a misdemeanor.
245. The maximum penalty for breach of s 359 is 5 years imprisonment.

246. Messrs Ravbar and Close each may have contravened s 359 of the *Criminal Code*.
247. Each one made the threats attributed to them above.¹⁶⁹ Each threat was one to cause detriment to one or more company in the Smithbridge Group. Each threat was made deliberately with the intention of compelling one or more company in the Smithbridge Group to enter into an EBA with the CFMEU (and in some cases also compelling the company to arrange for its employees to become CFMEU employees) in circumstances where the entity in question was lawfully entitled to refuse to do so.
248. It is recommended that this Interim Report be referred to the Queensland Director of Public Prosecutions in order that consideration may be given to the prosecution of Messrs Ravbar and Close in respect of offences under s 359 of the *Criminal Code*.

Breach of s 343 of the *Fair Work Act 2009* (Cth)

249. Section 343 of the *Fair Work Act 2009* (Cth) provides that a person must not organise or take, or threaten to organise or take, any action against another person with the intent to coerce the other person, or a third person, to exercise or not exercise, a workplace right.

¹⁶⁹ See paragraphs 208, 209, 215, 216, 219, 220, 223-225, 229-231, 235, 236, 239.

250. A person has a ‘workplace right’ if the person is, inter alia, entitled to the benefit of, or has a role or responsibility under, a workplace law.¹⁷⁰ ‘Workplace law’ includes the *Fair Work Act* 2009 (Cth).¹⁷¹
251. There are two essential elements to s 343. First, a person must organise or take, or threaten to organise or take, action against another person. Secondly, the first person must have so acted with the intent to coerce the other person, or a third person, to exercise or not exercise a workplace right.
252. The action which officers of the CFMEU organised or took, or threatened to organise or take, was as follows. Mr Ravbar and Mr Close each threatened to take the threatened action which has been dealt with already in the context of offences under the *Criminal Code*. The organisers, namely Messrs Robinson, Sutherland and Loakes all took the threatened action on worksites against a Smithbridge Group company which resulted in the company being shut down on the site. Mr Ravbar and Mr Close organised the taking of the threatened action. That may be inferred from the supervisory role they played relative to the organisers, the making of the threats, and the inherent improbability that the organisers would have each acted of their own accord in the particular way they did, either generally, let alone in the particular overarching circumstances
253. The action so taken was undertaken for a specific purpose. It was to try to coerce one or more Smithbridge Group companies to enter into an EBA with the CFMEU in particular terms. So much is obvious

¹⁷⁰ *Fair Work Act* 2009 (Cth), s 341.

¹⁷¹ *Fair Work Act* 2009 (Cth), s 341.

from the conduct itself, the nature of the threats that were made, and the surrounding circumstances.

254. One of the workplace rights which the Smithbridge Group companies were being coerced not to exercise was the right to make an enterprise agreement with its employees without the interference of the CFMEU. Another was the right to seek to make an enterprise agreement on terms other than those proposed by the CFMEU.¹⁷²
255. Section 343 is a civil remedy provision under the *Fair Work Act 2009* (Cth), which means that under s 539, action may be taken against the CFMEU and its officers by an inspector in the Federal Court or the Federal Circuit Court.
256. The maximum penalty is 60 penalty units, which equals \$10,200. This appears to be manifestly deficient for coercive conduct of the kind described.
257. A breach of s 343 may have taken place.
258. It is recommended that this Interim Report be referred to Commonwealth regulatory authorities in order that consideration may be given to the prosecution of Mr Ravbar and Mr Close in respect of breaches of s 343.

¹⁷² *Fair Work Act 2009* (Cth), s 341.

Breach of s 340 of the *Fair Work Act 2009* (Cth)

259. Section 340 of the *Fair Work Act 2009* (Cth) prohibits a union or union officer from taking ‘adverse action’ against another person (a) because the other person has a ‘workplace right’ or has or has not exercised that right, or proposes to exercise or not exercise that right, or (b) to prevent the exercise of that right by the other person.
260. A union takes ‘adverse action’ against a person if it, inter alia, takes action that has the effect, directly or indirectly, of prejudicing the person in the person’s employment or prospective employment.¹⁷³ An officer takes ‘adverse action’ in the same circumstances.
261. Hence a union will take adverse action against an employee of a company where it prevents the employee’s employer from undertaking paid work of a kind it would otherwise undertake to such an extent that the employee’s employment is prejudiced. The same is true of an officer.
262. This is because, although the action is primarily directed to the employer (here Universal Cranes), it has a direct effect on its employees, and either directly, or at least indirectly, prejudices the employees’ employment. Their employment is prejudiced because the employer earns less money than it otherwise would and thus has less money and work opportunities to be able to keep the employee in employment.

¹⁷³ See *Fair Work Act 2009* (Cth), Item 7 s 342(1).

263. This is precisely the sort of action that the CFMEU and its officials took against workers in the employ of Universal Cranes, some of whom were CFMEU members. The CFMEU was attacking employees, some of whom were its own members.
264. Mr Smith's uncontested evidence was that Universal Cranes had to start putting workers off because of the volume of work that the company lost as a result of the union's action in shutting down the company on work sites up to October 2012.
265. Action up to that point had been taken by at least Mr Sutherland at Port Connect, and CFMEU officials whose identities it has been impossible to determine on various other sites. That action was organised by Mr Ravbar and Mr Close.
266. That 'adverse action' was taken because of each and all of the following:
- (a) The employees of Universal Cranes had workplace rights, namely the right to have an EBA with their employer on the terms that were then in place, and the right to have an EBA on terms other than those the CFMEU was looking to force upon the company and its employees.
 - (b) The employees had exercised those rights.
 - (c) The CFMEU desired to prevent the employees from exercising their right to continue to have an EBA with their

employer on the existing terms, and to decline to have an EBA on the terms the CFMEU was seeking to impose.

267. The CFMEU and each of Mr Ravbar, Mr Close and Mr Sutherland may have breached s 340 of the *Fair Work Act 2009* (Cth).
268. That provision is a civil remedy provision under the *Fair Work Act 2009* (Cth), which means that under s 539, action may be taken against the CFMEU and its officers by an inspector in the Federal Court or the Federal Circuit Court.
269. The maximum penalty is 60 penalty units. Again, that appears to be manifestly deficient.
270. It is recommended that this Interim Report be referred to the Commonwealth regulatory authorities in order that consideration may be given to proceedings against Mr Ravbar, Mr Close and Mr Sutherland in respect of a breach of s 340.

Breach of s 228 of the *Fair Work Act 2009* (Cth)

271. Section 228(1)(e) of the *Fair Work Act 2009* (Cth) provides that a bargaining representative for a proposed EBA must refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining. The CFMEU may have failed to meet this standard by acting in the manner described in these submissions. The provision is not a civil remedy provision. It does not appear that any punitive action can be taken against the CFMEU in respect of this misconduct.

Breach of s 45E of the *Competition and Consumer Act 2010* (Cth)

272. Among other things, s 45E prohibits a person who has been accustomed or is under an obligation to acquire goods or services from another person, from making a contract or arrangement or arriving at an understanding with an employee organisation which contains a provision preventing or hindering the person from acquiring or continuing to acquire goods or services from that other person, provided the person or the other person (or both) are corporations.
273. Each of the Universal Cranes and Smithbridge customers identified above¹⁷⁴ were accustomed to acquiring services from Universal Cranes.
274. As a result of pressure from officers of the CFMEU of the kind described above¹⁷⁵ those customers arrived at an arrangement or understanding with the CFMEU and its officers that they would not insist on acquiring the services of Universal Cranes and Smithbridge.
275. The fact that the builders were placed under pressure from the CFMEU to act as they did does not detract from the proposition that an arrangement or understanding was reached.¹⁷⁶ They would not have been happy with the understanding that had been arrived at (in that their own preference would have been to continue to acquire the services) but, rather than standing up to the CFMEU organisers and

¹⁷⁴ See paras 48, 134, 162, 210 and 219.

¹⁷⁵ See paras 44, 47, 74, 107, 110, 152, 157, 158, 160, 161, 162 and 172.

¹⁷⁶ See *Gibbins v Australasian Meat Industry Employees' Union* (1986) 12 FCR 450, 470 (Smithers J).

take on the risk of industrial action in response, they arrived at the understanding nonetheless.

276. This understanding prevented or hindered those customers from acquiring or continuing to acquire services from Universal Cranes and Smithbridge.
277. The result is that each of the Universal Cranes and Smithbridge customers may have contravened s 45E. The fact that the understanding was entered into by the customers under pressure from the CFMEU officials would be a strong factor militating against any action being taken against them. No recommendation is made that their role be referred to the Australian Competition and Consumer Commission.
278. The CFMEU may have been a party to, or knowingly concerned in, each of the contraventions by the customers. The CFMEU may have been the other party to the arrangement or understanding and may have had knowledge of all of the elements of the contraventions by the customers. Accordingly, the CFMEU may be liable pursuant to s 76(1)(e) of the *Competition and Consumer Act 2010* (Cth) in respect of each contravention by a customer.
279. It is recommended that this Interim Report be referred to the Australian Competition and Consumer Commission in order that consideration may be given for the taking of proceedings against the CFMEU.

280. The maximum pecuniary penalty payable by the CFMEU in respect of each contravention by a customer in which its secondary participation is established is \$750,000.

Breach of s 45D of the *Competition and Consumer Act 2010* (Cth)

281. Section 45D relevantly provides that a person must not, in concert with a second person, engage in conduct that hinders or prevents a third person from acquiring services from a fourth person where that conduct is engaged in for the purpose, and would have or be likely to have the effect of, causing substantial loss or damage to the business of the fourth person.
282. Section 45DC provides that if two or more persons are officers of the same organisation of employees and engage in conduct in concert with each other, the organisation is taken to have engaged in that conduct in concert with the employees unless the organisation proves otherwise.
283. Section 45D may have been contravened by Mr Ravbar, Mr Close, Mr Sutherland, Mr Loakes and the CFMEU itself.
284. The conduct in question was that which resulted in the shutting down of Universal Cranes and Smithbridge on worksites on which they were operating. That conduct hindered or prevented the builders on those sites from acquiring the services of Universal Cranes and Smithbridge.
285. That conduct comprised two elements. The first was a decision by Mr Ravbar and Mr Close that such action would be taken and the giving of

directions to organisers for that action to be taken.¹⁷⁷ The second was the taking of that action by those organisers (Mr Sutherland at the Port Connect site, Mr Loakes at the Gladstone site, and unknown organisers at the Newstead Transcity and Carindale sites). Senior management and lower level organisers thereby acted in concert to achieve the shut downs.

286. The purpose of the ban was to cause substantial, in the sense of not insubstantial and not nominal,¹⁷⁸ damage to the Universal Cranes and Smithbridge businesses. Anything other than substantial damage would be insufficient to cause Universal Cranes and its related entities to enter into the EBAs as the CFMEU desired.
287. The shutting down of Universal Cranes and Smithbridge would have the effect of causing substantial damage to those companies. The very nature of the conduct was to prevent these companies from working for their customers on commercial building sites. The CFMEU's conduct did have that effect.
288. The maximum pecuniary penalty payable by the CFMEU if its contravention is established is \$750,000.
289. The maximum pecuniary penalty payable by each of the CFMEU officers if their respective contraventions are established is \$500,000.

¹⁷⁷ See paras 57 and 252 above.

¹⁷⁸ See *Building Workers' Industrial Union of Australia v ODCO Pty Ltd* (1991) 29 FCR 104, 140; *A&L Silvestri Pty Ltd v CFMEU* (2007) 165 IR 94; [2007] FCA 1047, [78].

290. It is recommended that this Interim Report be referred to the Australian Competition and Consumer Commission in order that consideration may be given to the taking of proceedings against Mr Ravbar, Mr Close, Mr Sutherland and Mr Loakes in respect of contraventions of s 45D.

CHAPTER 8.8

HINDMARSH

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A – OVERVIEW

1. This chapter deals with the conduct of officers of the Queensland Branch of the Construction & General Division of the CFMEU on the Brooklyn on Brookes project in Fortitude Valley, Brisbane, towards Hindmarsh Construction Australia Pty Ltd (**Hindmarsh**).

2. The officers in question are Mr Ravbar (Branch Secretary), Mr Hanna (Branch President), Mr Ingham (Assistant Secretary) and Mr Bragdon (Organiser).

B – FEDERAL CIRCUIT COURT PROCEEDINGS: CFMEU SUBMISSIONS

3. The CFMEU points out that there are proceedings before the Federal Circuit Court to do with the Hindmarsh project. They are entitled ‘*Director, Fair Work Building Inspectorate v Construction, Forestry, Mining and Engineering Union*’. Among the other respondents are Mr Ingham and Mr Bragdon. The file number of the proceedings is BRG 318/2014. The proceedings are set down for hearing on 1-11 June 2015. The CFMEU submits that no finding should be made while this litigation about the Hindmarsh project is before the Court.¹
4. This submission goes too far, but is to be accepted up to a point.

C – FEDERAL CIRCUIT COURT PROCEEDINGS: COUNSEL ASSISTING’S SUBMISSIONS

5. Counsel assisting advanced the following submissions²

[T]he Commission should avoid making findings if there is a substantial risk that reporting on the case study will cause substantial injustice in the court proceeding.^[3] The fact that the

¹ CFMEU submissions, 14/11/14, Pt 8.8, paras 3-7.

² Submissions in reply of counsel assisting, 25/11/14, paras 6-9, 12-13.

³ *Victoria v Australian Building Construction Employees’ and Builders’ Labourers’ Federation* (1982) 152 CLR 25 at 56, 95, 99 and 137.

court proceeding will be heard by a judge, trained and able to exclude irrelevant matters from their consideration and make findings on the basis of the evidence presented before him or her, is a relevant consideration.^[4]

The CFMEU's submission goes too far by claiming that the matters traversed in Counsel Assisting's submissions are the subject of the Federal Circuit Court proceeding.

The question of whether unauthorised industrial action was undertaken on site in April 2014, and if so, whether officers of the CFMEU organised such action, has been directly raised both in the Federal Circuit Court proceeding and in this Commission.

However, in respect of other issues, there is no material overlap, and no reason why the Commission should not proceed to address the matters that have been raised by Counsel Assisting.

These matters include:

- (a) [certain] behaviour of Mr Hanna ... [assessment of it] does not depend upon the accuracy or otherwise of the allegations made in the Federal Circuit Court proceeding;
- (b) the credit findings in respect of Mr Ravbar's evidence with respect to Mr Busch. The CFMEU remarkably contend in other parts of their submissions,^[5] and for the purposes of addressing a different case study, that Mr Ravbar was an 'impressive witness'. For a great many reasons that submission is ill-conceived. One of those reasons is the poor evidence he gave about Mr Busch, which reflects generally on his credit for reasons set out in Counsel Assisting's Submissions in Chief. His evidence on this subject does not depend upon the accuracy or otherwise of the allegations made in the Federal Circuit Court proceeding;
- (c) the credit findings in respect of Mr Bogunovic on the same subject. The shabby treatment by CFMEU representatives of individuals who speak out against the CFMEU should be a matter of great concern to this Commission, and Mr Bogunovic's behaviour is an instance of this;

⁴ *BLF Case* (1982) 152 CLR 25 at 58 (Gibbs CJ), 100-101 (Mason J), 136 (Wilson J, Aickin J agreeing).

⁵ CFMEU submissions, Pt 8.7, para 63.

- (d) the findings in respect of Mr Ravbar's evidence as to his attitude to the behaviour displayed on video footage of a demonstration at the site on 7 April 2014... While the events captured on the video relate to the matters the subject of the claims in the Federal Circuit Court proceeding, the conduct of the CFMEU official, captured on video, cannot credibly be denied, and dealing with the matter of principle and attitude that arises in the question and answer in paragraph 81 of Counsel Assisting's submissions in chief does not require the Commission to express an opinion as to the proper legal characterisation of the effect of the conduct of that CFMEU officer captured on the video. The question of principle and attitude, the answer to which both affects Mr Ravbar's credit and broader questions under consideration by this Commission, is whether the most senior official of the CFMEU in Queensland has any issue at all with another CFMEU official behaving in the way shown in the video in circumstances where there is an injunction in place.

...

In principle there would be no substantial risk of injustice in the Federal Circuit Court proceeding by this Commission expressing ultimate opinions as to what appears to be the position on the evidence before it in relation to these overlapping matters. The judge who hears that matter would be capable of deciding the matter on the evidence before him or her, and excluding from his or her mind the opinions expressed by the Commission.

Although in those circumstances the Commission would be at liberty to proceed to express such ultimate opinions at this time, there are a number of specific circumstances which would justify a decision by the Commission to decline to do so in its [I]nterim [R]eport, and on balance, Counsel Assisting consider that is the better approach to take. The particular circumstances influencing this view include the following:

- (a) the Federal Court proceeding is fixed for a final hearing in the relatively near future;
- (b) the Federal Circuit Court is in a position to make a determination on the overlapping issues that will have a substantive legal effect and bind the parties and individuals in question; and

- (c) if the Federal Circuit Court proceeding does not proceed to final hearing in June 2015, the Commission can reconsider its position and deal with the matter further at that time.

D – CONCLUSION

- 6. The submissions of counsel assisting are correct, but for one matter. There is too close a link between what the video shows and the Circuit Court proceeding. Hence the outcome would be, save in respect of the remaining three matters identified by counsel assisting, that desired by the CFMEU.
- 7. The problem is that the CFMEU elected to put on *no* submissions in answer to the substance of what counsel assisting alleged in their submissions in chief on all matters, including the three referred to above. It would have been preferable for the CFMEU to have adopted one of the following courses: to adopt a fall-back position of dealing with all of counsel assisting's submissions in chief as a matter of substance; or to give notice before 14 November 2014 of its precise position, so that consideration could be given by all concerned to receiving its submissions only on the three matters. But it indicated its stance only on 14 November 2014, and there has been too little time for the latter course to be worked through.
- 8. This is an unsatisfactory state of affairs. The CFMEU ran a risk of being told that its failure to address matters of substance might be met with the retort: 'You gambled, and you lost'.

9. However, since the Commission's reporting date has been extended to 31 December 2015, there will be time to return to the Hindmarsh problem if the Federal Circuit Court proceeding is adjourned or concluded within a reasonable time. Hence the submissions in chief of counsel assisting on Hindmarsh will not be dealt with now. If and when they are dealt with, they will be dealt with in the light of any submissions the CFMEU desires to make on the substantive merits.

CHAPTER 8.9

CFMEU TREATMENT OF FAIR WORK BUILDING INSPECTORS

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A – SUMMARY

1. Section 59 of the *Fair Work (Building Industry) Act* 2012 (Cth) provides for the appointment of inspectors (**FWB Inspectors**). Their duty is to conduct investigations in building matters, including breaches of that Act. This chapter concerns the conduct of officers of the CFMEU towards FWB Inspectors.
2. Two case studies are considered. The first study concerns events in early May 2014 at the Ibis Hotel construction site in Adelaide. The second concerns events in late July 2014 at the Barangaroo construction site in Sydney. On each occasion FWB Inspectors were attending the site to investigate whether workers were engaged in industrial action in contravention of the *Fair Work Act* 2009 (Cth). The findings made are those which counsel assisting submitted should be made.
3. On 1 May 2014 at the Ibis Hotel work site in Adelaide, Mr Perkovic acted in a violent and threatening way towards an FWB Inspector, Mr Flynn. He deliberately set out to frighten and intimidate Mr Flynn while Mr Flynn was in the course of carrying out his functions as an inspector. By so acting Mr Perkovic may have committed criminal offences against s 149.1 of the *Criminal Code* 1995 (Cth), may have committed a criminal offence against s 20(1) of the *Criminal Law Consolidation Act* 1935 (SA) and may have carried out a common law assault on Mr Flynn.

4. In late July 2014 a number of CFMEU officers, namely Mr Luke Collier, Mr Michael Greenfield, Mr Rob Kera and Mr Brian Parker, engaged in aggressive and intimidatory conduct against a number of FWB Inspectors who were working at the Barangaroo site in Sydney. By so acting they may have committed offences under s 149.1 of the *Criminal Code Act 1995* (Cth).

B – RELEVANT FACTS

FWB Inspectors

5. FWB Inspectors are appointed to their position by the Director of the Fair Work Building Inspectorate pursuant to s 59 of the *Fair Work (Building Industry) Act 2012* (Cth).
6. Under s 59C of that Act, Inspectors are invested with the same powers as an inspector appointed under the provisions of that Act in respect of a matter relating to a building industry participant.
7. Those powers may therefore be exercised, for example, for the purposes of determining whether that Act or any enterprise agreement has been complied with in a matter relating to a building industry participant: see s 706(1) of the Act.

Events at the Ibis Hotel site in Adelaide

8. Seamus Flynn is an FWB Inspector. At 7.43am on 1 May 2014 he received a call on his mobile from Rob Kamminga, the site

manager for Watpac Limited on the Ibis Hotel construction site, 122 Grenfell Street, Adelaide.¹

9. Mr Kamminga advised Mr Flynn that there were six CFMEU officials on site, that they did not provide permits or right of entry notices as required, and that they ignored his requests to leave.²
10. Soon afterwards Mr Flynn and Angeliek Peters, a fellow inspector, attended the Ibis Hotel construction site to investigate.³
11. Both signed the visitors' register.⁴ On doing so Mr Flynn noted that the register recorded that at 7.15am that day the following people had signed in: 'Luke from the CFMEU, T. Jarrett, John P, A. Sloane, Brendan Pitt and M. McDermott.'⁵
12. After signing in, Mr Flynn and Ms Peters were met by Mr Kamminga. Mr Kamminga advised that there were two groups of three CFMEU officials roaming the building site. He confirmed that they had not provided permits or right of entry notices and had refused to leave when asked to do so.⁶

¹ Seamus Flynn, witness statement, para 8.

² Seamus Flynn, witness statement, para 9.

³ Seamus Flynn, witness statement, para 11.

⁴ Seamus Flynn, witness statement, para 15.

⁵ Seamus Flynn, witness statement, para 16.

⁶ Seamus Flynn, witness statement, para 17.

13. Mr Kamminga accompanied Mr Flynn and Ms Peters to level 13 of the building. There they encountered several CFMEU officials.⁷
14. Mr Kamminga approached Anthony Sloane, one of the CFMEU officials, and asked him to show his permit. When Mr Sloane did not reply, Mr Kamminga stated: ‘You all need to leave site. You don’t have notices.’⁸ Despite this request, the CFMEU officials did not leave the site.⁹ They were trespassers.
15. Mr Kamminga, Mr Flynn and Ms Peters left down the fire escape stairs to attempt to locate the other three CFMEU officials. After checking levels 12, 11, 10, 9, 8 and 7, they reached level 6.¹⁰
16. Just as they entered the hallway, they noticed three CFMEU officials coming out of room 616.¹¹ The officials were Mick McDermott, Brendan Pitt and John Perkovic.¹² Mr Flynn took photographs of them.¹³

⁷ Seamus Flynn, witness statement, para 27 and 37.

⁸ Seamus Flynn, witness statement, para 39.

⁹ Seamus Flynn, witness statement, para 40.

¹⁰ Seamus Flynn, witness statement, para 43.

¹¹ Seamus Flynn, witness statement, para 45.

¹² Seamus Flynn, witness statement, para 46; Seamus Flynn, 2/9/14, T:9.25-27.

¹³ Seamus Flynn, witness statement, para 46.

17. Mr Kamminga said: 'I want to see your right of entry notice and your permits.'¹⁴
18. Mr Flynn states that he heard a response that he believed to be from Mr McDermott: 'Go fuck yourself.'¹⁵ Mr Flynn then heard another response from Mr Perkovic: 'Fuck off, grow some balls.'¹⁶
19. The inspectors and Mr Kamminga followed the three CFMEU officials down the hallway.¹⁷ Mr Flynn continued to take photographs of the CFMEU officials.¹⁸
20. On noticing this, Mr Perkovic moved towards Mr Flynn and stated: 'You fucking maggot, what are you taking a photo of me for, you piece of shit?'¹⁹
21. Mr Flynn describes Mr Perkovic being 'directly in front of me, face to face, and I could feel his body on my chest and stomach region.'²⁰
22. Among other insults in this exchange (as video recorded by Ms Peters²¹), Mr Perkovic said to Mr Flynn: '...the piece of shit.

¹⁴ Seamus Flynn, witness statement, para 49.

¹⁵ Seamus Flynn, witness statement, para 50.

¹⁶ Seamus Flynn, witness statement, para 51.

¹⁷ Seamus Flynn, witness statement, para 54.

¹⁸ Seamus Flynn, witness statement, paras 56 and 57.

¹⁹ Seamus Flynn, witness statement, para 58.

²⁰ Seamus Flynn, witness statement, para 59.

You fucking coward. I'd fucking take you to school, you fucking piece of shit.'²²

23. During this exchange, Mr Flynn's evidence is that Mr Perkovic was pushing him backwards with his stomach²³ and exerting his bodyweight against him.²⁴ Despite the fact that Mr Flynn said, 'Don't touch me'²⁵ and 'Get away from me, get away from me,'²⁶ Mr Perkovic continued to push against Mr Flynn so as to cause Mr Flynn's shoulder satchel to fall from his shoulder.²⁷ Mr Flynn's evidence is that whilst this occurred, Mr Perkovic said: 'You fucking piece of shit, you're going to have a heart attack. Look at you, you're shitting yellow you piece of shit...'²⁸
24. After the incident, Mr Flynn attempted to telephone the State Director of Fair Work Building and Construction, Mark Temple, to report the incident.²⁹
25. Mr Flynn witnessed the six CFMEU officials leave the site within the next five minutes.³⁰

²¹ Seamus Flynn, witness statement, para 64.

²² Flynn MFI-1, video and transcript of Video Transcript, 1/5/14.

²³ Seamus Flynn, witness statement, para 61.

²⁴ Seamus Flynn, 2/09/14, T:9.45-47.

²⁵ Seamus Flynn, witness statement, para 65.

²⁶ Seamus Flynn, witness statement, para 68.

²⁷ Seamus Flynn, witness statement, para 66.

²⁸ Seamus Flynn, witness statement, para 67.

²⁹ Seamus Flynn, witness statement, para 74.

³⁰ Seamus Flynn, witness statement, para 79.

26. Later that day, Mr Flynn and Mr Temple attended the Hindley Street Police Station and reported the assault to Senior Constable Nicola Buckle.³¹ Was this the legitimate use by the CFMEU of its industrial muscle? Or was it, in its descent from intelligible communication to the monotony of violent obscenity, the triumph of barbarism?

Events at the Barangaroo site in Sydney: Thursday 24 July 2014

27. On 24 July 2014 Matthew Barr, an FWB Inspector, was informed of industrial action at the Barangaroo South construction project. He was told that the CFMEU had blockaded the entrance to the project.³²
28. The head contractor at the project is Lend Lease Building Pty Ltd. The project is situated at Hickson Road, Barangaroo, NSW.³³
29. At about 8.20am Mr Barr asked Julie Siciliano and Jared O'Connor, two other FWB Inspectors, to attend the site to investigate.³⁴
30. Mr Barr then telephoned Eric Hensley, Lend Lease's Industrial Relations Officer, to discuss what had occurred at the project.³⁵

³¹ Seamus Flynn, witness statement, para 93.

³² Matthew Barr, witness statement, para 8.

³³ Matthew Barr, witness statement, para 8.

³⁴ Matthew Barr, witness statement, para 9.

31. Mr Hensley stated to Mr Barr:

At 6.15am the CFMEU arrived at the project and started to block the gates. A mass meeting was held offsite and they voted to stop work until Monday. The union and the men have left.³⁶

32. Ms Siciliano and Mr O'Connor arrived on site at about 9:00am.³⁷ They observed CFMEU officers present on site. Those persons included Brian Parker, the State Secretary of the CFMEU Construction and General Division NSW, and a number of other officials and organisers, including Richard Auimatagi, Darren Greenfield, Michael Greenfield, Darren Taylor, Luke Collier, Tony Sloane and Rob Kera.³⁸

33. The song 'Who let the dogs out' was being played over a loud hailer.³⁹

34. Ms Siciliano and Mr O'Connor entered the site office. As they were speaking to the receptionist, Mr O'Connor observed Mr Collier come up to the window of the office and mouth the words at him: 'You're a fucking grub' and 'fucking dog.'⁴⁰

35. Several unidentified CFMEU officials then came up onto the veranda outside the office and stood with their backs to the

³⁵ Matthew Barr, witness statement, para 10.

³⁶ Matthew Barr, witness statement, para 10.

³⁷ Jared O'Connor, witness statement, para 7.

³⁸ Jared O'Connor, witness statement, paras 8-17.

³⁹ Jared O'Connor, witness statement, para 21.

⁴⁰ Jared O'Connor, witness statement, para 23.

window. Someone outside was shaking the door.⁴¹ A worker inside the building was trying to leave, but the receptionist told him 'Don't go out that door, the union are trying to get in.'⁴²

36. Ms Siciliano and Mr O'Connor left the site office and started walking across the road. As they were doing so, Mr Collier said to Mr O'Connor: 'You're a fucking grub, why are you here, go away. You're lower than a paedophile you grub.'⁴³
37. At about 9.30am Mr Barr asked Terry Morton and Veronica Tadros, fellow FWB Inspectors, to accompany him to the project.
38. At about 9:45am, Mr Barr, Mr Morton and Ms Tadros were walking toward the main entrance of the site and observed a group of people standing on the path on Hickson Road in front of the main entrance to the project.⁴⁴ Mr Barr also observed Mr O'Connor and Ms Siciliano standing opposite the entrance, speaking to the police. While Mr Barr stood opposite to the site entrance, he identified a number of CFMEU officials, namely Michael Greenfield, Brian Parker and Luke Collier.⁴⁵

⁴¹ Jared O'Connor, 2/09/14, T:28.11.

⁴² Jared O'Connor, witness statement, para 25.

⁴³ Jared O'Connor, witness statement, para 26.

⁴⁴ Matthew Barr, witness statement, para 13.

⁴⁵ Matthew Barr, witness statement, para 14.

39. That afternoon, Mr Barr signed a record of decision to investigate whether the CFMEU officers and workers on the project had breached the *Fair Work Act* 2009.⁴⁶
40. The Fair Work Commission issued return to work orders under s 418 of the *Fair Work Act* 2009.⁴⁷
41. Mr Barr briefed other inspectors about a plan to return on 25 July 2014 to observe a mass meeting that had been planned between the CFMEU and workers and to obtain evidence should there be allegations of organising or engaging in conduct in breach of the orders.⁴⁸

Events at the Barangaroo site in Sydney: Friday 25 July 2014

42. At about 6am on 25 July 2014 Mr Barr and Mr O'Connor returned to the site. They saw 80 workers and a number of CFMEU officials, including Mr Parker, Mr Darren Greenfield, Mr Michael Greenfield and Mr Collier.⁴⁹ Police officers were also present. When Mr Parker saw Mr Barr arrive he said: 'For fuck's sake.'⁵⁰ Darren Greenfield was standing in front of the turnstiles into the site with his arms folded.⁵¹ Michael Greenfield

⁴⁶ Matthew Barr, witness statement, para 22.

⁴⁷ Matthew Barr, witness statement, para 23.

⁴⁸ Matthew Barr, witness statement, para 23.

⁴⁹ Matthew Barr, witness statement, paras 25 and 26.

⁵⁰ Matthew Barr, witness statement, para 30.

⁵¹ Matthew Barr, witness statement, para 32.

was around with a hoodie jumper on over his head.⁵² Mr Collier was handing out fliers to workers.⁵³

43. Mr Barr heard Mr Parker tell the workers that they would hold a meeting at 6.30am across the road.⁵⁴
44. Chris Blanchard, the Construction Manager from Lend Lease, told Mr O'Connor that on the previous day the union had shut the sliding door in front of the turnstiles and had not allowed anyone to pass.⁵⁵
45. Mr Barr asked Ms Tadros to take photos of the CFMEU officials standing at the site entrance.⁵⁶
46. As Ms Tadros was about to take a photo with her phone, Mr Parker said: 'You can take a photo of me? I'll fucking take a photo of you.'⁵⁷ Robert Kera stood in front of Ms Tadros, putting his back approximately five centimetres away from her and forcing her to move, as she felt his close proximity to her to be intimidating.⁵⁸ Mr Parker then took a photo of this.⁵⁹

⁵² Matthew Barr, witness statement, para 32.

⁵³ Matthew Barr, witness statement, para 33.

⁵⁴ Matthew Barr, witness statement, para 31.

⁵⁵ Matthew Barr, witness statement, para 35.

⁵⁶ Matthew Barr, witness statement, para 36.

⁵⁷ Veronica Tadros, witness statement, para 31.

⁵⁸ Veronica Tadros, witness statement, para 31.

⁵⁹ Veronica Tadros, witness statement, para 31; Matthew Barr, witness statement, para 37.

47. Mr Collier used a megaphone to call workers into a meeting, saying: 'Everyone, there is a meeting across the road... that doesn't include the FWBC grub in the fluoro.' Mr Barr understood Mr Collier to be referring to him as he was wearing a fluoro orange jacket.⁶⁰

48. Speaking through the megaphone, Mr Collier pointed to Mr O'Connor and broadcasted his name and mobile telephone number to the group and invited workers to call him and let him know what they thought.⁶¹ By this time, there were 150 to 200 workers present.⁶²

49. Mr O'Connor's evidence is that:

I was in a bit of shock. My name was mentioned in front of several hundred workers and also my phone number. So, yes, it was a little bit - I thought it was just an intimidation tactic.⁶³

50. Mr O'Connor heard Darren Greenfield yell out: 'They are nothing but dogs,' while he pointed to Mr O'Connor and Mr Barr.⁶⁴

51. Mr Parker addressed the meeting. Mr Parker said that Fair Work Building and Construction was present so the workers had to be

⁶⁰ Matthew Barr, witness statement, para 41; Matthew Barr, 2/09/14, T:16.16-18.

⁶¹ Matthew Barr, witness statement, para 42; Matthew Barr, 2/09/14, T:17.1-3; Jared O'Connor, witness statement, para 55; Jared O'Connor, 2/9/14, T:29.2-5.

⁶² Matthew Barr, witness statement, para 42.

⁶³ Jared O'Connor, 2/09/14, T:29.12-16.

⁶⁴ Jared O'Connor, witness statement, para 58.

Careful and did not have to answer questions. He also said that the workers should have legal representation and that the union would provide it. Mr Collier yelled out: 'They are dogs, don't talk to dogs!'⁶⁵

52. Mr Parker subsequently addressed the workers on the megaphone. He said that 'Fair Work Commission' had issued orders the previous day and a fine of \$11,000. He said that the workers had been notified by their employers to return to work. He further said 'FWBC and employers are intimidating you. I can't force you to go back to work... It is up to you what you do from here.'⁶⁶
53. Mr Kera pointed at Mr O'Connor and Mr Barr and said: 'That's the FWBC. They are here to prosecute workers. We have the right to go to work and not to be prosecuted like dogs. This is Australia!'⁶⁷
54. Mr Parker subsequently said: 'If you do return to work...I have to be very careful as this is being recorded. It's intimidation. I have to wrap up the meeting. I have no problem going to jail for it.'⁶⁸

⁶⁵ Matthew Barr, witness statement, para 47.

⁶⁶ Matthew Barr, witness statement, para 50.

⁶⁷ Matthew Barr, witness statement, para 56; Matthew Barr, 2/09/14, T:22:25-33; Matthew Barr, 2/09/14, T:17.42 to T:18.8.

⁶⁸ Matthew Barr, witness statement, para 62.

55. Michael Greenfield was standing close to Mr Barr and staring at him. Mr Barr then observed Michael Greenfield say to Mr Blanchard: 'Are you the Lend lease intimidation squad?'⁶⁹
56. Mr Collier stood about five metres away from Mr Barr and Mr O'Connor and said: 'We're starting a dog wash over here.' Mr Barr understood this to mean that Mr Collier was referring to him and Mr O'Connor as dogs.⁷⁰
57. Darren Greenfield said to Michael Greenfield: 'Don't stand too close Mick, they have fleas. They're dogs.'⁷¹
58. Michael Greenfield said to Mr Barr: 'I hope your kids work in the construction industry then they will come running to us.' Mr Barr's evidence is that he took this comment as a personal threat that Michael Greenfield would harm his children if they worked in the construction industry and that this threat was meant to intimidate him.⁷²
59. Darren Greenfield then walked past Mr Barr and Mr O'Connor and said: 'I have a can of PAL in the boot of the car, they can eat it for breakfast.'⁷³ PAL is a well-known brand of dog food.

⁶⁹ Matthew Barr, witness statement, para 74.

⁷⁰ Matthew Barr, witness statement, para 77.

⁷¹ Matthew Barr, witness statement, para 78.

⁷² Matthew Barr, witness statement, para 79.

⁷³ Matthew Barr, witness statement, para 81.

60. Mr O'Connor, Mr Blanchard and Mr Barr subsequently proceeded to cross the road to the site office next to the site entrance. As they were crossing, Mr Collier said through the megaphone: 'There goes the fuckin grubs... They're leaving cos the police are gone. Don't let a car hit ya!'⁷⁴ Mr Barr's evidence is that there was still a significant number of workers present at this time.⁷⁵

61. Mr Barr stated:⁷⁶

I felt that the abuse that O'Connor and I received from the Union Officials, especially COLLIER and M GREENFIELD, whilst at the meeting and at the Site Entrance was targeted at us to intimidate us as representatives of [Fair Work Building and Construction] and to stop us from doing our job effectively. I did not appreciate having personal threats made to me and have been concerned about this since this day. I believe that a Commonwealth Official such as myself should be able to carry out their role without being subject of [sic] constant and aggressive abuse.

Events at the Barangaroo site in Sydney: Monday 28 July 2014

62. On 28 July 2014, at about 5:45am, the following FWB Inspectors attended the construction site: Mr Barr, Mr O'Connor, Ms Tadros, Mr Pascoe, Mr Trent Roll and Mr David Shao. When they arrived, Mr Collier, Michael Greenfield and Mr Auimatagi were standing at the site entrance. There were also about 50 workers in the vicinity.⁷⁷

⁷⁴ Matthew Barr, witness statement, para 85.

⁷⁵ Matthew Barr, 2/9/14, T:18.46-47.

⁷⁶ Matthew Barr, witness statement, para 88.

⁷⁷ Matthew Barr, witness statement, paras 92 and 93.

63. As Mr Pascoe walked towards Mr Barr, Mr Collier took a swig of water from a bottle and spat it in the direction of Mr Pascoe's feet.⁷⁸
64. As Ms Tadros walked past the site entrance, Mr Collier said 'fucking slut.'⁷⁹ Michael Greenfield called Ms Tadros and Mr Pascoe 'fucking dogs' and asked Mr Pascoe if he had brought his wife to protect him.⁸⁰
65. Ms Tadros's evidence is that: 'I felt quite intimidated by the verbal abuse that I had received at that point.'⁸¹
66. Mr Barr gave evidence that Michael Greenfield said to Mr Blanchard: 'I hope you brought your knee pads, you're going to be sucking off those dogs all day.'⁸²
67. Mr Barr noticed that Mr Parker, Darren Greenfield, Mr Auimatagi and Mr Kera were also at the site entrance.⁸³
68. Mr Collier then walked past Mr O'Connor, Mr Blanchard and Mr Barr to a car and took out a megaphone. He used this to blast a

⁷⁸ Matthew Barr, witness statement, para 94.

⁷⁹ Veronica Tadros, witness statement, para 54.

⁸⁰ Adam Pascoe, witness statement, para 26.

⁸¹ Veronica Tadros, 2/9/14, T:34.31.

⁸² Matthew Barr, witness statement, para 96.

⁸³ Matthew Barr, witness statement, para 98.

wailer sound centimetres away from Mr O'Connor's and Mr Barr's ears. Mr Collier walked away laughing.⁸⁴

69. By about 6.30am, around 150 workers had gathered across the road where the meeting was held the previous Friday. Mr Parker addressed them.⁸⁵

70. Mr Collier said to Mr O'Connor: 'You think all I got is your phone number?' Mr O'Connor turned around to look at Mr Collier who was standing about three metres away. Mr Collier said: 'What the fuck are you looking at?' Mr Collier then spat at Mr Barr's feet and said in a menacing voice: 'Lick it up you fuckin' dog.'⁸⁶

71. Mr Barr stated:

When Collier said this it was said with an aggressive tone. I felt like COLLIER was making personal threats against O'Connor and I and that this behaviour was assault. I sensed hatred in Collier's voice and actions of [sic] O'Connor and me. I immediately became concerned about the safety of O'Connor and myself and looked around to see who was standing nearby.⁸⁷

72. Michael Greenfield came within five metres of Mr Barr and Mr O'Connor and said: 'Why don't you go up the front you fuckin'

⁸⁴ Matthew Barr, witness statement, para 101.

⁸⁵ Matthew Barr, witness statement, paras 105 and 106.

⁸⁶ Matthew Barr, witness statement, para 113 and 115.

⁸⁷ Matthew Barr, witness statement, para 116.

dog.’⁸⁸ Mr Barr observed there to be about 300 workers present at this time.⁸⁹

73. Mr Parker asked the workers to vote with their hands if they wanted the union to come on site for a stop work meeting. Mr Barr observed about fifty hands rise, including that of Michael Greenfield.⁹⁰

74. Soon after, the meeting ended and the police arrived.⁹¹

C – CONCLUSIONS

75. The relevant legislative provisions are set out below. In applying them to the facts, as submitted by Mr Parker, it is necessary to bear in mind the seriousness of the allegations and the possible consequences of any findings.⁹²

Adelaide: Section 149 of the *Criminal Code* (Cth)

76. Section 149.1(1) of the *Criminal Code* (Cth) provides:

(1) A person is guilty of an offence if:

(a) the person knows that another person is a public official; and

⁸⁸ Matthew Barr, witness statement, para 118.

⁸⁹ Matthew Barr, witness statement, para 120.

⁹⁰ Matthew Barr, witness statement, paras 121 and 122.

⁹¹ Matthew Barr, witness statement, paras 123 and 124.

⁹² Submissions on behalf of Brian Parker, 21/11/14, para 6: see *Briginshaw v Briginshaw* (1938) 60 CLR 336.

- (a) the first-mentioned person obstructs, hinders, intimidates or resists the official in the performance of the official's functions; and
- (b) the official is a Commonwealth public official; and
- (c) the functions are functions as a Commonwealth public official.

Penalty: Imprisonment for 2 years.

77. As to the first of those elements:

- (a) a person is considered to have knowledge of a circumstance if that person is aware that it exists or will exist in the ordinary course of events;⁹³
- (b) it is not necessary to prove that the person knew that the other person was a Commonwealth public official, or that the functions were Commonwealth public functions;⁹⁴ and
- (c) it is immaterial whether the person was aware that the official was performing the official's functions.⁹⁵

78. Mr Flynn is a Commonwealth public official, and was performing his function as such during the course of his attendance at the Ibis Hotel site on 1 May 2014.

79. Mr Perkovic knew this to be so. Mr Flynn and Ms Peters both had their identification cards visible.⁹⁶ Mr Flynn already knew

⁹³ *Criminal Code* (Cth), s5.3

⁹⁴ *Criminal Code* (Cth), s149.1(2)

⁹⁵ *Criminal Code* (Cth), s149.1(3)

⁹⁶ Seamus Flynn, witness statement, para 24.

Mr McDermott and Mr Pitt.⁹⁷ It is obvious from Mr Perkovic's behaviour that he knew what role Mr Flynn was performing on that day and that Mr Flynn was an FWB Inspector.

80. When Mr Flynn attempted to document the incidents he was investigating by taking photographs, Mr Perkovic acted towards Mr Flynn in the manner detailed above. He was seeking to intimidate and bully Mr Flynn, in a particularly aggressive manner, in order to frighten him away from the task at hand.
81. Mr Perkovic therefore may have committed an offence under s 149.1 of the *Criminal Code Act* 1995 (Cth).
82. It is recommended that this Interim Report be referred to the Commonwealth Director of Public Prosecutions in order that consideration may be given to the prosecution of Mr Perkovic in respect of an offence against s 149.1 of the *Criminal Code* (Cth).

Adelaide: assault

83. Intentionally or recklessly threatening force so as to cause another person to fear imminent and unlawful physical violence constitutes an assault. It is an offence punishable under the laws of South Australia in four ways.
84. First, under s 20(1)(a) of the *Criminal Law Consolidation Act* 1935 (SA), an assault will be occasioned when a person

⁹⁷ Seamus Flynn, witness statement, para 46.

intentionally applies force (directly or indirectly) to another person (the victim) without the consent of the victim.

85. Secondly, s 20(1)(b) of the same Act makes it unlawful for a person intentionally to make physical contact (directly or indirectly) with the victim without the victim's consent, knowing that the victim might reasonably object to the contact in the circumstances (whether or not the victim was at the time aware of the contact).
86. It is well established at common law that any touching of another person, however slight, may amount to a battery.⁹⁸
87. Mr Flynn gave evidence that during the altercation in the hallway, he could feel Mr Perkovic exerting his body weight against his chest and stomach and that Mr Perkovic used his stomach to push Mr Flynn backwards approximately six inches. He gave evidence that Mr Perkovic later pushed him with his stomach again so as to cause his satchel to fall from his shoulder. This conduct is sufficient to establish the requisite direct application of physical force for the purposes of an offence under s 20(1).
88. It is clear from the nature of Mr Perkovic's words and actions, as captured on video, that he intended to apply physical force to Mr Flynn. Not only was he deliberately moving towards Mr Flynn in

⁹⁸ *Collins v Wilcock* [1984] 3 All ER 374; *Bouhey v The Queen* (1986) 161 CLR 10, 25.

an intimidating fashion, but he was hurling verbal abuse at him and threatening to take Mr Flynn ‘to school.’

89. Obviously Mr Flynn was not consenting to Mr Perkovic’s conduct. Mr Flynn said ‘Don’t touch me’ and ‘Get away from me, get away from me’.
90. Mr Perkovic may have committed an offence under s 20(1) of the *Criminal Law Consolidation Act 1935* (SA).
91. It is recommended that this Interim Report be referred to the South Australian Director of Public Prosecutions in order that consideration may be given to the prosecution of Mr Perkovic in respect of an offence against s 20(1) of the *Criminal Law Consolidation Act 1935* (SA).
92. Thirdly, s 20(1)(e) of the *Criminal Law Consolidation Act 1935* (SA) makes it unlawful for a person to accost or impede another in a threatening manner without consent.
93. It is plain from the description of Mr Perkovic’s conduct set out in an earlier part of these submissions that he may have committed this offence.
94. It is recommended that this Interim Report be referred to the South Australian Director of Public Prosecutions in order that consideration may be given to the prosecution of Mr Perkovic in respect of an offence against s 20(1)(e) of the *Criminal Law Consolidation Act 1935* (SA).

95. Fourthly, assault will be established at common law where the following elements are satisfied beyond a reasonable doubt:
- (a) the accused commits an act that causes another person to apprehend immediate and unlawful personal violence;⁹⁹
 - (b) he or she does so without the other person's consent;¹⁰⁰ and
 - (c) his or her conduct was either intentional or reckless.¹⁰¹
96. The offence of assault does not require actual violence. It is sufficient that the victim reasonably believes that they he or she is at risk of immediate unlawful violence.¹⁰² The victim's fear must be of immediate violence, rather than violence that may be committed at some time in the future.¹⁰³
97. The requisite apprehension may exist even if the accused does not intend to carry out the threat.¹⁰⁴ It is also not necessary that

⁹⁹ *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439, 444; *Macpherson v Beath* (1975) 12 SASR 174, 177; *McIntyre v R* [2009] NSWCCA 305, [40].

¹⁰⁰ *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439, 444.

¹⁰¹ *Vallance v R* (1961) 108 CLR 56; *Macpherson v Brown* (1975) 12 SASR 184; *R v Venna* [1976] QB 421.

¹⁰² *Zanker v Vartzokas* (1988) 35 A Crim R 314.

¹⁰³ *R v Knight* (1988) 35 A Crim R 314.

¹⁰⁴ *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98, 114; *R v Mostyn* (2004) 145 A Crim R 304, 316.

the fear of violence into which the accused deliberately puts the victim should be a fear of violence from the accused.¹⁰⁵

98. Again, the description of Mr Perkovic set out earlier indicated that his conduct was both intentional, and undertaken without Mr Flynn's consent. It was behaviour of a kind that led Mr Flynn to reasonably believe that he was at risk of immediate violence.
99. It is recommended that this Interim Report be referred to the South Australian Director of Public Prosecutions in order that consideration may be given to the prosecution of Mr Perkovic in respect of the common law offence of assault.
100. The CFMEU submitted in relation to Mr Perkovic that it was outside the function of the Commission to determine whether Mr Perkovic had committed any offence, to determine whether he should be prosecuted and to make findings concerning any alleged breach of the law.¹⁰⁶ The summary of the evidence and conclusions from it does not do any of these things. Nor do the recommendations that the Interim Report be referred to the South Australian Director of Public Prosecutions in order that consideration may be given to the prosecution of Mr Perkovic for various offences.
101. The CFMEU also submitted that the matter has been reported by an inspector to the South Australian police and that Mr Perkovic

¹⁰⁵ *Macpherson v Beath* (1975) 12 SASR 174, 177.

¹⁰⁶ Submissions on behalf of the CFMEU, 14/11/14, Pt 8.9, para 4.

has not been advised of the outcome of any police investigation. For the sake of considering the submission, let it be assumed that these propositions, which are not in evidence, are correct. The CFMEU submitted that in the light of what it called ‘an apparent police investigation’ it would not be right for the Interim Report to ‘make any findings or express any opinion about this matter’.¹⁰⁷ Since legal proceedings alleging breaches of s 149 of the *Criminal Code* or s 20 of the *Criminal Law Consolidation Act* have not been instituted, there is no risk of a contempt of court in these respects. Again, what appears above makes no findings of criminal guilt. It does no more than summarise what can be seen on the video and what is stated in other evidence, and recommend that the responsible authorities consider whether a prosecution should be brought.

Barangaroo

102. The events described by the FWB Inspectors on the Barangaroo site indicate that the CFMEU officials on site at the time knew that they were inspectors, and were attending the site in the order to perform their official function in the investigation of alleged industrial action.
103. The following conduct by CFMEU officials during the course of the Barangaroo incidents described above is properly characterised as conduct which obstructed, hindered, intimidated

¹⁰⁷ Submissions on behalf of the CFMEU, 14/11/14, Pt 8.9, para 7.

or resisted the performance by the FWB Inspectors in the performance of their functions:

- (a) Mr Collier directed offensive language and abusive comments towards Mr O'Connor and Ms Siciliano on 24 July 2014. Mr O'Connor perceived Mr Collier's conduct as 'an attempt to intimidate or scare us due to the level of aggression he was showing.'¹⁰⁸
- (b) Mr Collier subjected the FWB Inspectors to verbal abuse on 25 July 2014. Mr O'Connor perceived Mr Collier's broadcast of his name and mobile telephone number to a group of approximately 150 to 200 striking workers as an 'intimidation tactic.'¹⁰⁹
- (c) Mr Kera stood very close to Ms Tadros, putting his back approximately five centimetres away from her so as to obstruct her when attempting to take photographs on 25 July 2014.¹¹⁰
- (d) Mr Parker told workers that the FWB Inspectors were trying to intimidate them by showing up on the site on 25 July 2014, and in the process misleading the workers about the important official function the FWB Inspectors were

¹⁰⁸ Jared O'Connor, witness statement, para 28.

¹⁰⁹ Jared O'Connor, 2/09/14, T:29.13-16.

¹¹⁰ Veronica Tadros, witness statement, para 31.

actually performing at the time. A specific submission by Mr Parker to the contrary is examined and rejected below.

- (e) Mr Collier and Mr Michael Greenfield launched a barrage of abusive and derogatory comments to the FWB Inspectors after their arrival on site on 28 July 2014. Ms Tadros felt intimidated by this verbal abuse.¹¹¹ Mr Collier spat water in the direction of Mr Barr's feet and stated: 'Lick it up you fuckin dog'.¹¹² He also spat in the direction of Mr Pascoe's feet.¹¹³ Mr Collier directed comments such as 'fucking slut'¹¹⁴ and 'fucking dogs'¹¹⁵ towards Ms Tadros and Mr Pascoe. Michael Greenfield stated to Mr Blanchard, in the presence of Mr Barr and Mr Pascoe, 'I hope you brought your knee pads, you're going to be sucking off those dogs all day'.¹¹⁶ Mr Collier blasted a wailer sound through a megaphone only centimetres away from Mr O'Connor's and Mr Barr's ears.¹¹⁷ Mr Collier stated to Mr O'Connor: 'What are you looking at, you

¹¹¹ Veronica Tadros, 2/9/14, T:34.30.

¹¹² Matthew Barr, witness statement, para 115.

¹¹³ Adam Pascoe, witness statement, para 23.

¹¹⁴ Veronica Tadros, witness statement, para 54.

¹¹⁵ Adam Pascoe, witness statement, para 23.

¹¹⁶ Matthew Barr, witness statement, para 96.

¹¹⁷ Matthew Barr, witness statement, para 101; Jared O'Connor, witness statement, para 87.

fucking dog, do you think your phone number is all I got'.
Mr O'Connor perceived this as a threat.¹¹⁸

104. All of this behaviour was intimidatory. It was calculated to belittle and scare the FWB Inspectors in the most public of ways, with a view to encouraging them to leave and not return. The CFMEU officials did not want FWB Inspectors witnessing workers engaging in industrial action, or the CFMEU seeking to encourage or support the workers in taking that action.
105. The CFMEU officials named above may have committed offences under s 149.1 of the *Criminal Code*, the terms of which were set out above.
106. It is recommended that this Interim Report be referred to the Commonwealth Director of Public Prosecutions in order that consideration may be given to the prosecution of each of Mr Collier, Mr Kera, Mr Parker and Mr Michael Greenfield in respect of offences under s 149.1 of the *Criminal Code*.
107. Counsel for Mr Parker put two submissions against the conclusion about him stated above.
108. The first concerned the construction of s 149.1(b). Counsel for Mr Parker submitted that the words 'obstructs, hinders, intimidates or resists' are words which 'require an integer of physical interference: as a matter of law, 'misleading' an

¹¹⁸ Jared O'Connor, witness statement, para 96.

audience about the nature of an official's functions is not enough'.¹¹⁹ The submission continued:¹²⁰

Indeed, if merely "telling workers" something – even something "misleading" about FWB Inspectors could amount to a breach of s 149.1, very real issues would arise about the constitutional validity of that provision, having regard to the implied freedom of communication on government and political matters, including the performance of official functions by Commonwealth officials. In the absence of submissions by Counsel Assisting as to the proper construction of s 149.1, enabling issue to be joined, the Royal Commission should not make the finding.

109. The last point is untenable. The position of counsel assisting in chief on the point of construction was clear. And in reply counsel assisting denied Mr Parker's contention. They were correct to do so. To say misleading things to people in relation to whom government officials are seeking to carry out their functions about those functions can obstruct or hinder the performance of the functions.
110. What of the implied freedom of communication on government and political matters? Here, as so often, the appeal to that freedom is the last refuge of the desperate. The appeal is so often made. But it so rarely succeeds. The implied freedom would not protect misleading conduct.
111. The second submission of Mr Parker was that the allegation was not put to him in cross-examination. Hence it was said to be unfair to make the finding against Mr Parker. The submission

¹¹⁹ Submissions on behalf of Brian Parker, 21/11/14, para 44.

¹²⁰ Submissions on behalf of Brian Parker, 21/11/14, para 45.

appealed to the rule in *Browne v Dunn*.¹²¹ That rule applies in litigation, but applies outside that field as well. It is a rule of fairness. In litigation, for example, it requires a party who proposes to advance an allegation adverse to another party or a witness, to put the latter party or witness on notice of the submission in cross-examination. But this need not be done if the latter party or witness is on notice of the allegation in some other way. Here Mr Parker was served with the inspectors' statements. He had the opportunity to prepare a statement in response with a view to counsel assisting tendering it. He did not take advantage of that opportunity, despite being represented by senior and junior counsel and several solicitors. He also had the opportunity to deal with the matter when he entered the witness box, but his counsel did not take it. In short, he knew the matters of fact alleged against him. The rule in *Browne v Dunn* does not call for the possible legal characterisations of conduct to be put to witnesses for their comment.

112. The CFMEU made two submissions about Barangaroo.

113. The first was put thus:¹²²

It should be noted that despite police presence on the site on the first day not one of the inspectors made any complaint to police about any assault or otherwise. The inspectors did not seek police assistance to carry out their duty.

¹²¹ (1893) 6 R. 67.

¹²² Submissions on behalf of the CFMEU, 14/11/14, Pt 8.9, paras 9-10.

The inspectors also made no arrangements for the police to attend on the second day. Again no complaints to police have apparently been made in relation to alleged conduct on that day.

114. Even if it is assumed that these propositions are correct, they do not bear on the question: ‘What actually happened?’ Nor do they bear on the question: ‘Should a recommendation be made that the relevant authorities consider whether or not to initiate a prosecution?’
115. The CFMEU’s second submission was: ‘The course submitted by Counsel Assisting is beyond the power of the Commission.’¹²³ The submission did not say why it was not. If the complaint is that no findings or opinions about criminal guilt should be expressed, they have not been. There is only a summary of the evidence and a recommendation to the relevant authorities to consider whether or not to prosecute.

Adelaide: Section 500 of the *Fair Work Act 2009*

116. The evidence outlined also raises questions regarding whether breaches of s 500 of the *Fair Work Act 2009* (Cth) arise. Section 500 is a civil penalty provision.
117. Section 500 of the *Fair Work Act 2009* (Cth) provides:

A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

¹²³ Submissions on behalf of the CFMEU, 14/11/14, Pt 8.9, para 11.

118. The CFMEU submitted that there were proceedings against the CFMEU, Mr Perkovic and others in the Federal Court in relation to the events at the Ibis Hotel site. The proceedings are under s 500. They are non-criminal proceedings for a penalty. They have been brought by the Director of the Fair Work Building Industry Inspectorate.¹²⁴ The issue is whether s 500 has been breached. The CFMEU submitted that the Interim Report should not contain any findings or any opinion on the matter.¹²⁵ It is understood that mediation has been ordered. What next? Mediating murder charges? However, the CFMEU was correct to submit that it is undesirable to address the question whether s 500 has been breached. At the same time, the summary of the evidence above does not create a substantial risk of injustice in the Federal Court proceedings, because it simply reflects what appears incontrovertibly on the video.

¹²⁴ J Agius SC, 2/9/14, T:29.43-30.5.

¹²⁵ Submissions on behalf of the CFMEU, 14/11/14, Pt 8.9, para 7.

CHAPTER 8.10

THE PENTRIDGE VILLAGE SITE

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A – SUMMARY

1. This chapter concerns the conduct of certain officers of the Victorian Branch of the Construction & General Division of the Construction Forestry Mining and Energy Union (**CFMEU**) and those associated with the CFMEU towards West Homes Pty Ltd (**West Homes**) and Pentridge Village Pty Ltd (**Pentridge Village**) on the Pentridge Village building site (**the Pentridge site**).
2. The officers in question are Mr John Setka (Victorian State Secretary) and Mr Gerard Benstead (organiser). The actions under consideration are those of Mr Setka and Mr Benstead both directly, and also through Mr Sucic and Mr Dadic, two CFMEU delegates appointed by them to work on the Pentridge site.

B – NATURAL JUSTICE

3. The ‘primary submission’ of the CFMEU can be treated as a preliminary point.¹ The submission was summarised by the CFMEU as follows:²

The Royal Commission should find that a denial of natural justice has occurred in circumstances where:

- (a) Mr Leigh Chiavaroli produced a significant amount of material to the Royal Commission which was not made available to the CFMEU;
- (b) the material produced by Mr Leigh Chiavaroli appears to have been directly relevant to a number of key factual matters the subject of the case study;
- (c) there was no reason proffered by Counsel Assisting as to why the material was not provided to the CFMEU;
- (d) as to (c) it was not suggested by Counsel Assisting that the material was confidential, was sensitive in nature, or that it was necessary to withhold the information to protect any person;
- (e) a small selection of the material produced by Mr Leigh Chiavaroli was provided to the CFMEU some two business hours before the resumed hearing;
- (f) the small selection of material that was provided to the CFMEU was probative but was limited mainly to the financial position of the Pentridge Village, joint venture (a matter which is addressed below);
- (g) the CFMEU’s counsel was required to cross-examine Mr Leigh Chiavaroli “in the dark”;
- (h) the difficulty in (g) was exacerbated by the fact that Mr Leigh Chiavaroli adopted a pattern of answering questions by referring to “the evidence” which he had provided to the Royal Commission, when it was clear that no such material was actually the subject of any evidence before the Royal Commission;

¹ Submissions on behalf of the CFMEU, 14/11/14, Pt 8.10, para 77.

² Submissions on behalf of the CFMEU, 14/11/14, Pt 8.10, para 4.

- (i) as a result of (g) and (h), Mr Chiavaroli's evidence could not be fully and properly tested;
- (j) as a result of (a) – (i), the CFMEU was at a serious disadvantage which impeded it and the relevant individuals from receiving a fair hearing.

4. The response of counsel assisting was follows:³

- 6. The CFMEU asked the Commission to issue notices to produce, and the Commission did so. Documents were produced to the Commission and were reviewed by staff assisting the Commission for the purpose of determining whether they were material to a proper assessment of the evidence under consideration, including the evidence of the Chiavarolis. The documents so identified were gathered together, regardless of whether they helped or harmed the CFMEU. The CFMEU was given the documents.
- 7. Some of those documents were helpful to the CFMEU's cause on issues which had been raised, and were used first by Counsel Assisting to form a view that no submission should be made as to the financial effect of the CFMEU's conduct on Pentridge Village (a fact which the CFMEU conveniently ignores when deciding if and to what extent persons assisting the Commission are partisan), and later by the CFMEU (to support submissions about that topic even though the point in question had not been made against it).
- ...
- 10. The "small selection of materials" produced to the CFMEU in Melbourne in response to its request for documentation ran to two full lever arch volumes. A third bundle was provided on the same day in relation to Mr Zaf.
- 11. The submission that no reason has been given as to why other material was not provided to the CFMEU is incorrect. The CFMEU's lawyers were told by persons assisting the Commission about the processes described in paragraph 6 above. The CFMEU has also overlooked the portion of the transcript which records the statement that the documents identified for disclosure to the CFMEU by staff assisting the Commission were

³ Submissions in Reply of Counsel Assisting, 25/11/14, Chapter 8.10: paras 6-8, 10-12.

those which had been determined to be relevant to the terms of reference.^[4]

12. If there was a different version of the facts for this Commission to consider, Mr Setka could have come and given evidence about it. Mr Reardon could have come and given evidence about it. Mr Benstead could have come and given evidence about it. None of them did. Each of them – having remained mute – nevertheless took up the opportunity to undertake a lengthy cross-examination of Mr Chiavaroli through senior counsel, and received from the Commission volumes of documents which they now seek to use to their advantage. The submission by them and the CFMEU that they have been denied natural justice should be rejected.
5. The CFMEU is correct in suggesting that Mr Chiavaroli's technique of answering questions, on occasion, by reference to materials he had provided to the Commission whether or not they were actually in evidence was not helpful. However, taken as a whole, the CFMEU submission is not compelling. The submission does not suggest that documents relevant to the Terms of Reference which might have been favourable to it were deliberately withheld. Some discretion must reside in those assisting the Commission to determine what documents are outside the Terms of Reference, and then to decline to disclose those documents. Counsel assisting is also entitled to decline to pursue issues which may be within the Terms of Reference, but are excessively prone to waste time or which it may otherwise be undesirable to pursue. As the CFMEU pointed out in another context, at one stage it seemed that the causal relationship between the CFMEU's conduct and any loss suffered by the Chiavaroli companies was in play. It is not now in play. The CFMEU is not denied natural justice by not having material going to that question. The CFMEU complaints of time constraints have to be understood in the light of the

⁴ Mr Stoljar SC, 17/9/14, T:12.37.

need to do a great deal of work against what was until quite recently a 31 December 2014 deadline. That imposed pressures on all involved, not just the CFMEU. There has been no showing that on any particular issue the CFMEU was unfairly hampered by what has happened. Hence the CFMEU's submission is rejected. It made other submissions which are dealt with at appropriate points below.

C – OUTLINE OF FINDINGS

6. The substance of counsel assisting's submissions are to be accepted. They lead to the following findings.
 - (a) There was a sad death on the Pentridge site during the life of the project. The circumstances surrounding and the causes of that fatality are not within the Terms of Reference.
 - (b) The CFMEU's response to the death was strong and swift. In many respects its reaction was both understandable and to be expected. It wanted to introduce a higher level of safety standards on site, for the benefit of workers on the site.
 - (c) However the CFMEU went too far, in that it used threats and coercion in order to ensure that its own preferred candidate, Mr Sucic, was retained to oversee matters of safety.
 - (d) In addition, and regrettably, the CFMEU took an advantage of the opportunity afforded to it to have some presence on site. It sought, through persons strategically placed on the site (Mr Sucic and then Mr Dadic), to take control of the project and all

of the workers on the site. It did so through the use of illegitimate pressure exerted by these individuals on builders and subcontractors to enter into the CFMEU form of enterprise bargaining agreement (**EBA**), and by seeking to exclude from the site workers who were not CFMEU members.

- (e) This conduct may have contravened ss 346 and 355 of the *Fair Work Act* 2009 (Cth).
- (f) An investigation into the Pentridge site has also revealed a number of discrete instances where Mr Setka engaged in grossly offensive and aggressive conduct. It indicates a type of behaviour that one would not expect to see from any trade union leader. The behaviour, and the underlying attitudes it reveals, fall well short of the professional standards expected of a State Secretary of the CFMEU.

D – RELEVANT FACTS

West Homes and Pentridge Village

7. West Homes, a family owned building and construction company, was incorporated in 1972 by Mr Peter Chiavaroli.⁵ West Homes holds a full building licence. Mr Leigh Chiavaroli, Peter Chiavaroli's son, was a director of West Home for various periods from 1994 to 2011.⁶

⁵ Leigh Chiavaroli, witness statement, 8/7/14, para 3, annexure 1, pp 55-62.

⁶ Leigh Chiavaroli, witness statement, 8/7/14, annexure 1, pp 55-62.

8. Pentridge Village was incorporated by Leigh and Peter Chiavaroli and their then joint venture parties in 1999.⁷ Pentridge Village was incorporated as a joint venture vehicle to purchase and develop the Pentridge site.⁸ The Pentridge site was originally an 88 acre site located at Urquhart Street in Coburg, Victoria.⁹ The site was purchased by Pentridge Village on 5 June 1999.¹⁰
9. The development proposed on the Pentridge Village site was an \$800 million multi-staged development¹¹ that was to be developed under the Pentridge Village master plan.¹²
10. Pentridge Village engaged West Homes to complete all building and construction on the Pentridge Village site.¹³ Construction and building commenced on the Pentridge site in November 2000.¹⁴
11. Prior to October 2010, West Homes did not have an enterprise bargaining agreement with its employees. West Homes predominantly engaged subcontractors and employees on individual contracts.¹⁵

⁷ Leigh Chiavaroli, witness statement, 8/7/14, para 8.

⁸ Leigh Chiavaroli, witness statement, 8/7/14, para 10.

⁹ Leigh Chiavaroli, witness statement, 8/7/14, para 10.

¹⁰ Leigh Chiavaroli, witness statement, 8/7/14, para 12.

¹¹ Leigh Chiavaroli, witness statement, 8/7/14, para 14.

¹² Leigh Chiavaroli, witness statement, 8/7/14, annexure 3, pp 77-81.

¹³ Leigh Chiavaroli, witness statement, 8/7/14, para 16.

¹⁴ Leigh Chiavaroli, witness statement, 8/7/14, para 18.

¹⁵ Leigh Chiavaroli, 17/9/14, T:61.4-7; Leigh Chiavaroli, witness statement, 8/7/14, para 47.

Pentridge Village was also not party to any enterprise bargaining agreement.¹⁶

12. At the peak of the development, there were up to 500 subcontractors engaged by West Homes to complete stages of the development.¹⁷
13. Mr Des Caple of Des Caple & Associates had been engaged in October 2000 as an occupational health and safety consultant for the Pentridge site.¹⁸ The frequency of Mr Caple's audits varied depending on the stage of the development. In addition to Mr Caple, Mr Martin Zerowsky was employed as a full time occupational health and safety officer at the Pentridge site.¹⁹

Initial dealings with the CFMEU

14. For the first nine years of the development and prior to 2009, the CFMEU was largely unconcerned with the Pentridge site.
15. In January 2009, Mr Gerard Benstead, an organiser with the Construction and General Division of the Victorian Branch of the CFMEU arrived at the Pentridge site and asked to enter the site. Leigh Chiavaroli met Mr Benstead in his site office.²⁰

¹⁶ Leigh Chiavaroli, witness statement, 8/7/14, para 47.

¹⁷ Leigh Chiavaroli, witness statement, 8/7/14, para 21; Leigh Chiavaroli, 8/7/14, T:7:24-25.

¹⁸ Leigh Chiavaroli, witness statement, 8/7/14, Annexure 9, p 180.

¹⁹ Leigh Chiavaroli, witness statement, 8/7/14, para 51.

²⁰ Leigh Chiavaroli, witness statement, 8/7/14, paras 27-29.

16. Mr Benstead requested that he be allowed to enter the Pentridge site to ‘have a look around’.²¹ Mr Benstead also asked for a copy of the project plan. He wanted to ascertain the commercial stages of the site so that the CFMEU could ‘move onto the site as the project entered the commercial stage of construction’.²²
17. Mr Benstead also discussed with Leigh Chiavaroli his belief that a ‘shop steward, occupational health and safety representative’, was required on site.²³ Leigh Chiavaroli told Mr Benstead that he had engaged Mr Caple for site audits and Mr Zerowsky as an occupational health and safety officer. Mr Benstead replied: ‘I think you need help from the CFMEU to look after the blokes on site’.²⁴
18. By March 2009, Mr Benstead had attended the Pentridge Village site on at least two further occasions seeking to inspect the Pentridge Village site.²⁵ On each occasion Leigh Chiavaroli maintained that the development was a residential development and not a commercial development. Traditionally, the CFMEU does not have coverage in relation to residential or domestic housing sector.
19. On 3 March 2009 Mr Benstead attended the Pentridge Village site again. Mr Benstead gave a copy of the CFMEU’s pattern enterprise

²¹ Leigh Chiavaroli, witness statement, 8/7/14, para 30(a).

²² Leigh Chiavaroli, witness statement, 8/7/14, para 30(b).

²³ Leigh Chiavaroli, witness statement, 8/7/14, para 31.

²⁴ Leigh Chiavaroli, witness statement, 8/7/14, para 31.

²⁵ Leigh Chiavaroli, witness statement, 8/7/14, para 32.

bargaining agreement to Leigh Chiavaroli. He told him to read it and ask Mr Benstead any questions he might have.²⁶

20. On 16 March 2009, Leigh Chiavaroli met Mr Benstead at a café near the development. During this meeting Mr Benstead asked Leigh Chiavaroli if he intended to sign the CFMEU enterprise bargaining agreement.²⁷ Mr Benstead again said to Leigh Chiavaroli ‘I think you need help from the CFMEU to look after the blokes on the site’.²⁸
21. At the meeting on 16 March 2009, Leigh Chiavaroli agreed to allow Mr Benstead to conduct a visual occupational health and safety inspection of the site.²⁹
22. This site inspection occurred that same day, during which Mr Benstead said to Leigh Chiavaroli ‘everything is okay. It’s a pretty clean site.’³⁰
23. Leigh Chiavaroli did not receive any phone calls or visits from the CFMEU for six months after this meeting with Mr Benstead.

A fatal accident on site

24. On 15 October 2009 an accident on the Pentridge site resulted in the death of Thomas Kelly, a concreter working on the site.³¹

²⁶ Leigh Chiavaroli, witness statement, 8/7/14, paras 44-45.

²⁷ Leigh Chiavaroli, witness statement, 8/7/14, para 60.

²⁸ Leigh Chiavaroli, witness statement, 8/7/14, para 60.

²⁹ Leigh Chiavaroli, witness statement, 8/7/14, para 61.

³⁰ Leigh Chiavaroli, witness statement, 8/7/14, para 63.

³¹ Leigh Chiavaroli, witness statement, 8/7/14, para 65.

25. Mr Benstead and Mr Gerry Ayers, the CFMEU's Safety Unit Manager, attended the site on the day of the accident.³² In response to demands from Mr Benstead, Leigh Chiavaroli met Mr Benstead and Mr Ayers that afternoon.
26. During this meeting Mr Benstead criticised the occupational health and safety staff that West Homes had engaged on the Pentridge site. Mr Benstead also said 'It is a prerequisite that because of the accident from here on in, a union representative will have to be put in place at the site'.³³ Mr Benstead told Leigh Chiavaroli that he would be contacting him by phone in the next 24 hours.³⁴
27. The Pentridge Village site was shut down immediately after the accident and remained shut until around January 2010.³⁵ Various site improvement and prohibition notices regarding the Pentridge site were issued by WorkSafe Victoria in the days after the 15 October accident.³⁶
28. Following the accident and on 12 October 2011 the Victorian WorkCover Authority charged West Homes with one count of failing as far as reasonably practicable to provide a safe working environment and one count of failing as far as reasonably practicable to ensure that

³² Leigh Chiavaroli, witness statement, 8/7/14, para 66(b).

³³ Leigh Chiavaroli, witness statement, 8/7/14, para 75.

³⁴ Leigh Chiavaroli, witness statement, 8/7/14, para 75.

³⁵ Leigh Chiavaroli, witness statement, 8/7/14, para 70.

³⁶ Leigh Chiavaroli, witness statement, 8/7/14, para 81.

employees are not exposed to risks to their health and safety under the *Occupational Health and Safety Act 2004 (Vic)*.³⁷

29. On 2 August 2012 the Victorian WorkCover Authority withdrew the charges against West Homes.³⁸
30. A coronial inquiry in relation to the facts and circumstances surrounding Mr Kelly's death is on foot. It is not appropriate to deal further with the cause of and circumstances surrounding Mr Kelly's death.

Meetings with the CFMEU

31. In the week immediately following the accident, Mr Benstead proceeded to call Leigh Chiavaroli two or three times a day.³⁹ Mr Benstead demanded that Leigh Chiavaroli meet officials of the CFMEU, including Mr John Setka (the State Secretary of the CFMEU Construction and General Division – Victoria) and Mr Bill Oliver (the former President).⁴⁰
32. During these conversations Mr Benstead repeatedly threatened that the site would be 'black banned and picketed' if Leigh Chiavaroli did not

³⁷ Leigh Chiavaroli, witness statement, 8/7/14, para 79.

³⁸ Leigh Chiavaroli, witness statement, 8/7/14, annexure 16, pp 193-195.

³⁹ Leigh Chiavaroli, witness statement, 8/7/14, para 82.

⁴⁰ Leigh Chiavaroli, witness statement, 8/7/14, para 82.

meet with and co-operate with the CFMEU and if West Homes did not engage a CFMEU shop steward on the site.⁴¹

33. In the weeks following the accident Mr Shaun Reardon (the Assistant State Secretary of the CFMEU) attended the site. He shook the fence. He yelled obscenities and threatening comments.⁴² He also regularly called Leigh Chiavaroli and demanded he come and talk to him.⁴³
34. The pressure placed on Mr Leigh Chiavaroli to co-operate with the CFMEU caused him to agree to attend a meeting with Mr Setka and Mr Oliver on 22 October 2009. Leigh Chiavaroli's diary records show that the meeting took place at Don Camillo's in West Melbourne.⁴⁴
35. Mr Chiavaroli's account of the meeting is that Mr Setka threatened to put a 'picket line across the front of your job' unless the Chiavarolis agreed to put the CFMEU nominated health and safety representative on the site.⁴⁵
36. Mr Bonnici's evidence is that the meeting was 'not threatening' and that there was 'nothing said' about establishing a picket line.⁴⁶ Mr Bonnici describes the tone taken by Mr Oliver at the meeting as 'authoritative' and 'like a parent dressing down a child'.⁴⁷

⁴¹ Leigh Chiavaroli, witness statement, 8/7/14, paras 83-84.

⁴² Leigh Chiavaroli, 17/9/14, T:27.1-4.

⁴³ Leigh Chiavaroli, witness statement, 8/7/14, para 97(d).

⁴⁴ Leigh Chiavaroli, witness statement, 8/7/14, annexure 17, p 196.

⁴⁵ Leigh Chiavaroli, witness statement, 8/7/14, para 88.

⁴⁶ Michael Bonnici, witness statement, 18/9/14, para 65.

⁴⁷ Michael Bonnici, witness statement, 18/9/14, para 63.

37. Leigh Chiavaroli's version of events should be preferred to that of Mr Bonnici.
38. A further meeting took place at the Pentridge Village site on 26 October 2009.⁴⁸ Mr Setka, Peter Chiavaroli and Leigh Chiavaroli attended. Mr Mario Amenta was also in attendance. He was a director of XL Concrete and someone who had been introduced to the Chiavarolis as a 'facilitator' for discussions with the CFMEU.⁴⁹
39. During this meeting there was a discussion about the employment of an additional occupational health and safety representative on site. The Chiavarolis said that they were in the process of employing an additional occupational health and safety representative, Mr Anthony Rowe.⁵⁰
40. Mr Setka told the Chiavarolis that employing Mr Rowe was not an option. He said that West Homes had to employ Mr Anton Sucic.⁵¹ Mr Setka said that this was 'non-negotiable'.⁵² Mr Sucic was a close personal friend of Mr Setka. Mr Setka was best man at his wedding, Mr Sucic is the godfather to Mr Setka's son. They each share a one eighth financial interest in a fishing boat.⁵³

⁴⁸ Leigh Chiavaroli, witness statement, 8/7/14, para 91.

⁴⁹ Leigh Chiavaroli, witness statement, 8/7/14, paras 38-39.

⁵⁰ Leigh Chiavaroli, 8/7/14, T:13.34-43.

⁵¹ Leigh Chiavaroli, witness statement, 8/7/14, para 94; Peter Chiavaroli, witness statement, 8/7/14, para 32.

⁵² Leigh Chiavaroli, witness statement, 8/7/14, para 94; Peter Chiavaroli, witness statement, 8/7/14, para 32.

⁵³ Anton Sucic, witness statement, 18/9/14, para 9.

41. Mr Bonnici gave a different account of the conversation. According to him, it was Mr Amenta who suggested Mr Sucic as a suitable occupational health and safety representative and Mr Setka agreed that Mr Sucic ‘would be a good fit’.⁵⁴ Mr Bonnici gave evidence that the only requirement Mr Setka described as ‘not negotiable’ was the engagement of a qualified health and safety officer on the site,⁵⁵ and that the ‘conclusion of the discussion was that Mr Sucic was the best person for the job’.⁵⁶
42. Leigh Chiavaroli’s account of this meeting, too, should be preferred.
43. The CFMEU submitted that Mr Leigh Chiavaroli’s accounts of the conversations of 22 and 26 October 2009 were prone to error. He admitted in oral evidence that his statement was wrong in claiming that Mr Sucic attended the 26 October 2009 meeting. The CFMEU pointed to the fact that Mr Peter Chiavaroli’s account omitted any threat of industrial action. It pointed to the fact that Mr Amenta was not called and that no notes or other documentary record of the meetings were in evidence. Finally it pointed to the fact that Mr Bonnici’s account of the conversations was different.⁵⁷
44. For reasons given below, Mr Bonnici’s credit is bad. The other points are reasonable points to make about conversations five years ago, but the crucial contest is between the uncreditworthy Mr Bonnici and Mr Leigh Chiavaroli. On the probabilities, the latter is to be preferred.

⁵⁴ Michael Bonnici, witness statement, 18/9/14, para 75.

⁵⁵ Michael Bonnici, witness statement, 18/9/14, para 74.

⁵⁶ Michael Bonnici, witness statement, 18/9/14, para 77.

⁵⁷ Submissions on behalf of CFMEU, 14/11/14, Pt 8.10, paras 81-91.

45. As a result of this meeting Leigh Chiavaroli felt there was 'no option but to employ' Mr Sucic.⁵⁸ Mr Setka had given the Chiavarolis an ultimatum. They decided to capitulate rather than face problems with the CFMEU.

Meeting Mr Hardy and the employment of Mr Sucic

46. Around the same time, the Chiavarolis were introduced to Mr Ken Hardy of Construction Safety and Training Services Pty Ltd. They understood that Mr Hardy could 'fix' the problems that West Homes was having with the CFMEU, and that he had close ties with the CFMEU and its officials. This was to become evident during the course of their dealings with Mr Hardy on the site.⁵⁹
47. On 27 October 2009 the Chiavarolis met Mr Hardy. They discussed the possibility of Mr Hardy providing occupational health and safety services together with advice in relation to industrial relations.⁶⁰
48. On 17 December 2009 Pentridge Village engaged Mr Hardy's company to provide occupational health and safety services for the Pentridge Village site.⁶¹ Mr Sucic was then employed by Mr Hardy's company from December 2009. Thereafter he began attending the Pentridge Village site.⁶²

⁵⁸ Leigh Chiavaroli, witness statement, 8/7/14, para 99; Peter Chiavaroli, witness statement, 8/7/14, para 36.

⁵⁹ Leigh Chiavaroli, witness statement, 8/7/14, para 113.

⁶⁰ Leigh Chiavaroli, witness statement, 8/7/14, paras 104-106.

⁶¹ Leigh Chiavaroli, witness statement, 8/7/14, annexure 24, pp 204-205.

⁶² Leigh Chiavaroli, witness statement, 8/7/14, para 108.

Mr Sucic

49. Other than an ‘occupational health and safety course at Trades Hall in Melbourne 20 years ago’, Mr Sucic does not have any occupational health and safety qualifications.⁶³ His only occupational health and safety expertise is that which he has gained ‘on the job’.
50. As Mr Sucic accepted, he was, in substance, ‘CFMEU’s man on site’, and he had been placed on site by Mr Setka and Mr Benstead.⁶⁴

Pressures applied by the CFMEU to transition to commercial

51. Each of counsel assisting and counsel for the CFMEU provided submissions in relation to an email dated 18 August 2010 sent by Mr Sucic, and the relevance of that email to the question of whether one particular part of the site, called S8, was ‘domestic’ or ‘commercial’.⁶⁵ It is not necessary to set out those submissions in this Interim Report. Resolution of that discrete sub-issue has become difficult. That is because matters that are now being advanced on the sub-issue travel beyond what was put to various witnesses by both counsel for the CFMEU and counsel assisting. Further, the sub-issue is not determinative of the critical events under consideration, as much of the conduct complained of by Mr Chiavaroli concerned the CFMEU’s coercion of West Homes generally, and the treatment of sub-contractors and their employees who were not CFMEU members. For these reasons no findings based on Mr Sucic’s email will be made

⁶³ Anton Sucic, witness statement, 18/9/14, para 3.

⁶⁴ Anton Sucic, 18/9/14, T:183.43-184.3.

which are adverse to the CFMEU or its officers, or adverse to Mr Sucic's credit.

52. When the Chiavarolis first met Mr Hardy in October 2009, Mr Hardy took steps to have West Homes sign an enterprise bargaining agreement with the CFMEU.⁶⁶ He told Leigh Chiavaroli that the site needed to be transitioned in order to 'keep the site going and to administer good relationships with the CFMEU', that if the CFMEU enterprise agreement was not signed, the CFMEU would 'shut you down',⁶⁷ and that there would be a 'full stoppage of work on site' if West Homes did not sign the enterprise bargaining agreement.⁶⁸
53. Mr Hardy's behaviour suggests that he was, at this time, doing the CFMEU's bidding. He had been introduced to the Chiavarolis as someone with links to union officials, and once he was on site, Mr Hardy was regularly meeting with union officials in his office. Indeed at one point he said to Mr Oliver that he did not need to worry because Mr Hardy was 'here now'.⁶⁹

⁶⁵ Submissions on behalf of CFMEU, 14/11/14, Pt 8.10, paras 59-76; Submissions in Reply of Counsel Assisting, 25/11/14, Chapter 8.10: paras 15-20.

⁶⁶ Leigh Chiavaroli, witness statement, 8/7/14, para 118.

⁶⁷ Leigh Chiavaroli, witness statement, 8/7/14, para 119(b).

⁶⁸ Leigh Chiavaroli, witness statement, 8/7/14, para 124.

⁶⁹ Leigh Chiavaroli, witness statement, 8/7/14, para 113; Peter Chiavaroli, witness statement, 8/7/14, para 49.

54. Faced with this pressure from the CFMEU, communicated through Mr Hardy, Leigh Chiavaroli felt he had to agree. He did not want to take the risk that the CFMEU would launch an attack if he did not agree.⁷⁰
55. The Chiavarolis were under significant pressure to complete parts of the development in time for settlements. The settlements were for an anticipated amount of \$69 million. In these circumstances Leigh Chiavaroli felt that he had no option but to comply with the CFMEU's demands.⁷¹ He did not want to upset the CFMEU and risk attacks on his site that would result in delays to the settlements.
56. After the Chiavarolis had buckled to this pressure and signed the CFMEU form of EBA, they dispensed with the services of Mr Hardy. At this point Mr Sucic ceased to be employed by Mr Hardy's company, and started working directly for Pentridge Village.⁷²

Pressure from Mr Sucic on workers and subcontractors

57. In and after mid 2010 subcontractors working on the Pentridge site were pressured by Mr Sucic to sign the CFMEU's form of EBA and, in the process, re-price their jobs based on the commercial rates in the enterprise bargaining agreements.⁷³
58. In tandem with this, Mr Sucic also sought to exclude workers who had been retained to work on the site if they were not CFMEU members,

⁷⁰ Leigh Chiavaroli, 17/9/14, T:35.33.

⁷¹ Leigh Chiavaroli, witness statement, 8/7/14, paras 129-130.

⁷² Leigh Chiavaroli, witness statement, 8/7/14, para 141.

⁷³ Leigh Chiavaroli, witness statement, 8/7/14, paras 120,133.

and through this and other means, applied significant pressure to workers to join the CFMEU.

59. Leigh Chiavaroli's evidence was that if subcontractors and their workers did not comply with requirements of this kind, they were prevented from accessing the Pentridge Village site. As a consequence they were prevented from completing outstanding works on the Pentridge Village site.⁷⁴ Complaints were made to him by a range of subcontractors, including Peter Brown, Rahimi Mobarak and Albert Moshi.⁷⁵
60. Contemporaneous emails from site staff reveal complaints being made about Mr Sucic behaving in this way. This supports Leigh Chiavaroli's evidence on the subject. The complaints concerned Mr Sucic:
- (a) not allowing non-union workers on the S8 site;⁷⁶
 - (b) putting 'a lot of pressure' on a subcontractor for not having an enterprise agreement with the CFMEU;⁷⁷
 - (c) putting pressure on a subcontractors whose employees were not members of the CFMEU;⁷⁸ and

⁷⁴ Leigh Chiavaroli, witness statement, 8/7/14, para 120.

⁷⁵ Leigh Chiavaroli, 17/9/14, T:27.25-28.17.

⁷⁶ Sucic MFI-4.

⁷⁷ Sucic MFI-5.

⁷⁸ Sucic MFI-5.

(d) handing out forms for joining the union, telling workers they had to sign those forms, and demanding the forms be signed.⁷⁹

61. Mr Sucic gave unsatisfactory evidence on these subjects. When it was suggested to him that he had put pressure on workers to join the union and would not allow non-union members to enter the site, he said he did not need to recruit members because every contractor had a CFMEU enterprise bargaining agreement and their employees were union members.⁸⁰

62. This was inconsistent with what he had said in his statement, to the effect that he was positively encouraging workers to join the union.⁸¹ When this contradiction was put to Mr Sucic, his evidence became nonsensical. He said he encouraged people to become union members even though they were already union members.⁸² At this point in the examination, Mr Sucic was dissembling.

63. At a later point in the examination, Mr Sucic accepted that he was making demands about union membership because he was trying to achieve direct negotiating strength as a union representative looking after union members, and that this was 'common practice'. He said he wanted a workforce that would 'take instruction', and that is what he was seeking to achieve at the Pentridge site. He admitted that was

⁷⁹ Sucic MFI-5.

⁸⁰ Anton Sucic, 18/9/14, T:177.6-9.

⁸¹ Anton Sucic, witness statement, 18/9/14, para 25.

⁸² Anton Sucic, 18/9/14, T:177.11-35.

indicative of the CFMEU's general position.⁸³ This was all about control – control by the CFMEU of all the workers, and thus the site.

64. On the question of applying pressure to subcontractors to sign CFMEU enterprise bargaining agreement, Mr Sucic did ultimately accept that he was insisting on subcontractors signing a commercial enterprise bargaining agreement.⁸⁴ He had no right to do so. The terms of employment between subcontractors and their employees was a matter for those parties. Mr Sucic was not entitled to force himself on their relationship and dictate the terms on which an employer would employ its employees.
65. Mr Sucic prevaricated as to whether his insistence that subcontractors had 'commercial EBAs' meant, in substance, an insistence that they sign the CFMEU's form of EBA. He started his answer with the words 'If that was the case', but then changed course and suggested that something else might have sufficed so long as it was of a commercial nature.⁸⁵ Given that he was CFMEU's man on site, and was positively requiring subcontractors to sign commercial enterprise bargaining agreements, a suggestion by Mr Sucic that he was not pressing for the CFMEU's form of enterprise bargaining agreement is not credible.

Pressure from Mr Dadic on workers and subcontractors

66. In October 2010, Mr Sucic told Leigh and Peter Chiavaroli that he was going to be replaced on site by Mr Ivan Dadic.⁸⁶ Mr Dadic is Mr

⁸³ Anton Sucic, 18/9/14, T:183.1-23.

⁸⁴ Anton Sucic, 18/9/14, T:179.38.

⁸⁵ Anton Sucic, 18/9/14, T:179.41-45.

Setka's brother-in-law.⁸⁷ He is also a long-term and close personal friend of Mr Sucic.⁸⁸ Mr Benstead told Leigh Chiavaroli that he had no choice and that Mr Dadic was coming onto the site.⁸⁹

67. Below there is a finding that Mr Setka may have breached s 355 of the *Fair Work Act* 2009 (Cth) by threatening industrial action unless Mr Dadic was employed. The CFMEU submitted that there is no evidence that Mr Setka had any role in the employment of Mr Dadic.⁹⁰ But Mr Dadic was Mr Setka's brother-in-law. It is unlikely that Mr Benstead would threaten Mr Chiavaroli without Mr Setka's knowledge and approval. A probable inference arises that Mr Benstead's statement to Mr Chiavaroli was made with Mr Setka's knowledge and approval.
68. As a result, Mr Dadic did replace Mr Sucic on site. He behaved in the same manner as his predecessor.
69. In this regard, Mr Dadic refused entry to the Pentridge site to subcontractors that had not signed an enterprise bargaining agreement with the CFMEU, and workers who were not union members.⁹¹ He told subcontractors during their inductions that they were required to be members of the CFMEU and were required to join the CFMEU

⁸⁶ Leigh Chiavaroli, witness statement, 8/7/14, para 143; Peter Chiavaroli witness statement, 8/7/14, para 54.

⁸⁷ Peter Chiavaroli, witness statement, 8/7/14, para 54.

⁸⁸ Anton Sucic, witness statement, 18/9/14, para 37.

⁸⁹ Leigh Chiavaroli, witness statement, 8/7/14, para 143.

⁹⁰ Submissions on behalf of CFMEU, 14/11/14, Pt 8.10, para 80.

⁹¹ Leigh Chiavaroli, witness statement, 8/7/14, para 149.

preferred income protection and superannuation schemes, Incolink and Cbus.⁹²

70. Subcontractors who reported Mr Dadic's conduct to Leigh Chiavaroli included:

- (a) Mr Peter Brown, director of Premium Shower Screens Pty Ltd, who complained that, in March 2011, one of his employees was refused access to the site by Mr Dadic on the grounds that the employee was not a CFMEU member;⁹³
- (b) Mr Talip Onal from Onal Painting Contractors Pty Ltd, who complained that, between 4 and 8 April 2011, he and his subcontractors was refused entry to the Pentridge Village site by Mr Dadic as he did not have a CFMEU enterprise bargaining agreement and Cbus and Incolink membership;⁹⁴
- (c) Mr Rahimi Mobarak of Golden Towers Construction Pty Ltd who complained that he was refused access to the Pentridge Village site by Mr Dadic as he was not a CFMEU member;⁹⁵
- (d) Mr Rahimi Hamidullah, a renderer, who reported that he was refused access by Mr Dadic to the site because he did not have CFMEU, Cbus or Incolink membership.⁹⁶

⁹² Leigh Chiavaroli, witness statement 8/7/14, para 150.

⁹³ Leigh Chiavaroli, witness statement 8/7/14, para 152(a).

⁹⁴ Leigh Chiavaroli, witness statement, 8/7/14, para 152(b).

⁹⁵ Leigh Chiavaroli, witness statement, 8/7/14, para 152(c).

71. Leigh Chiavaroli was told by Mr Mastramico that other subcontractors, including Carpet Call, Austral Kitchens, Super Kitchens and CSR Bradford were refused entry to the site by Mr Dadic because they had not signed an enterprise bargaining agreement with the CFMEU.⁹⁷ Ryden Braggins, a contracting carpet layer, was told that he would have to join the CFMEU, Cbus and Incolink before he could get access to the Pentridge Village site.⁹⁸

72. Mr Benstead was Mr Dadic's CFMEU supervisor. When Leigh Chiavaroli approached Mr Dadic about his conduct, Mr Dadic made clear to him that subcontractors were not allowed to work on the Pentridge Village site without an enterprise agreement. Mr Dadic also made clear that he was acting on instructions from the CFMEU, saying:⁹⁹

I get my instructions from my masters at the CFMEU. If you have a dispute or a problem with that, you need to speak to the area manager, Gerard. It's the policy of the CFMEU.

73. When Leigh Chiavaroli specifically asked Mr Dadic about CSR Bradford not being permitted access to the site as their employees were not members of the CFMEU and because they did not have a CFMEU enterprise bargaining agreement, Mr Dadic responded: 'You know, if these guys come to the site I won't allow them past the gate, I'll just refuse them entry and turn them around'.¹⁰⁰

⁹⁶ Leigh Chiavaroli, witness statement, 8/7/14, para 152(d).

⁹⁷ Leigh Chiavaroli, witness statement, 8/7/14, para 158.

⁹⁸ Ryden Lee Braggins, witness statement, 8/7/14, paras 18-22.

⁹⁹ Leigh Chiavaroli, witness statement, 8/7/14, para 166.

¹⁰⁰ Leigh Chiavaroli, witness statement, 8/7/14, para 169.

74. Mr Dadic also threatened subcontractors on the Pentridge site saying:¹⁰¹

you have to join the CFMEU and if you don't I will be watching you. If your shoelace is undone and you are going up a ladder, then that's it.

75. Peter Chiavaroli interpreted this to mean that Mr Dadic was threatening work stoppages on false workplace safety grounds if people did not sign up to the CFMEU.¹⁰²

76. Several of the subcontractors engaged by West Homes, some of whom had worked with West Homes for many years, ceased work on the Pentridge Village site due to the pressure to join the CFMEU and sign an enterprise bargaining agreement with the CFMEU.

77. Mr Dadic's employment with Pentridge ceased on 22 November 2011 and his position became redundant. Since that time there has been no CFMEU presence on the Pentridge Village site.¹⁰³

78. The CFMEU made some general submissions about the preceding paragraphs and others. It complained about particular subcontractors not being called. It complained about double hearsay. It complained about inability to test Mr Leigh Chiavaroli because of his references to material not in evidence. The last two complaints are exaggerated. So far as double hearsay was involved, it tended to take the form of statements by sub-contractors to their head contractors at the time of

¹⁰¹ Peter Chiavaroli, witness statement, 8/7/14, para 63.

¹⁰² Peter Chiavaroli, witness statement, 8/7/14, para 63.

¹⁰³ Leigh Chiavaroli, witness statement, 8/7/14, para 177.

particular CFMEU conduct: that is, it was part of the *res gestae*, as distinct from being a testimonial narration long after the relevant event. So far as particular subcontractors were not called, it is necessary to bear in mind the difficulties of obtaining assistance from witnesses of that character in view of the strong industrial position of the CFMEU.

Mr Setka's awareness and endorsement of the actions on site

79. Peter Chiavaroli's evidence is that he attended a meeting with Mr Setka and two other CFMEU representatives at the CFMEU's offices in Swanston Street. During that meeting Mr Setka made clear to Peter Chiavaroli that employees and subcontractors working on the Pentridge Village site had to become CFMEU members. Mr Setka also made clear that those who did not wish to join would need to be replaced.¹⁰⁴
80. When Peter Chiavaroli pushed back, Mr Setka retorted 'there's more than one fucking way to skin a cat'.¹⁰⁵ Peter Chiavaroli interpreted this as a threat of industrial action if he did not comply with Mr Setka's demands to use a 'unionised' workforce on the site.
81. Mr Setka also told Peter Chiavaroli that he was to engage Mr Amenta and XL Concrete to provide concrete to the Pentridge Village site.¹⁰⁶
82. Peter Chiavaroli's protested that West Homes already had a concrete supplier, Holcim, with whom they had had a long-running commercial

¹⁰⁴ Peter Chiavaroli, witness statement, 8/7/14, para 65.

¹⁰⁵ Peter Chiavaroli, witness statement, 8/7/14, para 66.

¹⁰⁶ Peter Chiavaroli, witness statement, 8/7/14, para 67.

relationship and a better commercial price, Mr Setka retorted 'It is not a fucking option. Do you want to finish the job?'¹⁰⁷ Peter Chiavaroli took this as a threat by Mr Setka to shut the Pentridge Village site and prevent them from finishing construction of the units if he did not comply with Mr Setka's demands.

83. The CFMEU provided no evidence to contradict Peter Chiavaroli's version of these events, even though Mr Setka and others were given the opportunity to do so.
84. Out of fear that the site would be shut down, Mr Amenta and XL Concrete were engaged to perform multiple concrete pours over multiple days.¹⁰⁸
85. The CFMEU submitted that Mr Leigh Chiavaroli's evidence did not implicate Mr Setka or refer to XL Concrete, Mr Peter Chiavaroli was not tested because he was too ill to attend for cross-examination, there was no written or other complaint about the retainer of XL Concrete, and Mr Amenta did not give evidence.¹⁰⁹ The lack of complaint is not significant. A person who submits to coercive behaviour in the form of threats out of fear that a union may cause that person harm is well advised not to submit complaints lest the union be irritated into carrying out the conduct threatened. Mr Peter Chiavaroli's evidence may be untested, but it is also uncontradicted by Mr Setka. The fact that it is uncontradicted suggests that it could not have been tested successfully. There is no reason not to accept it.

¹⁰⁷ Peter Chiavaroli, witness statement, 8/7/14, para 66.

¹⁰⁸ Leigh Chiavaroli, 17/9/14, T:70.25-30.

¹⁰⁹ Submissions on behalf of CFMEU, 14/11/14, Pt 8.10, paras 92-99.

Mr Benstead flexes his muscle on site

86. In June 2011 Mr Onal told Leigh Chiavaroli that he had lodged a complaint with the then Australian Building and Construction Commission in relation to Mr Dadic refusing to allow Mr Onal access to the Pentridge Village site.¹¹⁰
87. Mr Benstead was not pleased when he found out that Mr Onal had made the complaint and that the Australian Building and Construction Commission was investigating the complaint.
88. On 30 June 2011 Mr Benstead telephoned Leigh Chiavaroli. He told him not to talk to the Australian Building and Construction Commission unless he was forced to do so. Mr Benstead made clear to Leigh Chiavaroli the CFMEU's view that getting the Australian Building and Construction Commission involved would only hold the job up. He said that the CFMEU would take unnecessary industrial action if a contractor complained to the Australian Building and Construction Commission. A recording of the call was played to the Commission. Mr Benstead said, in a very aggressive, tense, energetic, passionate and intimidating way:

And he goes talking to the ABCC ... if Johnny Setka ever hear him about that that would be a friggin - that'll be the end of it, right, if they hear about the fact that you're talking to them and you're running to them all the time, right.¹¹¹

...

¹¹⁰ Leigh Chiavaroli, witness statement, 8/7/14, para 179.

¹¹¹ Leigh Chiavaroli MFI-1, 8/7/14, T:3.29-4.2.

Forget about the law. I can do it another way. Do you want me to do it by the law, what I'll do is I'll push – serve paperwork to the company that gives me the entitlement to put bans on the job in pursuit of an enterprise agreement.¹¹²

...

Everything works on a bit for youse and a bit for us. Forget about the law, right.¹¹³

Mr Setka flexes his muscle on site

89. On 21 September 2011, Leigh Chiavaroli received a call from Mr Setka in relation to Mr Paul Costa of Costa Constructions Pty Ltd. He was a subcontractor engaged to provide concreting services on the Pentridge Village site.

90. Mr Setka said during the call:

I know that you have a concreter on site by the name of Paul Costa. I hate the cunt. I'm going to come down there, rip his head off, shit down his throat, and bury his head next to Ned Kelly's.¹¹⁴

91. Mr Setka then demanded that Leigh Chiavaroli remove Mr Costa from the site. Leigh Chiavaroli was told to 'get rid of him'.¹¹⁵ When pressed for a reason Mr Setka said:

Because ten years ago I had a blue with him and he used to work for Daniel Grollo and I hate Grollo, I can't stand the cunt.¹¹⁶

¹¹² Leigh Chiavaroli MFI-1, 8/7/14, T:4.12-16.

¹¹³ Leigh Chiavaroli MFI-1, 8/7/14, T:5.13-14.

¹¹⁴ Leigh Chiavaroli, witness statement, 8/7/14, para 182.

¹¹⁵ Leigh Chiavaroli, witness statement, 8/7/14, para 182.

¹¹⁶ Leigh Chiavaroli, witness statement, 8/7/14, para 182.

92. Mr Setka also threatened to ‘throw’ Mr Costa off site if Leigh Chiavaroli did not comply with Mr Setka’s demands to have Mr Costa removed from the site.

Mr Setka’s call about Mr Onal

93. On 27 September 2011 Mr Setka left a voicemail message on Leigh Chiavaroli’s mobile telephone in relation to Mr Onal saying:¹¹⁷

Leigh, its John Setka, can you please give me a ring about this fucking dog Turkish fucking painting piece of shit on your job on ...

94. The recording of this voice message was stored on Leigh Chiavaroli’s phone. It was played to the Commission.¹¹⁸ Mr Setka was shouting almost uncontrollably.

Disposing of Mr Bonnici’s evidence

95. Mr Bonnici was not a truthful witness, and his evidence cannot be preferred to that of the Chiavarolis.
96. In his statement Mr Bonnici made a number of very serious allegations against the Chiavarolis. They were false allegations that should never have been made. Many of them had nothing to do with the issues under consideration by the Commission. It was yet another example of the CFMEU’s tendency to engage in slur campaigns against witnesses who were willing to give evidence against them.

¹¹⁷ Leigh Chiavaroli, witness statement, 8/7/14, para 220; Leigh Chiavaroli, MFI-2, 8/7/14.

¹¹⁸ Leigh Chiavaroli, 8/7/14, T:29.35.

97. In this regard, Mr Bonnici gave evidence that he was sacked by the Chiavarolis and escorted off the site. Security camera footage of the parting meeting between these parties was played before the Commission and the witness. It demonstrated that Mr Bonnici's evidence was a lie.¹¹⁹
98. Other examples of the deficiencies in Mr Bonnici's evidence may be given. He alleged the Chiavarolis had mistreated contaminated soil.¹²⁰ Documents showed that statement to be false.¹²¹ He alleged that Leigh Chiavaroli requested Mr Bonnici to bribe an employee of a power company to have certification completed as quickly as possible to obtain certificates of occupancy.¹²² Documents revealed that this could not have been so.¹²³

E – CONCLUSIONS

99. This case study illustrates the way in which officers of the CFMEU, and persons appointed by them to act on the CFMEU's behalf, misuse their powers and position in order to force builders, subcontractors and workers to enter into agreements and join a union against their will.
100. Mr Setka is the most senior official in the Construction and General Division in Victoria. He has behaved towards the Chiavarolis and their companies, both directly and through his delegates Mr Sucic and Mr

¹¹⁹ Bonnici MFI-1.

¹²⁰ Michael Bonnici, witness statement, 18/9/14, para 22.

¹²¹ Bonnici MFI-2, tabs 10, 14.

¹²² Michael Bonnici, witness statement, 18/9/14, para 24.

¹²³ Bonnici MFI-2, tab 16.

Dadic, in an intimidating and unsavoury way. He misused his position and power.

101. It is not lawful to attempt to force people to join a trade union, and to exclude them from a work site if they refuse.¹²⁴ It is not lawful to attempt to force contractors to sign an enterprise bargaining agreement, and to exclude them from a site if they refuse.¹²⁵ It is not permissible to seek to interfere in the contractual relationship between a developer and a subcontractor by applying pressure to the subcontractor to increase price. It is not lawful to make threats in order to encourage a developer to use or not use a particular subcontractor.¹²⁶
102. Yet this is how the CFMEU officials and delegates under consideration – Mr Setka, Mr Benstead, Mr Sucic and Mr Dadic - may have behaved.
103. Even if Mr Setka and others initially held strong and genuine concerns about safety on the site, that does not excuse the behaviour that is now under consideration. That behaviour was not motivated by a concern for safety. It was motivated by a desire to control the work site and the workers on it, increase the membership base of the union, and increase the number of subcontractors bound to the CFMEU's form of enterprise bargaining agreement (the terms of which require subcontractors to make payments to Incolink and Cbus, two companies in which the CFMEU has a substantial financial interest).

¹²⁴ *Fair Work Act 2009* (Cth), s 346.

¹²⁵ *Fair Work Act 2009* (Cth), s 343.

¹²⁶ *Fair Work Act 2009* (Cth), s 355.

104. The demands and threats made in relation to Paul Costa, the Turkish painter, Mr Oral and the Australian Building and Construction Commission had nothing to do with safety. The pressure applied to workers to join the union had nothing to do with safety. It was Mr Sucic's and Mr Dadic's job to ensure that the safety systems on site were adequate. The workers did not need to be union members in order for Mr Sucic and Mr Dadic to do their job.
105. The facts set out above indicate that Mr Setka and Mr Benstead may have breached s 355 of the *Fair Work Act 2009* (Cth). That prohibits a person from organising or taking action against another person with intent to coerce the other person to employ or not employ a person or engage or not engage a particular independent contractor (or threatening to do so). The evidence indicates one or other of them threatened to take industrial action against the Chiavarolis and the companies associated with them unless they employed Mr Dadic, unless Construction Safety and Training Services Pty Ltd employed by Mr Sucic, and unless XL Concrete was retained.
106. The CFMEU appeared to submit that s 355 did not apply to coercion by Mr Setka of Pentridge Village to procure Construction Safety and Training Services Pty Ltd to employ Mr Sucic to employ services which Pentridge Village requested Construction Safety and Training Services Pty Ltd to perform. That submission is rejected. Section 355 is not limited to coercion by Mr Setka of Pentridge Village to employ Mr Sucic.
107. Further, Mr Sucic and Mr Dadic may have breached s 346 of the *Fair Work Act 2009* (Cth). That prohibits a person from taking adverse

action against another person because the person is not a member of an industrial association.

108. Sections 346 and 355 are civil penalty provisions.
109. It is recommended that this Interim Report and any other relevant materials be referred, pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, to the Fair Work Building Inspectorate in order that consideration may be given to whether proceedings should be commenced and carried on against:
 - (a) each of Anton Sucic and Ivan Dadic for taking adverse action against a person because they were not a member of an industrial association contrary to s 346 of the *Fair Work Act* 2009 (Cth);
and
 - (b) each of John Setka and Gerard Benstead for coercion by allocating duties to a particular person contrary to s 355 of the *Fair Work Act* 2009 (Cth).

CHAPTER 8.11

ANDREW ZAF

1. This chapter relates to the conduct of officers of the Victorian Branch of the Construction & General Division of the Construction, Forestry, Mining and Energy Union towards Mr Andrew Zaf.
2. Shortly before this Interim Report was completed, material came to the Commission's attention which requires investigation before any concluded findings can be made. There has been insufficient time to carry out that investigation.
3. For those reasons nothing further should be said at this stage.

CHAPTER 8.12

LIS-CON'S QUEENSLAND LOCKOUT

1. This chapter concerns the alleged conduct of officers of the Queensland Branch of the Construction & General Division of the Construction, Forestry, Mining and Energy Union (the **CFMEU**) towards Lis-Con Concrete Constructions Pty Ltd and Lis-Con Services Pty Ltd. These companies are referred to either as the Lis-Con companies or Lis-Con.
2. The officers in question are Mr Michael Ravbar (Branch Secretary), Mr Peter Close (Branch Assistant Secretary), Mr Greg McLaren (organiser) and Mr Bud Neiland (organiser).
3. Lis-Con alleges, and the CFMEU denies, that the CFMEU engaged in an 'industrial campaign' against Lis-Con so as to have it removed from work sites in Queensland as a result of Lis-Con failing to accede to the CFMEU's demands.
4. Counsel assisting submitted that there was insufficient evidence to support the making of adverse findings against the CFMEU or the officers referred to above.¹

¹ Submissions of Counsel Assisting, 31/10/14, para 4.

5. Not surprisingly, the CFMEU in this instance agreed with counsel assisting.²
6. However, counsel for Mr O'Neill and the Lis-Con companies took issue with this unwonted consensus – very strongly.³
7. For various reasons there is some force in her submissions. The main reason concerns the Cbus scandal. Although Mr Fitzpatrick was the witness who first gave direct evidence about it, counsel for Mr O'Neill and the Lis-Con companies pursued the Cbus scandal strongly. That is because her clients were the victims of the Cbus-CFMEU misbehaviour. The fact that the CFMEU was prepared to go to those lengths is a sign of a strong motivation. That motivation could well spring out of a 'war'.
8. The position should be reviewed when the examination of the Cbus scandal – in which there are frequently new developments – is complete. The origins of the Cbus scandal may cast light on the important question whether there was such a thing as 'Lis-Con's Queensland lockout'. But no findings will be made at this stage.

² Submissions on behalf of the CFMEU, 14/11/14, Pt 8.12, para 3.

³ O'Neill/Lis-Con submissions, Chapters 8.3, 8.12, 14/11/14, paras 53-63.

PART 9: HEALTH SERVICES UNION

CHAPTER 9

RIGHT OF ENTRY PERMIT TESTS

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A – INTRODUCTION

1. This chapter of the Interim Report deals with events in and concerning the HSU Victorian No 1 Branch, now known as the Health Workers' Union, in 2013 (**No 1 Branch**).
2. Ms Diana Asmar has since 21 December 2012 been the Secretary of the No 1 Branch. The Commission has heard evidence raising a number of concerns relating to Ms Asmar's discharge of her duties as Secretary. It includes allegations of autocratic hiring and firing of staff, the appointment to paid positions of Ms Asmar's friends and acquaintances, bullying, attempting to undermine the outcome of the democratic elections, and serious lack of proper practices. These allegations will not be analysed in this Interim Report.
3. The Interim Report will, however, deal with a discrete but most serious issue. It relates to whether Ms Asmar directed and acquiesced in the General Manager of the No 1 Branch, Ms Kimberley Kitching, and a then industrial officer, Ms Pik ki (Peggy) Lee, sitting online right of entry tests purportedly carried out by other organisers, thereby falsely

and deceitfully obtaining right of entry permits for a number of organisers.

4. Ms Kitching sat an online right of entry test for Ms Asmar on 25 January 2013 and for a number of other organisers on 15 February 2013. Ms Lee sat the online test for Mr Darryn Rowe on 20 March 2013 and for Mr David Eden on 26 March 2013. All this occurred with the knowledge and at the direction of Ms Asmar. The reasons for these findings are stated below. They are based on the submissions of counsel assisting, subject to challenges from counsel for Ms Asmar, Ms Kitching and other officials.

B – RIGHT OF ENTRY TESTING

5. In order to enter workplaces, union officials must have a right of entry permit issued by the Fair Work Commission.¹
6. Each application for a right of entry permit contains a declaration which provides, among other things, that the proposed permit holder has received the appropriate training.² The declaration must be signed by a member of the Branch Committee of Management. The declaration specifically states that the proposed permit holder has:³

(a) ... received appropriate training about the rights and responsibilities of a permit holder, namely:
The ACTU Federal Right of entry online training course completed on [insert date].

¹ *Fair Work Act 2009* (Cth), ss 498 and 512.

² *Fair Work Commission Rules 2013* (Cth), r 51(1).

³ McCubbin MFI-1, 25/8/14, pp 1782-1784.

7. The usual practice was that Ms Asmar signed these forms and indeed, she signed all of the forms for the applicants set out in paragraph 54 below and for Mr Rowe and Mr Eden.⁴
8. In order to show that the online training has been completed, proposed permit holders must complete an online test. If they pass this test, a certificate of completion is generated.

C – CRITICAL FACTUAL DISPUTES

9. There are three hotly contested factual disputes. Did Ms Kitching sit the test for Ms Asmar on 25 January 2013 and for a number of other organisers on 15 February 2013? Did Ms Lee sit the online test for Mr Rowe on 20 March 2013 and Mr Eden on 26 March 2013? If this conduct occurred, did it occur with the knowledge and at the direction of Ms Asmar, and in the case of Ms Lee, at the direction of Ms Kitching also?
10. It is convenient to deal with the second question first, because an assessment of that matter bears upon the answer to the first question.

Did Ms Lee sit online tests for Mr Rowe and Mr Eden?

11. The relevant witnesses in relation to this issue were Ms Lee, Mr Rowe and Mr Eden. Ms Lee's evidence was that she sat the test for Mr Rowe on 20 March 2013 and for Mr Eden on 26 March 2013 at the direction of Ms Asmar and Ms Kitching. Mr Rowe and Mr Eden denied this and said they sat their own test.

⁴ McCubbin MFI-1, 25/8/14, pp 34, 123, 634, 1149, 1411, 1599, 2083.

Did Ms Lee sit online tests for Mr Rowe and Mr Eden? – evidence of Pik Ki (Peggy) Lee

12. From January 2013 Ms Lee continued in her role as Industrial Assistant.⁵ On 13 February 2013 Ms Lee went on holiday to Hong Kong.⁶ Ms Lee returned to Australia on 6 March 2013 and appears to have returned to work shortly thereafter.
13. Ms Lee testified that after returning from leave she was handed a bundle of permits and asked to deal with them. She said that she took the bundle of applications, certificates and test results into Ms Kitching's office and discussed the issue with Ms Kitching.⁷
14. Ms Lee testified that Ms Kitching told her that she had completed the right of entry tests for various organisers. Ms Lee recounted that Ms Kitching became excited about the fact that she had achieved a perfect score (100%) in some of the tests.⁸
15. It was clear to Ms Lee that Ms Kitching was talking about having completed the right of entry tests for the organisers whose forms were in the bundle of documents that had been handed to Ms Lee and which

⁵ Peggy Lee, witness statement, 25/8/14, para 14. A copy of Ms Lee's statement of evidence is contained within McCubbin MFI-1, p 100. For ease of reference references to the six volume McCubbin MFI-1 will be given by reference to the number of the folder followed by the relevant page. Thus the statement of Peggy Lee is at 1/100.

⁶ Peggy Lee, witness statement, 25/8/14, para 38; 1/106.

⁷ Peggy Lee, witness statement, McCubbin MFI-1, 25/8/14, para 44; 1/107.

⁸ Peggy Lee, witness statement, 25/8/14, para 45.

she had taken into Ms Kitching's office. These included Mr Sherriff, Mr Katsis, Mr McCubbin, Ms Govan and Mr Trajcevksi-Uzunov.⁹

16. On 15 March 2013 Ms Lee sent an email to Ms Govan, Mr Trajcevski, Mr Sherriff, Mr Atkinson and Mr Mitchell. She copied in Ms Kitching and Ms Asmar. The email advised them that their right of entry permit applications had been lodged with the Fair Work Commission.¹⁰
17. Ms Lee gave evidence that around this time, Ms Asmar told the organisers to forward the emails they had received from the ACTU containing their course access passwords to Ms Kitching.¹¹ Ms Lee said that as far as she knew, one could only access an organiser's online test and coursework if one had that organiser's password.¹²
18. Ms Lee realised that Mr David Eden and Mr Darryn Rowe had not completed their right of entry tests. This was in part because they were country organisers and were not always in the city office. Ms Lee raised the issue with Ms Kitching. At some stage while Mr Eden and Mr Rowe were in the branch office Ms Kitching asked them to sign a F42 Application for Permit forms although they were not dated at that time. Ms Lee said that she asked them to sign these forms before they had done the test so that she could have signed forms ready to process once their tests had been done.¹³

⁹ Peggy Lee, witness statement, McCubbin MFI-1, 25/8/14, paras 44-46, 50; 1/107-108.

¹⁰ Peggy Lee, witness statement, McCubbin MFI-1, 25/8/14, 1/118.

¹¹ Peggy Lee, witness statement, 25/8/14, para 29.

¹² Peggy Lee, witness statement, 25/8/14, para 30.

¹³ Peggy Lee, witness statement, 25/8/14, paras 52-54; 1/109.

19. Ms Lee's evidence was that at about this time Ms Asmar and Ms Kitching asked her to sit the tests for Mr Eden and Mr Rowe.¹⁴ Ms Lee resisted at first because she regarded it as wrong for her to do tests for other people. On 18 or 19 March 2013 Ms Lee seems to have accessed Mr Rowe's course details to check whether he had done his test and confirmed that he had not. Ms Lee testified:¹⁵

This was a time of significant stress for me because Diana had been angry that the tests had not been done and Kimberly had been constantly asking me about them.

20. Ms Lee further testified that she was working at the HSU on a sponsored visa and felt under immense pressure to keep her job. Ms Lee testified:¹⁶

Because of how angry Diana had been and the pressure I felt from Kimberly, I felt that if I did not complete the ROE tests for Darryn Rowe and David Eden that I might be fired and my visa would immediately be at risk.

21. Ms Lee testified that although she knew it was wrong and although she found it stressful and distressing she decided that she would complete the right of entry tests for both Mr Rowe and Mr Eden.¹⁷
22. On 18 March 2013 at 2.14pm, Mr Rowe forwarded his Australian Council of Trade Unions (ACTU) enrolment letter which included his login and password to Ms Lee.¹⁸

¹⁴ Peggy Lee, 25/8/14, T:478.30-34; Peggy Lee, 16/9/14, T:995.22-26, 997.7-.21

¹⁵ Peggy Lee, witness statement, 25/8/14, para 60; 1/110.

¹⁶ Peggy Lee, witness statement, 25/8/14, para 62; 1/111.

¹⁷ Peggy Lee, witness statement, 25/8/14, para 63; 1/111.

¹⁸ McCubbin MFI-1, 25/8/14, 1/137; 1/22.

23. On 20 March 2013, according to records created by the ACTU, Mr Rowe's online test was commenced at 9.07pm (AEST). Ms Lee's evidence is that the IP address recorded on the ACTU record was that of her home computer. Ms Lee said that she completed the test from her home address on the evening of 20 March 2013.¹⁹ On 20 March 2013 at 10.34pm a 'Certificate of 'Completion' for Mr Rowe was sent via email from the ACTU.²⁰
24. As noted above Ms Lee had already caused Mr Rowe to sign a Form F42 – Application for an Entry Permit in relation to Mr Rowe.
25. On the morning of 21 March 2013 Ms Lee collated the necessary forms and documents and asked Ms Asmar to sign the Form F42 application. Ms Asmar did so, dating it 21 March 2013.²¹
26. On 21 March 2013 at 9.21am Ms Lee sent this Form F42 by email to the Fair Work Commission.²² On the same day the Fair Work Commission received Mr Rowe's signed and completed Form F42 application.²³
27. On 26 March 2013 Ms Lee deposes that she sat the online test for Mr Eden, commencing at 8.51am (AEST).²⁴ On 26 March 2013 at

¹⁹ Peggy Lee, witness statement, 25/8/14, para 65-66; 1/111.

²⁰ McCubbin MFI-1, 25/8/14, 1/154.

²¹ Peggy Lee, witness statement, 25/8/14, 1/34.

²² Peggy Lee, witness statement, 25/8/14, para 69; 1/129.

²³ McCubbin MFI-1, 25/8/14, 3/1001.

²⁴ Peggy Lee, witness statement, 25/8/14, para 76; McCubbin MFI-1, 25/8/14, 1/113.

10.16am (AEDT) a 'Certificate of 'Completion' for Mr Eden was sent via email from ACTU.²⁵

28. Again, Mr Eden had previously signed the form F42. Ms Lee printed out Mr Eden's certificate of completion and wrote in the date '26/3/2013' above his signature.²⁶ On 26 March 2013 Ms Lee also arranged for Ms Asmar to sign and date her part of Mr Eden's application.²⁷

29. Later that morning, at 10.39am (AEDT) on 26 March 2013, Ms Lee sent an email to the Fair Work Commission attaching the form F42 and the signed declaration by both Ms Asmar and Mr Eden.²⁸ On the same day the Fair Work Commission received Mr Eden's signed and completed Form F42 application.²⁹

Did Ms Lee sit online tests for Mr Rowe and Mr Eden? – evidence of David Eden

30. As noted above, Ms Lee deposed that she sat the online test for Mr Eden on 26 March 2013, in the No 1 Branch office in Melbourne. Mr

²⁵ McCubbin MFI-1, 25/8/14, 1/419; Peggy Lee, 25/8/14, T:483.39-4.

²⁶ Peggy Lee, witness statement, 25/8/14, para 79.

²⁷ Peggy Lee, witness statement, 25/8/14, para 79; 1/113; 25/8/14 T:484.45-46;484.1-5.

²⁸ Peggy Lee, witness statement, 25/8/14, McCubbin MFI-1, 25/8/14, 1/132; McCubbin, MFI-1, 25/8/14, 1/416-417.

²⁹ McCubbin MFI-1, 25/8/14, 3/1001.

Eden gave evidence that this was not true.³⁰ He clearly remembered sitting the test himself.³¹

31. The first difficulty in accepting Mr Eden's evidence is that he has propounded numerous versions of events at different times. On 12 September 2013 Mr Eden made a statutory declaration which stated, among other things, that he completed the ACTU Fair Work Right of Entry Online Training Course on 26 March 2013.³²

32. In his oral evidence, Mr Eden retreated from this statement:

Q. You knew that this stat dec was false when you signed it, that's right isn't it?

A. No, that's not correct. I thought it was correct at the time. My recollection wasn't correct.

Q. What do you mean by that, Mr Eden? You thought it was correct?

A. That's right. I thought it was correct when I signed it but I don't believe that – it may well have been 26 March, it may not have been. It was a long time ago.³³

33. As appears from this evidence Mr Eden was apparently sure on 12 September 2013 that he had sat the test on 26 March 2013, but had ceased to be sure of that fact at some later point.

34. However he was still sure on 26 November 2013. On that date the solicitors for the No 1 Branch, Holding Redlich, sent a detailed letter to

³⁰ David Eden, 19/9/14, T:1011.19-20.

³¹ David Eden, witness statement, 19/9/14, para 20.

³² McCubbin MFI-1, 25/8/14, 2/585.

³³ David Eden, 19/9/14, T:1005.21-30.

the Fair Work Commission addressing various allegations that had been raised concerning the obtaining of right of entry permits.³⁴ This letter included the following concerning the completion of the test by Mr Eden:

In relation to Mr Eden, the ACTU record shows that Mr Eden undertook his ROE test on 26 March 2013 at 8.51am and the time taken was 21 minutes and 49 seconds. Mr Eden has provided a Statutory Declaration as requested by you and **further instructs that he came down to Melbourne on the afternoon of 26 March 2013 to do his test** – he did not do the test at 9.14am that day. To the best of his recollection, it took longer than the 21 minutes and 49 seconds set out in the ACTU record. Mr Eden also recalls that Ms Kitching opened up the computer for him and that Mr Rowe also came down from Bendigo that afternoon to do his test.³⁵ (emphasis added)

35. Mr Eden accepted that he gave instructions to someone at Holding Redlich for the purposes of him or her drafting and sending this letter.³⁶ It follows that as at 26 November 2013 Mr Eden gave instructions to Holding Redlich to the effect that he did the test on 26 March 2013, and indeed was able to recall not only that he did the test in the afternoon, but also incidental details to the effect that Ms Kitching opened the computer for him and that Mr Rowe sat the test on the same afternoon.
36. On 19 December 2013 Mr Eden was interviewed by representatives of the Fair Work Commission. A transcript of that interview is in evidence.³⁷ Mr Eden was accompanied by Mr David Shaw from Holding Redlich. The representatives of the Fair Work Commission

³⁴ McCubbin MFI-1, 25/8/14, 1/407.

³⁵ McCubbin MFI-1, 25/8/14, 1/409-410.

³⁶ David Eden, 19/9/14, T:1006.8-13.

³⁷ McCubbin MFI-1, 25/8/14, 1/421.

conducting the interview were Mr Enright and Ms Fraser. In that interview Mr Eden said that he recalled doing his test in the evening of 26 March 2013 not in the morning.³⁸ He said that he remembered Mr Rowe being present when he did his test and that Mr Rowe had done the test after Mr Eden did his.³⁹

37. By the time Mr Eden gave evidence in the Commission his position had changed again. When asked about what he said to the Fair Work Commission concerning his alleged recollection of Ms Kitching opening up the computer for him and Mr Rowe coming down from Bendigo in the afternoon to do the test as set out in paragraph 34 above he said, 'I was confused'.⁴⁰ He also retreated from the proposition that he had observed Mr Rowe doing his right of entry test on the afternoon of 26 March 2013. He said again that he was confused and added 'I did not witness him do his right of entry test that afternoon'.⁴¹

38. Mr Eden's evidence in his witness statement was to the following effect:⁴²

Because so much time had passed, I do not know what time of day or what date I did the ROE test. I remember that I came especially to Melbourne to do the test. I also clearly remember that I did the test myself.

39. Written submissions filed on behalf of a number of individuals including Mr Eden argued that Mr Eden should be believed because he is the President of the Health Workers' Union (**HWU**), has been a

³⁸ McCubbin MFI-1, 25/8/14, 2/465.

³⁹ McCubbin MFI-1, 25/8/14, 2/467.

⁴⁰ David Eden, 19/9/14, T:1007.46.

⁴¹ David Eden, 19/9/14, T:1008.22.

⁴² David Eden, witness statement, 19/9/14, para 20.

nurse for 26 years, and it is 'possible' that both he and Ms Lee sat the test and the relevant documentary records were incomplete.⁴³

40. In the circumstances the fact of Mr Eden's position carries no weight. As to the possibility that multiple tests were completed, Mr Eden does not point to any records which indicate that the test was carried out by him or on his behalf on any day other than 26 March 2013. At 10.16am (AEDT) on that day, he was sent a 'Certificate of Completion' via email. If he had already completed the test, he would have already received such a certificate. Would he not have questioned why he was receiving a second certificate? If he completed the test after 26 March 2013, he would have received a later certificate. There is no evidence of such a certificate. The contention that it was 'possible' that Mr Eden completed the test on a day other than 26 March 2013 must be rejected. One test was completed on the morning of 26 March 2013.

41. Yet Mr Eden was in Bendigo, on the morning of 26 March 2013, as appears from his phone records. When asked about those telephone records the examination proceeded as follows:⁴⁴

Q. One point we draw from that is that you are certainly at Bendigo when the test was done on the morning of 26 March; that's right?

A. If this is my phone record, it would indicate that.

Q. You know it's your phone record, Mr Eden. You've just said you had produced it to the Fair Work Commission that's correct?

⁴³ Submissions on behalf of named No 1 Branch officials, 14/11/14, paras 24-25.

⁴⁴ David Eden, 19/9/14, T:1009.5-17.

A. That's right, we volunteered that information to the Fair Work Commission.

Q. So you know it is your phone record?

A. I believe it to be my phone record, yes.

42. Ms Lee's evidence should be accepted. Ms Lee have her evidence in a careful and thoughtful way. It carries significant weight because it is against interest. It is consistent with the documentary records. It has remained unchanged. Whilst the submissions filed on behalf of the No 1 Branch officials alleged that other persons who gave evidence against interest had a motive to inculcate Ms Asmar, no such submission was advanced in respect of Ms Lee. In contrast, Mr Eden repeatedly changed his evidence. His only explanation for the many competing versions was to say that he was 'confused'.

43. On the evidence before the Commission, Ms Lee sat Mr Eden's online test on the morning of 26 March 2013.

44. A further submission was made that there is no evidence that Mr Eden asked Ms Lee to complete his test, or that he knew Ms Lee had done his test, or that he knew of any request for Ms Lee to complete the test on his behalf.⁴⁵ It is true there is no evidence before the Commission, but that is irrelevant. Mr Eden allowed a declaration to be submitted to the Fair Work Commission which was false or misleading in that he stated that he had received the required training when he had not. Mr Eden had a duty to correct the misleading declaration.

⁴⁵ Submissions on behalf of named No 1 Branch officials, 14/11/14, para 26.

Did Ms Lee sit online tests for Mr Rowe and Mr Eden? – evidence of Darryn Rowe

45. The evidence of Mr Darryn Rowe was similarly problematic. The letter of 26 November 2013 from Holding Redlich to the Fair Work Commission included the following:

As to Darryn Rowe, he does not agree that he did the test on 20 March 2013 starting at 9.08pm. Mr Rowe instructs that he, like Mr Eden, did his test on 26 March 2013. He recalls that both he and Mr Eden attended a meeting at 2.00pm in Bendigo and, following the conclusion of that meeting, they both drove to Melbourne to undertake the test.

46. Mr Rowe's story then changed: he told the Commission that he completed the test on 20 March 2013 as per the ACTU record.⁴⁶
47. In his oral evidence Mr Rowe accepted that someone from Holding Redlich asked him for an account of what had happened regarding his online test and that he knew that this was for the purposes of responding to the investigation that the Fair Work Commission was conducting.⁴⁷ It was put to Mr Rowe that he had been careful to give a truthful account to Holding Redlich and Mr Rowe accepted this and agreed he gave those instructions to Holding Redlich in November 2013.⁴⁸
48. In his oral evidence Mr Rowe attempted to explain the discrepancy in his evidence by saying that when he was interviewed by Holding Redlich he could not remember when he had sat the test so he

⁴⁶ Darryn Rowe, 19/9/14, para 8.

⁴⁷ Darryn Rowe, 19/9/14, T: 1022.5-12.

⁴⁸ Darryn Rowe, 19/9/14, T:1022.14-39; 1026.25-32.

discussed it with Mr Eden who suggested to him that they had travelled to Melbourne from Bendigo to do the test on 26 March 2013.⁴⁹ Mr Rowe said:

Q: But you discussed it with Mr Eden, hadn't you?

A: I had - at that stage I was -

Q: You discussed it with Mr Eden hadn't you?

A: At that stage, if you'd let me finish, I was having trouble as far as I couldn't remember the exact time or date that I'd done the - completed the test, and I did speak to Mr Eden to see if he could recollect when we had completed. He said, "I believe it was here", and because we had travelled to Melbourne, there was a recollection, yes, that's right, I had to go down to the office on that day I do remember travelling down.

49. When asked again to explain why his evidence had changed from what he told the Fair Work Commission in November 2013, Mr Rowe said:⁵⁰

A: The evidence that was initially put forward, and as I said to you prior, I had trouble recalling, I'd started a new job which I was trying to learn, and because of the amount of travel that we were doing at the time, it was very hard to recall exactly where I was at any given time. I remember doing the right of entry, but I could not recall exactly when I did it. Because of that I spoke to David [Eden] and said, "Look, do you remember?" He said, "Yes, I believe it was here". I remember travelling down to Melbourne from Bendigo with him and I thought, yep, that sounds fine, that's right, more than happy. So, as things progressed I looked at, and this is as we went down, we looked at the record, ironed that, okay, yes, I remember where I was clearly.

Q. So your memory gets better and better over time, does it, Mr Rowe?

⁴⁹ Darryn Rowe, 19/9/14, T:1027.28.

⁵⁰ Darryn Rowe, 19/9/14, T:1027.18-38.

A. Yeah.

50. Submissions filed on behalf of Mr Rowe did not appeal to Mr Rowe's position in the union, or the fact that he is nurse, as a reason for accepting his account. But they advanced the same argument as was made on behalf of Mr Eden: it was 'possible' that both he and Ms Lee sat the online test on 20 March 2013 and the ACTU records were incomplete.⁵¹ For reasons similar to those articulated in respect of Mr Eden, that possibility should be rejected as fanciful.
51. Mr Rowe was an unconvincing witness. His story has changed repeatedly over time. His first attempt to defeat the allegations, when raised by the Fair Work Commission, was, in effect, to deny the accuracy of the computer records as to the time and date his test was done. After being confronted with evidence that the computer records were correct, Mr Rowe's evidence also changed and he told the Commission that he completed the test on 20 March 2013 (not 26 March 2013 as previously claimed), a new story which attempted to fit with what was shown on the ACTU record as to the timing and date the test was done.
52. Ms Lee's evidence that she sat Mr Rowe's online test on the evening of 20 March 2013 should be accepted. As with Mr Eden, a submission was made that there is no evidence that Mr Rowe asked Ms Lee to complete the test on his behalf and there is no evidence that he knew of any request for Ms Lee to complete the test on his behalf.⁵² The

⁵¹ Submissions on behalf of named No 1 Branch officials, 14/11/14, para 29.

⁵² Submissions on behalf of named No 1 Branch officials, 14/11/14, para 29.

answer to that submission is the same as the answer in relation to Mr Eden.

Did Ms Kitching sit online tests for Ms Asmar and others?

53. The next issue is whether Ms Kitching sat the online right of entry test for Ms Asmar on 25 January 2013 and for a number of other organisers on 15 February 2013.

54. The ACTU's records demonstrate that on 15 February 2013, a series of right of entry online tests were conducted as follows:⁵³

- (a) Mr Lee Atkinson's right of entry online test was opened at 9.02am (10.02am AEDT) and concluded at 9.14am (10.14am AEDT),;
- (b) Ms Jayne Govan's right of entry online test was commenced 1 minute later, at 9.25am (10.25am AEDT) and concluded at 9.34am (10.34am AEDT), in 9 minutes and 9 seconds;
- (c) Mr McCubbin's right of entry online test was undertaken at 1.56pm (2.56pm AEDT) and concluded at 1.59pm (2.59pm AEDT), in 2 minutes and 49 seconds;
- (d) Mr Dean Sherriff's right of entry online test was undertaken at 2.10pm (3.10pm AEDT) and concluded at 2.12pm (3.12pm AEDT), in 2 minutes and 31 seconds;

⁵³ McCubbin MFI-1, 25/8/14, pp 1396, 1501, 1512, 1698.

- (e) Mr Saso (Sasha) Trajcevski-Uzunov's right of entry online test was undertaken at 2.54pm (3.54pm AEDT) and concluded at 2.56pm (3.56pm AEDT), in 1 minute and 57 seconds; and
- (f) Mr Nick Katsis's right of entry online test was undertaken at 3.00pm (4.00pm AEDT) and concluded at 3.02pm (4.02pm AEDT), in 2 minutes.

55. In summary, Ms Govan and Mr McCubbin gave sworn evidence that they did not sit their respective tests. This was not challenged. Who sat them? Their evidence was that it was Ms Kitching. The evidence of Ms Lee, which has already been recounted, was to the same effect. Ms Kitching denied this. She also denied that she sat the test for Ms Asmar and for Messrs Atkinson, Trajcevski-Uzunov and Katsis. This latter denial of Ms Kitching was supported by the evidence of Ms Asmar and Messrs Atkinson, Trajcevski-Uzunov and Katsis.

56. It is necessary first to recount the evidence of the relevant witnesses. Given the overlapping and conflicting accounts it is difficult to assess the evidence of a number of the witnesses in isolation. In those cases, an assessment of the evidence is deferred to paragraph 102 and following. However, where it is possible to assess a witness's evidence in isolation that has been done in the section concerning that witness's evidence.

Did Ms Kitching sit online tests for Ms Asmar and others? – evidence of Robert McCubbin

57. On 18 March 2013, an application for a right of entry permit was lodged with the Fair Work Commission by the No 1 Branch on behalf of Mr McCubbin. The application was dated 12 March 2013 and included a declaration from Ms Asmar, as the Committee of Management member making the application.
58. On the application a box had been ticked stating that the proposed permit holder, Mr McCubbin, was an employee of the No 1 Branch holding the position of occupational health and safety officer.⁵⁴
59. Mr McCubbin gave evidence that he commenced full time employment with the No 1 Branch as an occupational health and safety officer on 22 April 2013.⁵⁵ For approximately three months prior to commencing this role, Mr McCubbin said he had been assisting Ms Asmar on a voluntary basis until the No 1 Branch had the funds to start paying him wages.⁵⁶ Ms Asmar gave evidence that when she signed the declaration she knew that Mr McCubbin was not an employee of the No 1 Branch.⁵⁷
60. Mr McCubbin said that he did not receive the training referred to in his right of entry permit application and that he knew he had not received

⁵⁴ McCubbin MFI-1, 25/8/14, 4/1782.

⁵⁵ Robert McCubbin, witness statement, 25/8/14, para 14; Robert McCubbin, 25/8/14, T:469.5-20.

⁵⁶ Robert McCubbin, witness statement, 25/8/14, para 14.

⁵⁷ Diana Asmar, 26/8/14, T:559.23-29.

this training at the time he signed the application.⁵⁸ Mr McCubbin said that he signed the application at the direction of Ms Asmar.⁵⁹ Mr McCubbin said that Ms Kitching did the online test for him as well as a number of other people including Ms Asmar, Mr Eden, Mr Katsis and a person named 'Sasha'.⁶⁰

61. Mr McCubbin also gave evidence that he recalled attending a meeting in April 2013 at the No 1 Branch office with his partner Ms Porter where Ms Asmar told them that Ms Kitching had completed her right of entry test for her and that at the upcoming industrial day she was going to tell the No 1 Branch staff that Ms Kitching would do their right of entry tests for them.⁶¹

Did Ms Lee sit online tests for Ms Asmar and others? – evidence of Sandra Porter

62. Ms Porter has been Mr McCubbin's partner since 2006. Ms Porter gave evidence that around January to March 2013, she and Mr McCubbin attended a barbecue at Ms Asmar's house. Ms Porter deposed that she recalled Ms Asmar saying that she was getting Ms Kitching to do her right of entry test, and that Mr McCubbin would do the same.⁶²

⁵⁸ Robert McCubbin, 25/8/14, T:469.22-46.

⁵⁹ Robert McCubbin, 25/8/14, T:470.1-3.

⁶⁰ Robert McCubbin, witness statement, 25/8/14, para 19.

⁶¹ Robert McCubbin, witness statement, 25/8/14, para 15.

⁶² Sandra Porter, witness statement, 16/9/14, paras 11-12.

63. Ms Porter also deposed that around the same time in early 2013, she and Mr McCubbin attended Ms Asmar's office at the No 1 Branch to discuss the commencement of Mr McCubbin's employment and other issues. Ms Porter said that Mr McCubbin asked Ms Asmar what was happening with the right of entry permits and testing to which she responded that Ms Kitching had already done her test and that she had asked her to do Mr McCubbin's test as well.⁶³

Did Ms Lee sit online for Ms Asmar and others? – evidence of Jayne Govan

64. Ms Govan was an HSU Organiser in 2013. Ms Govan gave evidence that around February or March 2013, she attended an industrial day at the No 1 Branch offices on Park Street, Melbourne where the following occurred:⁶⁴

I recall that a number of organisers raised the issue of Right of Entry Permits because of the difficulties we had been experiencing. Most if not all the employees of the union would have been present at the meeting, including most if not all of the organisers. ... Diana Asmar told all of us present that we would not be required to complete our own Right of Entry tests and that Kimberly Kitching would be completing the tests for us.

65. Ms Govan said she understood that Ms Asmar arranged for Ms Kitching to complete the right of entry tests for the organisers because

⁶³ Sandra Porter, witness statement, 16/9/14, para 16.

⁶⁴ Jayne Govan, witness statement dated 16 September 2013, 25/8/14, paras 13-14.

the organisers did not really have time to do the tests due to their workloads.⁶⁵

66. Ms Govan gave evidence that the following people did not complete their own right of entry tests:⁶⁶

- (a) Nick Katsis;
- (b) Dean Sherriff;
- (c) Diana Asmar;
- (d) Sasha (whose surname Ms Govan could not recall);
- (e) David Eden; and
- (f) Rob McCubbin.

67. Ms Govan said that she, Mr Katsis, Mr Sherriff and 'Sasha' all commenced their employment as organisers at the same time and they spoke about the right of entry tests amongst themselves. Ms Govan also said she recalled Ms Asmar boasting that Ms Kitching got around 99% or 100% when she completed Ms Asmar's right of entry test.⁶⁷

⁶⁵ Jayne Govan, witness statement dated 16 September 2013, 25/8/14, para 15.

⁶⁶ Jayne Govan, witness statement dated 16 September 2013, 25/8/14, para 17.

⁶⁷ Jayne Govan, witness statement dated 16 September 2013, 25/8/14, paras 18-19.

Did Ms Lee sit online tests for Ms Asmar and others? – evidence of Lee Atkinson

68. Mr Atkinson is an Organiser at the HSU. Mr Atkinson gave evidence that he did not sit his right of entry test but obtained a right of entry permit.⁶⁸ Mr Atkinson said that Ms Lee told him that she completed his right of entry test and he got 100%.⁶⁹ Mr Atkinson said that Ms Lee did not mention Ms Kitching.⁷⁰
69. On Ms Lee's unchallenged evidence, Mr Atkinson must have been mistaken in his recollection. Ms Lee's evidence was that she was on annual leave in Hong Kong from 13 February 2013 to 6 March 2013, and during this time she did not access the online ACTU training course or have anything to do with right of entry permits.⁷¹ Mr Atkinson's test was undertaken on 15 February 2013.

Did Ms Lee sit online tests for Ms Asmar and others? – evidence of Nick Katsis

70. Mr Katsis was an Organiser with the No 1 Branch from January to May 2013 and an Industrial Officer with the No 1 Branch from May to June or July 2013. Mr Katsis is currently a Lead Organiser with the No 1 Branch.

⁶⁸ Lee Atkinson, 19/9/14, T:1038.7-.11;1039.10-11.

⁶⁹ Lee Atkinson, 19/9/14, T:1037.42-45.

⁷⁰ Lee Atkinson, 19/9/14, T:1038.3-5.

⁷¹ Peggy Lee, witness statement, 25/8/14, paras 38-39.

71. Mr Katsis gave evidence that he completed his own right of entry test during the early stages of his employment as an Organiser. Mr Katsis denied that Ms Kitching or anyone else completed his right of entry test for him.⁷² Mr Katsis told the Fair Work Commission that he recalled taking the test on 15 February 2013 in the No 1 Branch office, and that the test took him more than 30 minutes to complete.⁷³
72. It is apparent from the evidence recounted above that Mr Katsis's evidence was contradicted by Mr McCubbin, Ms Govan and Ms Lee, all of whom gave evidence that Ms Kitching sat Mr Katsis's test. Ms Govan also gave evidence that Mr Katsis had told her that Ms Kitching sat his right of entry test.⁷⁴
73. Apart from the evidence of those three witnesses, there is other evidence that contradicts Mr Katsis's evidence. The records of the ACTU show that Mr Katsis's right of entry test was commenced on 15 February 2013 at 2.59pm (AEST) or 3.59pm (AEDT) and completed on 3.02pm (AEST) or 4.02pm (AEDT).⁷⁵ At 4.03pm on that day a generic email was sent from the ACTU to Mr Katsis attaching a certificate of compliance for the right of entry course.⁷⁶
74. The submissions filed on behalf of Mr Katsis made the submission that the timing in relation to the ACTU computer records cannot safely be relied upon because of the revelations in a report prepared by KPMG

⁷² Nick Katsis, 19/9/14, T:1059.17-37.

⁷³ McCubbin MFI-1, 25/8/14, 4/1672.

⁷⁴ Jayne Govan, 16/9/14, T:965.6-25.

⁷⁵ McCubbin MFI-1, 25/8/14, p 1698.

⁷⁶ McCubbin MFI-1, 25/8/14, p 1697.

that Mr Katsis's user account has been deleted on 9 July 2013 and that there were some discrepancies in time zones in the ACTU records.⁷⁷ That report was dated 11 November 2014, was attached to the back of the submissions and was not tendered in evidence until 28 November 2014.⁷⁸

75. The KPMG report does not assist Mr Katsis in relation to the submission made on his behalf. The KPMG report specifically accepted that on the basis of a snapshot of information as at 17 February 2013, Mr Katsis's test on 15 February 2013 commenced at 3.00pm (AEST) and was completed at 3.01pm (AEST).⁷⁹ The report obtained by the Fair Work Commission from an independent expert, Mr Scott Mann of Invest-e-gate Pty Ltd explained that any time extracted from the ACTU records during the period in which daylight savings operated, should be accounted for by adding one hour to that time.⁸⁰ Thus all of the evidence points to the conclusion that Mr Katsis's test was commenced at approximately 4.00pm (AEDT) on 15 February 2013 and completed 2 minutes later. The subsequent deletion of Mr Katsis's account on 9 July 2013 is thus irrelevant.
76. But Mr Katsis's telephone records show that he was making a telephone call from Malvern at 3.48pm (AEDT) on 15 February 2013.⁸¹ His diary entry for that day records that he had a meeting from 2–3 pm with delegates and members followed by a meeting with

⁷⁷ Submissions on behalf of named No 1 Branch officials, 14/11/14, para 22.

⁷⁸ HSU Additional Tender Bundle, 28/11/2014, Tab 1.

⁷⁹ HSU Additional Tender Bundle, 28/11/2014, p 18.

⁸⁰ McCubbin MFI-1, 25/8/14, p 1701.

⁸¹ McCubbin MFI-1, 25/8/14, p 1681.

human resources at Cabrini Hospital.⁸² There is a Cabrini Hospital on Wattletree Road, Malvern. It is approximately 8 km by road between Cabrini Hospital and the No 1 Branch at Park Street, South Melbourne. 15 February 2013 was a Friday. It is unlikely that Mr Katsis could have made a phone call at 3.48pm (AEST) near Malvern and then be sitting at a computer in the No 1 Branch at Park Street to commence his test 11 or 12 minutes later.

77. Mr Katsis's evidence is thus inherently unlikely and contradicted by the evidence of three other witnesses. It is not accepted.

Did Ms Lee sit online tests for Ms Asmar and others? – evidence of Saso (Sasha) Trajcevski-Uzunov

78. Mr Trajcevski-Uzunov was an Organiser with the No 1 Branch from late January to early April 2013.
79. Mr Trajcevski-Uzunov's evidence was that on or about 15 February 2013 he completed an online right of entry test.⁸³ He could not remember the exact time or date.⁸⁴ He denied that Ms Kitching completed the test for him.⁸⁵ He said that it took him a couple of minutes to take the test and that it was the first time he sat it.⁸⁶

⁸² McCubbin MFI-1, 25/8/14, p 1688.

⁸³ Saso Trajcevski-Uzunov, witness statement, 19/9/14, paras 9-10.

⁸⁴ Saso Trajcevski-Uzunov, witness statement, 19/9/14, para 9.

⁸⁵ Saso Trajcevski-Uzunov, 19/9/14, T:1101.8-.10, 1102.11-17.

⁸⁶ Saso Trajcevski-Uzunov, 19/9/14, T:1101.12-31.

80. Mr McCubbin, Ms Govan and Ms Lee all gave evidence to the effect that Ms Kitching sat Mr Trajcevski-Uzunov's test. 'Sasha' was Mr Trajcevski-Uzunov.⁸⁷
81. Ms Govan gave the most detailed evidence on this point. She deposed that Mr Trajcevski-Uzunov told her that he had not done his own test. Ms Govan thought this conversation occurred when she and Mr Trajcevski-Uzunov were travelling together in a car to a meeting at the Kingston Centre which is part of Monash Health, Cheltenham. Ms Govan recalled that Mr Trajcevski-Uzunov said words to the effect that he had not done his right of entry test either and that Ms Kitching was doing all of the organisers' exams.⁸⁸
82. Ms Govan provided information to the Fair Work Commission that Mr Trajcevski-Uzunov accompanied her in attending a meeting at Monash Health in the afternoon of 15 February 2013. Ms Govan said that by at least 12.56pm on 15 February 2013, she was travelling to Monash Health with Mr Trajcevski-Uzunov in her HSU vehicle. Ms Govan said that she and Mr Trajcevski-Uzunov arrived at the meeting location at approximately 2.30pm, they participated in a meeting which took place between 3pm – 4pm and then Ms Govan drove Mr Trajcevski-Uzunov back to the No.1 Branch office in South Melbourne.⁸⁹ Ms Govan produced telephone records which showed that she was near 'MCL Tunnels' being the Melbourne CityLink tunnel at 12.56pm on 15 February 2013.⁹⁰ This evidence supported Ms Govan's account that

⁸⁷ See, eg, McCubbin MFI-1, 25/8/14, p 1380.

⁸⁸ Jayne Govan, 16/9/14, T:966.35-46; 967.1-9.

⁸⁹ McCubbin MFI-1, 25/8/14, p 2067.

⁹⁰ McCubbin MFI-1, 25/8/14, p 2155.

she was travelling from South Melbourne to Monash Health on 15 February 2013. Ms Govan also produced copies of print-outs from her electronic diary indicating the fact and timing of the meeting at Monash Health.⁹¹ No challenge was made to that evidence.

83. The relevance of this evidence was that it demonstrated that Mr Trajcevski-Uzunov could not have been completing his test at the time the records show the test was completed. The ACTU records showed that Mr Trajcevski-Uzunov's test was commenced at 2.54pm (AEST) or 3.54pm (AEDT) and concluded at 2.56pm (AEST) or 3.56pm (AEDT) taking 1 minute and 57 seconds to complete.⁹² Mr Trajcevski-Uzunov answered all of the questions correctly.⁹³ At 3.57pm (AEDT) a generic email from the ACTU was sent to Mr Trajcevski-Uzunov attaching a Certificate of Compliance for the right of entry training course.⁹⁴ Those records support the conclusion that the test was completed at 3.56pm (AEDT).

84. When it was put to Mr Trajcevski-Uzunov that Ms Govan had said that he was on site at Monash Health on 15 February 2013 at the time that his right of entry test was undertaken, he said that he could not recall where he was on that date and he could not recall being with Ms Govan at Monash Health.⁹⁵ Mr Trajcevski-Uzunov's phone records showed that on 15 February 2013 he made a telephone call at 2.54pm,

⁹¹ McCubbin MFI-1, 25/8/14, p 2156.

⁹² McCubbin MFI-1, 25/8/14, p 2164.

⁹³ McCubbin MFI-1, 25/8/14, p 2166.

⁹⁴ McCubbin MFI-1, 25/8/14, p 2167.

⁹⁵ Saso Trajcevski-Uzunov, 19/9/14, T:1101.47, 1102.1-.5.

lasting for 0.16 minutes, which used the Moorabbin tower.⁹⁶ The timing and location of the call using the Moorabbin tower is consistent with Ms Govan's evidence that Mr Trajcevski-Uzunov accompanied her to Kingston Centre, Monash Health in Cheltenham (which is an adjoining suburb to Moorabbin) on the afternoon of 15 February 2013.

85. Mr Trajcevski-Uzunov's evidence that he sat his own test cannot be accepted.

Did Ms Lee sit online tests for Ms Asmar and others? – evidence of Alexander Leszcynski

86. Mr Leszcynski was a Senior Industrial Officer at the No 1 Branch from late 2012 to March 2013. Mr Leszcynski's evidence that Ms Kitching told him that Ms Asmar was too busy to complete her right of entry training and test so Ms Kitching was going to do it for her.⁹⁷

Did Ms Lee sit online tests for Ms Asmar and others? – evidence of Robert Morrey

87. Mr Morrey was a member of the Branch Committee of Management from late 2012 until March-April 2013.
88. Mr Morrey gave evidence that Mr Leszcynski told him that employees of the No 1 Branch were not permitted to do their own right of entry

⁹⁶ McCubbin MFI-1, 25/8/14, p 2153.

⁹⁷ Alexander Leszcynski, witness statement dated 6 January 2014, 19/9/14, para 47.

permit applications and Ms Kitching completed the right of entry tests and applications on their behalf.⁹⁸

Did Ms Lee sit online tests for Ms Asmar and others? – evidence of Kimberley Kitching

89. Ms Kitching said she was at the No 1 Branch office for part of the morning and part of the afternoon on 15 February 2013 but denied that she completed right of entry tests for other people that day.⁹⁹ Ms Kitching denied that she was in the No 1 Branch office at the times that the right of entry tests referred to in paragraph 54 above were completed.¹⁰⁰
90. Ms Kitching produced some documentary evidence to the Commission which establishes that she was away from the No 1 Branch office at times during the day on 15 February 2013.¹⁰¹ However, taken at its highest, all this documentary evidence shows is that Ms Kitching left the No 1 Branch office for short periods of time during that day but does not exclude the possibility of Ms Kitching returning to the Branch, to sit the tests at the times recorded in the ACTU records.
91. Ms Kitching said that she attended two industrial days at the No 1 Branch office in February and March 2013. Ms Kitching said that Ms Asmar addressed staff on various topics at both meetings but did not

⁹⁸ Robert Morrey, witness statement dated 18 July 2014, 25/8/14, paras 34-35.

⁹⁹ Kimberley Kitching, witness statement dated 16 September 2014, 19/9/14, paras 8-9.

¹⁰⁰ Kimberley Kitching, witness statement dated 16 September 2014, 19/9/14, paras 8-9.

¹⁰¹ Kimberley Kitching, third witness statement, dated 17 September 2014, 19/9/14, paras 2,4-5; annexures A, C, D.

say that Ms Kitching was going to complete the organisers' right of entry tests for them.¹⁰²

92. Ms Kitching gave evidence that she never told Ms Lee, or anyone else, that she had completed right of entry tests for organisers.¹⁰³ In relation to Ms Lee's statement that Ms Asmar and Ms Kitching told her that she would be sitting the right of entry tests for Mr Rowe and Mr Eden, Ms Kitching denied this and said the conversation never took place.¹⁰⁴

93. When asked why numerous witnesses would say that Ms Asmar told them that Ms Kitching would sit their right of entry tests, Ms Kitching said the following:¹⁰⁵

Q. You heard yesterday, when you were listening to the evidence, a number of witnesses say that there was a meeting of organisers in the office in early 2013 at which Ms Asmar directed all the organisers present that you would sit the test for them?

A. What I can tell you, Mr Stoljar, is that did not happen. That conversation did not happen. I can also tell you that perhaps some of these witnesses are politically motivated. They're running on other tickets. We have elections coming up and they may be motivated by malicious purposes.

94. When asked whether Ms Lee was running for any office, Ms Kitching said she was not, but that she helped in the previous campaign on the ticket that ran against Ms Asmar.¹⁰⁶

¹⁰² Kimberley Kitching, witness statement dated 16 September 2014, 19/9/14, para 33.

¹⁰³ Kimberley Kitching, witness statement dated 16 September 2014, 19/9/14, para 34.

¹⁰⁴ Kimberley Kitching, 26/8/14, T:530.14-18.

¹⁰⁵ Kimberley Kitching, 26/8/14, T:529.18-28.

¹⁰⁶ Kimberley Kitching, 26/8/14, T:529.38-46.

95. Ms Kitching also proffered a reason why organisers may have given evidence that Ms Kitching did their right of entry tests for them. The reason was that they were ‘disgruntled former employees’.¹⁰⁷
96. Ms Kitching gave evidence that she does not hold a right of entry permit and has never sat the test for a right of entry permit. Ms Kitching said she had never been instructed or asked to do a right of entry test.¹⁰⁸
97. Ms Kitching gave evidence that she never discussed right of entry tests with the Senior Industrial Officer at the No 1 Branch at the time, Mr Leszcynski.

Did Ms Lee sit online tests for Ms Asmar and others? – evidence of Ms Diana Asmar

98. In her evidence Ms Asmar said she sat her own right of entry test and that each organiser was required to undertake his or her right of entry test.¹⁰⁹
99. The ACTU records show that Ms Asmar’s right of entry test was completed on 25 January 2013 and she scored 99%.¹¹⁰ Ms Asmar

¹⁰⁷ Kimberley Kitching, 26/8/14, T:529.36.

¹⁰⁸ Kimberley Kitching, 26/8/14, T:529:13-16.

¹⁰⁹ Diana Asmar, witness statement, 26/8/14, para 83.

¹¹⁰ McCubbin MFI-1, 25/8/14, p 936.

signed her declaration on 29 January 2013.¹¹¹ On 31 January 2013, Ms Asmar was issued with her right of entry permit.¹¹²

100. Ms Asmar gave evidence that she did not tell a meeting of organisers in early 2013 that Ms Kitching would be sitting their right of entry tests.¹¹³ Ms Asmar's evidence on 28 August 2014 was that no meeting or industrial day took place in April 2013 or on an earlier date.¹¹⁴ However, Ms Asmar's evidence changed on 19 September 2014 during the following exchange:¹¹⁵

Q: You attended the industrial day in February-March 2013?

A: I would have, yes.

101. Ms Asmar squarely denied instructing Ms Lee to sit the right of entry tests for Mr Rowe and Mr Eden.¹¹⁶ Ms Asmar said that when she hired Ms Lee she said she was politically neutral. However, Ms Asmar later discovered that Ms Lee had assisted on the opposing campaign for Mr Marco Bolano. Ms Asmar said that Ms Lee 'appeared to want to destabilise the current Branch leadership with a view to reinstating the previous team'.¹¹⁷

¹¹¹ McCubbin MFI-1, 25/8/14, 2/845.

¹¹² McCubbin MFI-1, 25/8/14, p 1372.

¹¹³ Diana Asmar, 26/8/14, T:557.18-21.

¹¹⁴ Diana Asmar, 26/8/14, T:557.23-29.

¹¹⁵ Diana Asmar, 19/9/14, T:1094.10-12.

¹¹⁶ Diana Asmar, 26/8/14, T:562.39-41.

¹¹⁷ Diana Asmar, witness statement, 26/8/14, paras 86-87.

Did Ms Lee sit online tests Ms Asmar and others? – assessment of the various witnesses

102. The contemporaneous written record from the ACTU shows that six right of entry tests were undertaken on 15 February 2013. The time taken to complete the tests gets progressively quicker throughout the day. Three of the organisers whose tests were taken that day, Mr McCubbin, Ms Govan and Mr Atkinson gave evidence that they did not complete their tests. Mr Kastis and Mr Trajcevski-Uzunov did not complete their tests. Who completed them? Ms Lee did not.
103. The evidence of Ms Lee, Ms Govan, Mr McCubbin, Ms Porter, Mr Morrey and Mr Leszcynski all indicates that it was Ms Kitching. The evidence given by Mr McCubbin and Ms Govan was against their interests. The submissions filed on behalf of the named No 1 Branch officials submitted that because Mr McCubbin and Ms Govan were, on their own accounts, persons who have been prepared to make false declarations their evidence was unreliable.¹¹⁸ The contrary is the case. The fact that they have given evidence which is discreditable to them gives support to their evidence. Those submissions went on to contend that it is true to say that Mr McCubbin and Ms Govan gave evidence against their interests only if their interests are defined solely by reference to the rights of entry test issue; but they had broader interests in discrediting Ms Asmar because they were disgruntled former employees with political ambitions.¹¹⁹ Those considerations do not

¹¹⁸ Submissions on behalf of named No 1 Branch officials, 14/11/14, para 33.

¹¹⁹ Submissions on behalf of named No 1 Branch officials, 14/11/14, para 33.

outweigh the risk of criminal punishment as a consequence of coming forward.

104. Another powerful indicator that Ms Kitching completed the tests on 15 February 2013 is the documentary evidence that between 8 February 2013 and 15 February 2013, Mr Atkinson, Ms Govan, Ms Porter (on behalf of Mr McCubbin), Mr Sherriff and Mr Trajcevski-Uzunov all forwarded their username and password for the ACTU online right of entry training course to Ms Kitching.¹²⁰ It is very difficult to conceive why that would have occurred, other than the reason of enabling Ms Kitching or someone organised by Ms Kitching to sit the right of entry tests.
105. As noted above, the documentary evidence Ms Kitching provided showing she was away from the No 1 Branch office on 15 February 2013 does not outweigh the overwhelming weight of the documentary and oral evidence against her. The material provided by Ms Kitching shows that she was away from the office for short periods but she remained in the vicinity of the No 1 Branch office and hence she was capable of sitting the tests at the times shown on the ACTU records.
106. There is a further piece of evidence against Ms Kitching. Craig Ferguson McGregor is the Secretary of the Victorian No 3 Branch of the Health Services Union. In the first half of 2013 the No 3 Branch and the No 1 Branch shared premises at Park Street, Melbourne. Ms

¹²⁰ McCubbin MFI-1, 25/8/14, pp 1167, 1424, 1787, 1945 and 2158.

Kitching often dropped in to Mr McGregor's office and spoke to him, since their offices were on the same floor. He testified:¹²¹

I recall that, in early 2013, Ms Kitching came into my office in the Park Street offices and said words to the effect of "Did another one. Got 100 percent again." She was boasting in her tone.

I understood her to be referring to the tests for right of entry permits, as we had previously spoken about right of entry permit matters and the need to sit a test. Almost all the new officials and new employees of the No 3 Branch did not have right of entry permits and needed to apply and sit the online test. Further, Ms Kitching had previously told me that many of the officials and employees of the No 1 Branch did not have right of entry permits and needed to apply and sit the online test.

107. It has been agreed that Ms Kitching's denial of that evidence need not be verified by affidavit, and that neither she nor Mr McGregor is to be cross-examined on it. However it is impossible to understand why Mr McGregor would have provided false evidence to the Commission on this issue. There is no reason not to accept his evidence.
108. The submissions on behalf of Ms Kitching made two submissions against the conclusion that she sat tests for others. The first is that she was an officer of the Supreme Court of Queensland, and a finding against her would be a most serious matter.¹²² Implicitly the submission called in aid the principles in *Briginshaw v Briginshaw*, which had been relied on more generally elsewhere. However, the strength of the evidence against Ms Kitching outweighs any contrary conclusion. The second was that her evidence as to periods out of the office on 15 February 2013 means it was improbable that she had the

¹²¹ Craig Ferguson McGregor, affidavit sworn 24/11/14, tendered on 28/11/14, paras 9-10.

¹²² Submissions on behalf of named No 1 Branch officials, 14/11/14, para 19.

opportunity to complete the tests.¹²³ That submission has been dealt with and rejected above.

109. Finally, as to Ms Asmar's test, the evidence of Mr McCubbin, Ms Porter and Ms Govan was that Ms Asmar said to them that Ms Kitching completed her test for her. The evidence of Mr Leszcynski was that Ms Kitching told him that she had done Ms Asmar's test.

110. The fact that Ms Asmar is the recipient of a Centenary Medal cannot stand in the way of the conclusion that Ms Kitching sat Ms Asmar's test.¹²⁴ The finding is supported by the larger context in which the alleged test was sat, namely the practice in the No 1 Branch for Ms Kitching or Ms Lee to sit applicants' right of entry tests.

Did the conduct of Ms Kitching and Ms Lee occur at the direction of Ms Asmar?

111. Ms Lee's evidence, which was denied by Ms Asmar and Ms Kitching, was that she sat Mr Eden and Mr Rowe's tests at the direction of Ms Asmar and Ms Kitching. Contrary to the submissions made on behalf of Ms Kitching that evidence was not limited to evidence that she sat the tests at the direction of Ms Asmar.¹²⁵

112. Ms Lee's evidence must be accepted. Ms Lee was, for the reasons already outlined, a compelling witness.

¹²³ Submissions on behalf of named No 1 Branch officials, 14/11/14, para 19.

¹²⁴ Submissions on behalf of named No 1 Branch officials, 14/11/14, para 15.

¹²⁵ Peggy Lee, 16/9/14, T:995.22-26, 997.7-21.

113. In relation to Ms Kitching's conduct, the evidence of Mr McCubbin, Ms Porter and Ms Govan was to the effect that Ms Kitching's conduct in sitting the tests was at the direction of Ms Asmar. This fits strongly with the fact that a number of employees sent their login details to Ms Kitching. The compelling inference is that this was not mere coincidence. Somebody had told the employees that Ms Kitching would complete their tests for them. The evidence before the Commission supports a finding that it was Ms Asmar.

D – CONSEQUENCES OF FACTUAL FINDINGS

114. It is now necessary to consider the possible consequences of the factual findings above.

Mr McCubbin's application

115. Ms Asmar's conduct in signing the declaration stating that Mr McCubbin was an employee of the No 1 Branch when she knew he was not, leads to consideration of ss 136 and 137 of the *Criminal Code* (Cth). The question is whether Ms Asmar committed an offence by providing a false or misleading statement in an application to the Fair Work Commission.
116. At the relevant time, a person was guilty of making a false or misleading statement in an application contrary to s 136.1(1) of the *Criminal Code* where:
- (a) the person makes a statement (orally or in any other way);

- (b) the person does so knowing the statement is false or misleading or omits any matter or thing without which the statement is misleading;
- (c) the statement is made in or in connection with an application for a licence, permit, authority, registration, or claim for a benefit; and
- (d) the statement is made to a Commonwealth entity or to a person exercising powers or performing functions under, or in connection with, a Commonwealth law or in compliance or purported compliance with a Commonwealth law.

117. As to consideration of the possible application of s 136.1(1):

- (a) Ms Asmar knew that she was making a false or misleading statement to the Fair Work Commission as she knew that Mr McCubbin was not an employee of the No 1 Branch;¹²⁶
- (b) the statement was made to obtain a right of entry permit; and
- (c) the statement was made in compliance or purported compliance with a law of the Commonwealth, namely, the *Fair Work Act 2009* (Cth) under which a right of entry permit

¹²⁶ Diana Asmar, 26/8/14, T:559.23-29.

must be acquired by an official¹²⁷ (an official is defined in the *Fair Work Act 2009* (Cth) as including an employee).¹²⁸

118. At the relevant time, the elements of the offence of recklessly making a false or misleading statement in an application contrary to s 136.1(4) of the *Criminal Code* (Cth) were that:

- (a) the person makes a statement (orally or in any other way);
- (b) the person makes the statement reckless as to whether the statement is false or misleading or omits any matter or thing without which the statement is misleading;
- (c) the statement is made in or in connection with an application for a licence, permit, authority, registration, or claim for a benefit; and
- (d) the statement is made to a Commonwealth entity or to a person exercising powers or performing functions under, or in connection with, a Commonwealth law or in compliance or purported compliance with a Commonwealth law.

119. ‘Recklessness’ occurs where a person is aware of a substantial risk that the circumstance exists or will exist and accordingly it is unjustifiable to take the risk.¹²⁹ By knowing that Mr McCubbin was not formally employed by the No 1 Branch, Ms Asmar knew there was a very

¹²⁷ *Fair Work Act 2009* (Cth), s 512.

¹²⁸ *Fair Work Act 2009* (Cth), s 12.

¹²⁹ *Criminal Code* (Cth), s 5.4.

substantial risk that her declaration was false or misleading and that it was unjustifiable to make the statement to the Fair Work Commission that she had made proper inquiries, reviewed the No 1 Branch's records and that Mr McCubbin was employed by the No 1 Branch.

120. As to the consideration of a contravention of s 137.1 of the *Criminal Code* (Cth), which concerns giving false or misleading information, by Ms Asmar, at the relevant time, the elements of the offence were that:

- (a) the person gives information to another person;
- (b) the person does so knowing that the information is false or misleading or omits any matter or thing without which the information is misleading; and
- (c) the information is given to a Commonwealth entity or to a person exercising powers or performing functions under, or in connection with, a Commonwealth law or in compliance or purported compliance with a Commonwealth law.

121. On the evidence, Ms Asmar's conduct may have contravened either or both of ss 136 and 137 of the *Criminal Code* (Cth).

Applications of Mr Eden and Mr Rowe

122. On the findings above, Mr Eden and Mr Rowe may have contravened ss 136 or 137 of the *Criminal Code* (Cth). Each of Mr Eden and Mr Rowe made a declaration to the Fair Work Commission that he had received the required training when he had not.

123. Ms Asmar's role in Mr Eden's and Mr Rowe's applications for right of entry permits may also constitute a contravention of ss 136.1(1), 136.1(4) and/or s 137.1(1). Ms Asmar may have given a false or misleading declaration to the Fair Work Commission that she had made proper inquiries (when she had not), that she had reviewed the records of the organisation (when she had not) and that, to the best of her knowledge and belief, Mr Eden and Mr Rowe had received the required training (when she knew that they had not, or alternatively was reckless as to this fact).

Ms Asmar's application

124. In respect of Ms Asmar's own application for a right of entry permit, on the findings made, Ms Asmar falsely declared that she had undertaken the required training when Ms Kitching had actually done this training and the relevant test for her. This may involve a contravention of ss 136.(1) or 137.1(1) of the *Criminal Code* (Cth).

The other organisers' applications

125. On the findings made, Ms Asmar either knew that Mr Atkinson, Ms Govan, Mr McCubbin, Mr Sherriff, Mr Trajcevski-Uzunov and Mr Katsis had not completed their right of entry training, or alternatively was reckless as to her certification that they had done so because she knew that she had made arrangements for Ms Kitching or Ms Lee to complete their training.
126. Further, Ms Kitching's conduct in sitting the relevant right of entry tests may have involved the aiding and abetting of offences possibly

committed by Ms Asmar, Mr Atkinson, Ms Govan, Mr McCubbin, Mr Sherriff, Mr Trajceovski-Uzunov and Mr Katsis. At the relevant time, the elements of aiding and abetting the commission of an offence were that:¹³⁰

- (a) the person's conduct must have in fact aided or abetted the commission of the offence by the other person;
- (b) the offence must have been committed by the other person;
and
- (c) the person intended that his or her conduct would aid or abet the commission of the type of offence the other person committed or intended that his or her conduct would aid and abet the commission of an offence and the person was reckless about the commission of the offence which was committed.

127. The relevant conduct of Ms Kitching was sitting the tests on behalf of one or more of Ms Asmar, Mr Atkinson, Ms Govan, Mr McCubbin, Mr Sherriff, Mr Trajceovski-Uzunov and Mr Katsis. By so doing, Ms Kitching enabled each of them to make a false or misleading statement or to give false or misleading information to the Fair Work Commission that he or she had received the required training. On the findings made, Ms Kitching must have known that her completion of the tests for Ms Asmar and the organisers was so that they could submit applications for right of entry permits to the Fair Work

¹³⁰ *Criminal Code* (Cth), s 11.2.

Commission which among other things required a declaration that the required training had been undertaken.

Recommendations

128. For the foregoing reasons, it is recommended that a copy of this Interim Report be referred to the Commonwealth Director of Public Prosecutions in order that consideration may be given to whether:

- (a) each of Diana Asmar, David Eden, Darryn Rowe, Nick Katsis, Saso Trajcevski-Uzunov and Lee Atkinson should be charged with and prosecuted for making a false statement in an application or recklessly making a false statement contrary to ss 136 and 137 of the *Criminal Code* (Cth); and
- (b) Kimberly Kitching should be charged with and prosecuted for aiding and abetting the contraventions of each of Diana Asmar, David Eden, Darryn Rowe, Nick Katsis, Saso Trajcevski-Uzunov and Lee Atkinson.

E – A PRELIMINARY POINT

129. Counsel for Ms Asmar and other officials took a preliminary point. They submitted that the Commission should defer any report on the right of entry tests issue until the completion of a Federal Court proceeding. That proceeding is *Diana Asmar and others v Fair Work Commission No VID 634/2014*. In that proceeding, Beach J granted an interlocutory injunction restraining the Fair Work Commission from taking any steps pursuant to Terms of Inquiry dated 18 July 2014.

Those Terms of Inquiry relate to an inquiry which the Fair Work Commission wishes to conduct. Counsel submitted:¹³¹

Substantial evidence obtained by the FWC in its Inquiry is now also admitted as evidence before the Commission. A possible consequence of the Federal Court's proceeding is a judicial finding that the evidence obtained by the FWC in its Inquiry was obtained by actions beyond its jurisdiction. Consequential issues may arise as to whether the Commission should rely on the evidence obtained by the FWC beyond its powers and subsequently admitted in the Commission: see *Evidence Act*, s 138. If such a finding eventuates, the HWU officials may wish to be heard on that issue. It is not yet possible to identify with precision the consequences (if any) of any Federal Court decision as to evidence already admitted before the Commission. In these circumstances, the Commission's ultimate finding may be affected by matters that are yet to be determined by a Court.

130. Section 138 of the *Evidence Act* 1995 (Cth) does not bind the Commission. Even if it did, it is far from clear that for the Fair Work Commission to obtain statements beyond its jurisdiction was to obtain them 'improperly or in contravention of an Australian law'. It is even less clear that if it were, the material would be excluded after a consideration of the factors listed in s 138(3). In any event, counsel for Ms Asmar and the other official of the branch do not identify which particular documents or classes of document are said to have been obtained improperly or in breach of an Australian law. Counsel have not demonstrated that the evidence before the Fair Work Commission was obtained by exercise of the Fair Work Commission's coercive powers. Most of it – if not all – appears to have been obtained by the Fair Work Commission by reason of answers to non-coercive requests. Even if the Fair Work Commission lacks jurisdiction to examine the controversy, this Commission does have power to do so. Accordingly the submission is rejected.

¹³¹ Submission on behalf of named No 1 Branch officials, 14/11/14, para 7.

PART 10: TRANSPORT WORKERS' UNION OF AUSTRALIA

CHAPTER 10.1

INTRODUCTION

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A – PRELIMINARY

1. The Transport Workers' Union of Australia (**TWU**) is an employee association nominated in the Commission's Terms of Reference. The TWU is a federally-registered organisation. A number of state-registered organisations associated with the TWU are also relevant to the Terms of Reference.

2. The Commission's inquiries examined the conduct and affairs of a number of officers of the TWU. Most of these inquiries are the subject of separate chapters elsewhere in this Interim Report. They are:
 - (a) Chapter 3.6, concerning the Transport, Logistics, Advocacy and Training Association;
 - (b) Chapter 4.2, concerning the McLean Forum Ltd;
 - (c) Chapter 4.3, concerning the New Transport Workers' Team Inc.;
 - (d) Chapter 4.4, concerning the Team Fund of the Victorian/Tasmanian Branch of the TWU;
 - (e) Chapter 6.2, concerning TWUSUPER; and
 - (f) Chapter 7.2, concerning the Transport Education Audit Compliance Health Organisation.
3. Chapter 10.2 concerns the compliance by the TWU of NSW (a state-registered organisation) and the NSW Branch of the TWU with record-keeping requirements relating to its register of members. It also considers the conduct of officers of those entities in declaring the relevant member numbers of the TWU of NSW for the purposes of calculating the organisation's delegation size at NSW State ALP Conferences.

4. The balance of this chapter sets out some background information pertaining to the TWU.

B – BACKGROUND TO THE TWU

History of the TWU

5. The TWU represents a range of employees in the road transport, freight logistics, aviation, public transport, mining, oil and gas industries.
6. The TWU has its roots in the Federated Carters and Drivers' Industrial Unions that operated across Australia in the early 20th Century. In 1928, the Federated Carters' and Drivers' Industrial Union, the Trolley Draymen & Carters' Union and the Motor Transport & Chauffeurs' Association merged to form the Amalgamated Road Transport Workers' Union.¹ In 1938 this union became a federal organisation and was renamed the TWU. The TWU expanded in the 1960s to accommodate the growth of the road transport, oil, bus, airlines and dairy industries in Australia.²

¹ Transport Workers' Union NSW, *Over a century of struggle and achievement*, <http://www.twunsw.org.au/about-us/twu-history>, accessed 30/10/14.

² Transport Workers' Union NSW, *Over a century of struggle and achievement*, <http://www.twunsw.org.au/about-us/twu-history>, accessed 30/10/14.

Current structure and internal governance

7. The TWU is structured around a National Office and five branches. The five branches are:
 - (a) the New South Wales Branch (including a Canberra Sub-Branch);
 - (b) the Queensland Branch;
 - (c) the South Australian /Northern Territory Branch;
 - (d) the Victorian/Tasmanian Branch; and
 - (e) the Western Australian Branch.
8. Each branch operates autonomously, though within the ambit of the rules of the TWU and the branch rules contained therein. The branches exist for the purpose of assisting the National Council of the TWU. Under the TWU's rules, the National Council and all branches must loyally support each other financially and otherwise when required.³
9. As of 31 December 2013, the TWU had 94,025 members according to the Annual Return lodged with the Fair Work

³ Rules of the Transport Workers' Union of Australia, rule 19; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 133.

Commission.⁴ The table below outlines the number of branch members the TWU declared in the Annual Return for each branch.

BRANCH	NUMBER OF MEMBERS
New South Wales Branch	43,835 ⁵
Queensland Branch	9,558 ⁶
South Australian/Northern Territory Branch	5,990 ⁷
Victorian/Tasmanian Branch	24,612 ⁸
Western Australian Branch	10,030 ⁹

10. Irregularities with respect to the TWU's branch numbers are the subject of Chapter 10.2.

⁴ Fair Work Commission Registered Organisations, *Transport Workers Union Annual Return 2013*, <http://www.e-airc.gov.au/179v/annual>, accessed 14/8/14.

⁵ Fair Work Commission Registered Organisations, AR2014/93, <http://www.e-airc.gov.au/179vns/annual>, accessed 10/12/14.

⁶ Fair Work Commission Registered Organisations, AR2014/96, <http://www.e-airc.gov.au/179vqld/annual>, accessed 10/12/14.

⁷ Fair Work Commission Registered Organisations, AR2014/98, <http://www.e-airc.gov.au/179vsa/annual>, accessed 10/12/14.

⁸ Fair Work Commission Registered Organisations, AR2014/94, <http://www.e-airc.gov.au/179vvic/annual>, accessed 10/12/14.

⁹ Fair Work Commission Registered Organisations, AR2014/95, <http://www.e-airc.gov.au/179vwa/annual>, accessed 10/12/14.

Rules and governance

11. The objects of the TWU, as set out in the TWU rules, include securing improved member employment conditions, securing member preference in their employment, obtaining for members a greater share of the product of their work, assisting in cases of industrial oppression and seeking to improve the status, training and qualifications of members.¹⁰ The TWU has the power to financially assist persons who have been endorsed by the Australian Labor Party to become members of the Commonwealth and State Parliaments.¹¹
12. The TWU has one national rulebook as a central reference point for governance and structures of the union and its branches. It covers eligibility for membership, the objects of the union, governing committees, elections, the specific duties of office holders and requirements for financial disclosures. The national rulebook also includes special rules for the NSW Branch.¹²
13. The TWU has a National Council which comprises the National Secretary, the National Assistant Secretary, the Branch Secretary of each branch and a range of additional Councillors.¹³ For

¹⁰ Rules of the Transport Workers' Union of Australia, rule 2; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 125.

¹¹ Rules of the Transport Workers' Union of Australia, rule 2(4)(g); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 126.

¹² Rules of the Transport Workers' Union of Australia, Annexure F; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 212.

¹³ Rules of the Transport Workers' Union of Australia, rule 24(1); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 136.

example, each branch may be represented by an additional Councillor if it has between 3,001 and 6,000 members, two Councillors if it has between 6,001 and 9,000 members, or three Councillors if it has over 9,000 members.¹⁴

14. The National Council has supreme control over the Union. Its roles and powers include dealing with industrial matters, disbanding branches, administering rules, and resolving matters submitted to it by branches.¹⁵ In meetings and ballots of the National Council, the National Secretary and the National Assistant Secretary each have one vote, while a branch is entitled to one vote if it has up to 1,000 members. If a branch has over 1,000 members, it has an additional vote for each additional 1,000 members.¹⁶
15. The TWU also has a Finance Committee of National Council and a National Committee of Management. The Finance Committee of National Council consists of the National President, the National Secretary, the National Assistant Secretary and three

¹⁴ Rules of the Transport Workers' Union of Australia, rule 24(2); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 136-137.

¹⁵ Rules of the Transport Workers' Union of Australia, rule 25(2); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 137.

¹⁶ Rules of the Transport Workers' Union of Australia, rule 53(1); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 156.

National Trustees.¹⁷ Its duty is to scrutinise all accounts and advise the National Council on all financial matters.¹⁸

16. The National Committee of Management consists of the National Secretary, the National Assistant Secretary, the National President, the National Vice-President and each Branch Secretary.¹⁹ Its duties include dealing with industrial matters, resolving matters submitted by the branches and charging national officers for offences against the TWU rules.²⁰
17. In meetings and ballots of the National Committee of Management, each member is generally entitled to one vote. However, any member may request that voting on a particular motion be conducted in accordance with an alternative voting system where the National Secretary, National President and National Vice-President each have one vote and each Branch Secretary is entitled to the number of votes which his or her branch would be entitled to at meetings and ballots of the National Council.²¹

¹⁷ Rules of the Transport Workers' Union of Australia, rule 26; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 138.

¹⁸ Rules of the Transport Workers' Union of Australia, rule 27; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 138.

¹⁹ Rules of the Transport Workers' Union of Australia, rule 28; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 138.

²⁰ Rules of the Transport Workers' Union of Australia, rule 29; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 138-139.

²¹ Rules of the Transport Workers' Union of Australia, rule 53(2); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 157.

18. Each branch of the TWU must have a Branch Committee of Management consisting of the Branch President, the Branch Vice-President, the Branch Secretary, the Branch Assistant Secretary (if required), two trustees and between seven and 11 other members.²² Branch Committees of Management have control of all business of the TWU within the branch, including dealing with industrial matters, raising and expending funds and employing persons to assist the branch.²³ The Branch Committee of Management must not act contrary to any decision of the National Council.²⁴

²² Rules of the Transport Workers' Union of Australia, rule 30; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 139.

²³ Rules of the Transport Workers' Union of Australia, rule 31; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 140.

²⁴ Rules of the Transport Workers' Union of Australia, rule 31(4); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 141.

CHAPTER 10.2

MEMBERSHIP ROLL OF THE TWU OF NSW

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A – INTRODUCTION

1. This Chapter addresses matters concerning the membership rolls of the Transport Workers’ Union of Australia, New South Wales Branch (**TWU NSW Branch**) and the Transport Workers’ Union of New South Wales (**TWU of NSW**).
2. Membership rolls are required to be kept by both state and federally registered organisations. Where a union is affiliated with the Australian Labor Party (**ALP**), membership numbers play a significant role in determining the strength of the union within that party. The TWU of NSW inflated its numbers in the period 2005 – 2013 when submitting its membership numbers to both auditors and to the Australian Labor Party (NSW Branch) (**NSW Labor**).

B – PRELIMINARY POINT: THE TERMS OF REFERENCE

3. Counsel for the TWU submitted that the subject of this Chapter was outside the Terms of Reference.¹ In fact the subject falls within the Terms of Reference in two ways.
4. The first is that the failure to keep a register of members was within paragraph (g) of the Terms of Reference. It was a breach of a law – s 231 of the *Fair Work (Registered Organisations) Act* 2009 (Cth). It is true that at the end of the Commission’s inquiry into this matter, there is no evidence that the breach was engaged in ‘in order to’ procure an

¹ Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, paras 254-255.

advantage. But that does not take the inquiry itself outside the Terms of Reference. The inquiry is within the Terms of Reference because it was directed to whether the conduct ‘may’ amount to a breach of law ‘in order to’ do something.

5. The second aspect of the inquiry – both in its aspect as an inquiry simpliciter and in its aspect as an element of the report, is within the Terms of Reference. Paragraph (g) of the Terms of Reference refers to breaches of professional standards with the necessary intent. Mr Sheldon’s conduct was done in order to benefit an organisation – the TWU – in increasing delegate numbers and therefore voting power at the NSW Labor Conference. It was also done in order to procure an advantage for an officer of the TWU, Mr Sheldon, since his power as leader of the TWU delegates would increase. That is conduct falling below the professional standards of a leading trade union official.

C – MAINTENANCE OF MEMBERSHIP ROLL

Requirements of NSW legislation

6. Amongst other matters, s 278 of the *Industrial Relations Act* 1996 (NSW) requires organisations such as the TWU of NSW to keep a ‘register of its members, showing the name, postal address of each member...’. If a person becomes a member, or ceases to be a member, the organisation must update this register to reflect that change within 28 days after the person either becomes or ceases to be a member.²

² *Industrial Relations Act* 1996 (NSW), ss 278(2)(a), (b) .

This register of members must also be updated to reflect any change in the particulars shown on the register.³ This change must take place within 28 days after the matters necessitating the change become known to the organisation.⁴

7. Although there is no specified time during which a State registered organisation must keep its record of members, those organisations are required to keep such records at the registered office of the organisation.⁵

Requirements of federal legislation

8. Section 230(1) of the *Fair Work (Registered Organisations) Act* 2009 (Cth) requires an organisation to keep 'a register of its members, showing the name and postal address of each member ...'.⁶ This record of members must be updated in the same fashion as applies to the TWU of NSW pursuant to the *Industrial Relations Act* 1996 (NSW).⁷
9. In addition, a federally registered organisation is required to keep a copy of its register of members as it stood on 31 December in the preceding seven years.⁸ This section is a civil penalty provision,⁹

³ *Industrial Relations Act* 1996 (NSW), s 278(2)(c).

⁴ *Industrial Relations Act* 1996 (NSW), s 278(2)(c) .

⁵ *Industrial Relations Act* 1996 (NSW), s 278 (7) .

⁶ *Fair Work (Registered Organisations) Act* 2009 (Cth), s 230(1)(a).

⁷ *Fair Work (Registered Organisations) Act* 2009 (Cth), s 230(2).

⁸ *Fair Work (Registered Organisations) Act* 2009 (Cth), s 231.

⁹ *Fair Work (Registered Organisations) Act* 2009 (Cth), s 305(2)(p).

breach of which by a branch is taken to be a contravention by the organisation of which the branch is part.¹⁰

Requirements of TWU rules

10. The Rules of the TWU of NSW provide that ‘the Union Secretary/Treasurer shall keep, or cause to be kept, a register of all particulars of the transport members of the Union’.¹¹ This register is required to detail the member’s name, address, employer, joining or resignation date, the Entrance Fee and dues paid into the Union.¹²
11. Rule 15 of the Rules of the Transport Workers’ Union of Australia requires the Branch Secretary of each Branch to keep at the Branch Office a roll of the Membership, recording the membership number, name, address and date of enrolment of each member enrolled in that Branch.¹³

Records kept by the TWU

12. Since May 2013, Sammy Marfatia has been employed by the TWU of NSW as the Chief Operating Officer/Director Finance & Corporate Services. In this role, Mr Marfatia also performed the duties of the

¹⁰ *Fair Work (Registered Organisations) Act 2009* (Cth), s 305(3).

¹¹ TWU of NSW Rules, rule 41.1; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 103.

¹² TWU of NSW Rules, rule 41.2; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 104.

¹³ Rules of the Transport Workers’ Union of Australia, rule 15(2); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 132.

Chief Operating Officer/Director Finance & Corporate Services for the TWU NSW Branch.¹⁴

13. Mr Marfatia has 'oversight of the administrative tasks relating to membership including, the maintenance of the membership roll for the TWU of NSW and TWU NSW Branch'.¹⁵
14. Mr Marfatia's evidence was that the TWU of NSW and the TWU NSW Branch each maintain, and has at all relevant times maintained, an electronic membership list.¹⁶
15. From around 2001 to September 2013, both the TWU of NSW and TWU NSW Branch used an electronic membership system called 'Membership Today'.¹⁷ In September 2013, that system was replaced by a new database called 'Member Connect'.¹⁸
16. The information stored on the 'Membership Today' system included, amongst other matters, each member's full name, address, date of birth, yard (work) location, financial status, account balance and financial transactions.¹⁹

¹⁴ Sammy Marfatia, affidavit dated 10/10/14, paras 1-2.

¹⁵ Sammy Marfatia, affidavit dated 10/10/14, para 7.

¹⁶ Sammy Marfatia, affidavit dated 10/10/14, para 13(a).

¹⁷ Sammy Marfatia, affidavit dated 17/10/14, paras 7.

¹⁸ Sammy Marfatia, affidavit dated 17/10/14, para 6.

¹⁹ Sammy Marfatia, affidavit dated 17/10/14, para 9.

17. On the register of members produced to the Commission for the period ending 31 December 2013, it is evident that these details are also stored by the new system, being 'Member Connect'.
18. It is also clear from the register of members produced to the Commission that under the 'Member Connect' system at least, a reader is easily able to determine which members on the register are financial, and which members are unfinancial.²⁰
19. The 'Membership Today' system required new membership details and resignations to be incorporated on a daily basis, with the system updating a member's financial status automatically at the end of each day. Every time the system updated, previous data was overwritten.²¹ Such processes meant that historical point in time (snapshot) reports could not be produced after a given period had passed.²²
20. Using the new system, being the 'Member Connect' system, historical snapshots of the membership roll at the end of each month are capable of being produced at any time.²³
21. Although historical point in time reports could not be produced under the old 'Membership Today' system, the system did retain a historical record of financial transactions. The consequence was that whether or

²⁰ TWU NSW Membership Numbers Tender Bundle, 31/10/2014, p 14.

²¹ Sammy Marfatia, affidavit dated 17/10/14, para 12.

²² Sammy Marfatia, affidavit dated 10/10/14, para 13(b); Sammy Marfatia, affidavit dated 17/10/14, para 13.

²³ Sammy Marfatia, affidavit dated 10/10/14, para 15.

not a member was a financial or unfinancial member at a historical point in time was capable of being manually determined.²⁴

22. The critical point in relation to the membership roll of the TWU NSW Branch is that for at least the period 2007-2012, no membership reports were prepared as at 31 December each year, and no hardcopy print outs of the roll as it stood at such time were made let alone kept. Additionally, it was always possible to print out the roll on a given date – for example 31 December – and thereby retain a hardcopy record of the roll as required by s 231 of the *Fair Work (Registered Organisations) Act* 2009 (Cth). But this was not done. The deficiency has now been remedied.
23. The TWU submitted that s 231 does not require hard copies: any copy will suffice.²⁵ That is correct. But the TWU's response to a Notice to Produce has revealed that it had no copies at all in the years ending 31 December 2009, 31 December 2010, 31 December 2011 and 31 December 2012.
24. Notice to Produce No. 307 was served on Maurice Blackburn Lawyers, solicitors for the TWU NSW Branch, on 1 August 2014. The Notice required production of:²⁶

2. All Documents forming the Roll of the Membership as it stood on the following dates:

- (a) 31 December 2013;

²⁴ Sammy Marfatia, affidavit dated 17/10/14, para 15.

²⁵ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 258.

²⁶ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p. 222.

- (b) 31 December 2012;
- (c) 31 December 2011;
- (d) 31 December 2010; and
- (e) 31 December 2009.

Definitions and interpretation:

...

Document includes:

- (a) *anything on which there is writing;*
- (b) *anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;*
- (c) *anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or*
- (d) *a map, plan, drawing or photograph.*

Roll of the Membership means the roll of the membership as referred to in sub-rule 15(2) of the Rules of the Transport Workers' Union of Australia.

25. On 20 August 2014, Maurice Blackburn wrote to Solicitors Assisting the Commission and advised that: 'our client is unable to locate any documents that fall within categories 2(b) to 2(e)'.²⁷
26. It is apparent that the TWU NSW Branch did not keep a hardcopy, a soft copy or any other copy of its register of members for the required period. The fact that 'it may be possible to recreate the list using historical records of financial transactions'²⁸ ought not be accepted as a

²⁷ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p. 239.

²⁸ TWU Submissions, 14/11/14, para 258.

possibility that satisfies the obligations on the TWU NSW Branch pursuant to s 231(1).

Conclusions as to record keeping

27. Under the respective State and Commonwealth legislation, both the TWU of NSW and the TWU NSW Branch are under an obligation to keep a register of their members. At all times, both unions had the capacity to produce a snapshot record of their roll of members as at 31 December of each year.
28. Whilst the state registered union is not under an obligation to maintain historical records of its membership rolls, in failing to keep a copy of the register of its members as it stood on 31 December in each year for the past seven years, the TWU NSW Branch may have breached s 231 of the *Fair Work (Registered Organisations) Act 2009* (Cth).
29. As s 231 of the *Fair Work (Registered Organisations) Act 2009* (Cth) is a civil penalty provision,²⁹ it would be open to the General Manager of the Fair Work Commission, or a delegate of the General Manager, to apply for a pecuniary penalty order, or any such other order as the Federal Court considers appropriate, to be imposed on the TWU.³⁰
30. It is recommended that this Interim Report be referred to the General Manager of the Fair Work Commission, or a delegate of the General Manager, in order that consideration may be given to proceedings

²⁹ *Fair Work (Registered Organisations) Act 2009* (Cth), s 305(2)(p) .

³⁰ *Fair Work (Registered Organisations) Act 2009* (Cth), ss 305(3), 306, 308 and 310.

against the TWU for a pecuniary penalty order by reason of a contravention of s 231.

D – DECLARATIONS OF MEMBER NUMBERS TO ALP

ALP rules

31. The ultimate policy making and governing body of NSW Labor is the NSW Annual Conference. It has numerous powers, including the power to elect Party Officers, Organisers and Committees. Some Committees play a key role in choosing candidates for Parliament (e.g. Administrative Committee).³¹
32. The rules of NSW Labor determine how many delegates from each affiliated trade union can attend the NSW Annual Conference. Each year, affiliated unions report their numbers of union members to NSW Labor by lodging an Independent Membership Audit Affiliation form for the relevant year to the General Secretary of NSW Labor.
33. At least 50 per cent of the delegates to the NSW Annual Conference must be union delegates.³² Relevant to individual trade union representation at the Annual Conference is the number of affiliated

³¹ NSW Labor Rules, rule B.2(ii); TWU NSW Membership Numbers Tender Bundle, 31/10/2014, p 16.

³² NSW Labor Rules, rule B.20(a); TWU NSW Membership Numbers Tender Bundle, 31/10/2014, p 21.

members that a union has.³³ Rule A.42 of the NSW Labor Rules is headed “Membership and Affiliation Fees”. Rule A.42(b) provides:³⁴

For the purposes of calculating union delegation sizes and affiliation fees, the number of members of each affiliated union must be determined each year by an independent audit by a registered auditor of:

(i) the number of members eligible to vote in a ballot for an office in that union at 31 December as conducted by the Australian Electoral Commission or NSW Electoral Commission; and

(ii) the number of members identified in subsection (i) for whom the union received an amount of dues in relation to the period between 1 October and 31 December inclusive for that year.

34. The key element of this rule is that the members of each affiliated union must be determined by an audit of ‘the number of members eligible to vote...’.

Members ‘eligible to vote’

35. The TWU of NSW Rules provide that for the state registered union, the ‘Sub-branch Executive Committee and committee members for each Sub-branch shall be elected by and from the financial members of the Sub-branch concerned..’³⁵ and ‘notwithstanding anything to the contrary contained in or implied in these rules, only members of the

³³ NSW Labor Rules; rule B.20(b); TWU NSW Membership Numbers Tender Bundle, 31/10/2014, p 21.

³⁴ NSW Labor Rules, rule A.42(b) ; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 10.

³⁵ TWU of NSW Rules, rule 57.3; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 117.

Union who were financial at 5pm on.. the third Tuesday of August... shall be entitled to a ballot paper in accordance with the foregoing'.³⁶

36. Members who fail to pay their subscriptions, fines, levies and other dues as provided in the TWU of NSW Rules, are deemed to be unfinancial members until these contributions have been paid.³⁷ Unfinancial members of the TWU of NSW are 'not entitled to any of the benefits of membership, and shall not be entitled to participate in the affairs of the Union'.³⁸
37. The effect of these rules is, and was at all material times, that unfinancial members of the TWU of NSW do not receive a ballot paper and therefore could not be considered as a member for the purposes of the Independent Membership Audit Affiliation forms lodged with NSW Labor.
38. For completeness, it ought be noted that the rules applicable to the TWU NSW Branch also provided at all material times that unfinancial members were not eligible to vote unless the Branch Committee of Management had resolved otherwise.
39. Rule 60 of the Rules of the Transport Workers' Union of Australia concerns Branch elections. Pursuant to this rule, each Branch Returning Officer must compile a list of all financial members enrolled

³⁶ TWU of NSW Rules, rule 57.5; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 117.

³⁷ TWU of NSW Rules, rule 14.1; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 85.

³⁸ TWU of NSW Rules, rule 14.1; TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 85.

in that Branch and post ballot papers, together with pre-paid envelopes, to each voter on the list so compiled.³⁹

40. Rule 10 of the Rules of the Transport Workers' Union of Australia addresses the status and rights of unfinancial members. Under this rule, if a member fails to pay dues when due and payable, that member will become an unfinancial member, the class of which have no benefits, privileges or rights whatsoever associated with membership.⁴⁰
41. Therefore, under the Rules of the TWU NSW Branch, it is clear that unless the Branch Committee of Management has resolved otherwise,⁴¹ unfinancial members of the TWU NSW Branch also do not, and did not, have the right to vote.

³⁹ Rules of the Transport Workers' Union of Australia, rules 60(13) and 60(17); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 169.

⁴⁰ Rules of the Transport Workers' Union of Australia, rule 10 and Annexure F Special Rule 5; TWU NSW Membership Numbers Tender Bundle, 21/8/14, pp 130, 213.

⁴¹ Rules of the Transport Workers' Union of Australia, rule 31(2)(m); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 140, Anthony Sheldon, 21/8/14, T:103.4-27.

Numbers declared by the TWU of NSW

42. From 2005 to December 2012, the number of eligible members declared by the TWU of NSW on the membership audit forms submitted to the ALP was fairly consistent, being well above 30,000 for each year.⁴² The declared member numbers for each year from 2005 to 2014 are set out in the table below.

Year	Declared Number of audited members
2005/06	33,585 ⁴³
2006/07	38,104 ⁴⁴
2007/08	38,504 ⁴⁵
2008/09	39,212 ⁴⁶
2009/10	36,448 ⁴⁷
2010/11	36,639 ⁴⁸
2011/12	38,006 ⁴⁹
2012/13	38,267 ⁵⁰
2013/14	39,555 ⁵¹
2014/15	17,822 ⁵²

⁴² TWU NSW Membership Numbers Tender Bundle, 21/8/14, pp 17-44.

⁴³ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 17.

⁴⁴ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 19.

⁴⁵ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 21.

⁴⁶ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 23.

⁴⁷ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 25.

⁴⁸ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 27.

⁴⁹ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 35.

⁵⁰ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 40.

⁵¹ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 44.

⁵² TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 48.

43. In 2014, the number of eligible members declared by the TWU of NSW radically declined. The Independent Membership Audit Affiliation form for 2014/2015 lodged with NSW Labor declared that, as at 31 December 2013, the TWU of NSW had only 17,822 members eligible to vote in a ballot for office in the TWU of NSW who were also financial members in the relevant period.⁵³

Were the figures wrong 2005 – 2013?

44. At no point in the period 2005 – 2013 did Rule A.42 of the NSW Labor Rules change. At all material times the number of members that could be counted for the purposes of a declaration to NSW Labor was the number of members eligible to vote in TWU of NSW elections who were also financial members in the specified period.
45. Taking the 2008/2009 declaration as an example, it declared the number of members who satisfied the criteria in rule A.42 to be 39,212 members.
46. However during his oral testimony, Mr Sheldon admitted that there were not 39,212 members that could vote in a union ballot that year,⁵⁴ and that roughly half of the declared members were in fact unfinancial members.⁵⁵
47. Plainly, the 2008/2009 declaration submitted by Mr Sheldon was wrong. It grossly inflated the eligible number of TWU of NSW

⁵³ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 48.

⁵⁴ Anthony Sheldon, 21/8/14, T:111.12.

⁵⁵ Anthony Sheldon, 21/8/14, T:112.22-24.

members to be used for the purposes of calculating the TWU of NSW's delegates to the ALP Annual Conference.

48. Mr Sheldon attempted to argue that there had been no breach of the ALP rules and/or that there had been a recent 'clarification' to the meaning of Rule A.42 which explained the discrepancies. He testified, for instance, that:

- (a) there was no error because 'the TWU had 38,000 members under the TWU rules, members include financial and non-financial members';⁵⁶
- (b) it was relevant that at all times the Branch Committee of Management had a capacity to wipe a member's obligation to pay overdue fees;⁵⁷ and
- (c) that the proper construction of Rule A.42 was a matter of only recent clarification.

49. On this last point Mr Sheldon testified:⁵⁸

Without reference to documents or records, my recollection is that this issue arose from an enquiry made by Fairfax journalists about membership numbers. As a result, the TWU of NSW sought clarification of the rule from the ALP. The Secretary of the ALP, Jamie Clements, referred the request for clarification to the administrative committee of the ALP, and put an alternative interpretation of the rule to the committee for its consideration. The administrative committee did not criticise the union's

⁵⁶ Anthony Sheldon, witness statement, 20/8/14, para 58.

⁵⁷ Anthony Sheldon, 21/8/14, T:103.4-34.

⁵⁸ Anthony Sheldon, witness statement, 20/8/14, para 59.

interpretation and there was definitely an appreciation for the ambiguity which existed.

50. Mr Sheldon also deposed that the act of the TWU of NSW seeking clarification resulted in the Administrative Committee of the ALP providing a report to the Secretary of the ALP.⁵⁹ As a result of this report, the ALP allegedly interpreted the rule ‘to operate more narrowly’, with the union accepting ‘the rule interpretation without complaint or criticism from the ALP.’⁶⁰ Once the rule was clarified, the TWU of NSW amended the number of delegates it sent to the Annual Conference.

51. On 22 August 2014, the Commission issued Notice to Produce number 464 to the Proper Officer of the TWU of NSW. This Notice to Produce requested:⁶¹

(1) All Documents referred to, or relied upon in:

- (a) paragraph 58 to 60 of the Statement of Anthony Sheldon, dated 20 August 2014; and
- (b) evidence given by Anthony Sheldon on 21 August 2014 at T:103.43-T:104.9 of the transcript of the hearing of the Commission on 21 August 2014.

52. The relevant segments of Mr Sheldon’s witness statement and the transcript were annexed to the Notice to Produce.

53. The Commission sought, in effect, any documents in existence that supported Mr Sheldon's evidence that there was no error in membership numbers, and that the change in TWU of NSW member

⁵⁹ Anthony Sheldon, 21/8/14, T:104.1-19.

⁶⁰ Anthony Sheldon, witness statement, 20/8/14, para 60.

⁶¹ TWU NSW Membership Numbers Tender Bundle, 31/10/2014, p 2.

numbers was a result of the TWU's interpretation of the NSW Labor Rules being clarified by the Administrative Committee of the ALP. It now appears that no such documents exist.

54. On 29 August 2014, Maurice Blackburn, solicitors for the TWU of NSW, informed the Commission that there were no such documents. They emphasised that the evidence given by Mr Sheldon in relation to the clarification made by the ALP was stated to be 'without reference to documents or records' and to be based on 'recollection'.⁶²
55. Thus, the Commission has not received any documents which support Mr Sheldon's claim that the reason for the TWU overstating its membership numbers was an alternative interpretation of the NSW Labor Rules. In these circumstances, Mr Sheldon's explanation cannot be accepted. All along the TWU should only have been reporting the 'number of members eligible to vote in a ballot for an office in that union...'.⁶³
56. The TWU submitted that the first sentence of the last paragraph was defective. It said:⁶⁴

Mr Sheldon did not say that the matter was documented in any particular manner.^[65] If such documents exist, they would not be within the custody or control of the TWU, but (presumably) of the ALP. The Commission appears to have taken no steps to make inquiries of the ALP.

⁶² TWU NSW Membership Numbers Tender Bundle, 31/10/2014, p 12-13.

⁶³ NSW Labor Rules, rule A.42(b); TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 10.

⁶⁴ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, paras 268-269.

⁶⁵ Counsel Assisting's Submissions, Ch 14.2, para 46.

In any event, the submissions of Counsel Assisting miss the point. The TWU of NSW has conceded that the past practice of reporting its membership numbers to the ALP as including unfinancial members was in error and that they “got it wrong”.⁶⁶ The past practice occurred as a result of an erroneous application of the Rules of the NSW Branch of the ALP borne out of historical practice and endorsed by independent auditors. The TWU of NSW has now rectified the manner it reports its independent auditors. The TWU of NSW has now rectified the manner it reports its membership numbers. There is simply no doubt that the TWU of NSW has changed its approach and that this occurred [following] consultation with the ALP.

57. The matter can be clarified in this way.
58. There is confusion evident in paragraph 268 of the submissions made by the TWU. This concerns the evidence given by Mr Sheldon as to why the TWU was significantly overstating its membership numbers and the reason for the belated recognition that it was not entitled to include all unfinancial members in its calculations. To clarify the matter, Mr Sheldon’s evidence is set out in full below:⁶⁷

... in my interpretation and the auditor's interpretation, the subsequent interpretation that was made by people after my leadership that was supported by the auditors, that has been - when there was an issue raised by a journalist we went then and rechecked with the party. The party had a different view, which is contained within my statement, and we accepted that decision.

The thing of interest, because I'm on the Administrative Committee of New South Wales, is that all the factional alignments, including some of our friends that aren't always that friendly, accepted that that was an appropriate change, that there was a misinterpretation of the rule, and a report was given by them to the Secretary of the ALP. We've subsequently used the new interpretation without dispute. We thought we were doing it the right way, we thought the auditor was interpreting it the right way, but it appears, and as it's turned out, it's not the way the ALP wanted us to do do [sic] it.

⁶⁶ Transcript, 21 August 2014, p 111:46.

⁶⁷ Anthony Sheldon, 21/8/14, T:104.1-19.

59. As outlined in paragraphs 42-46 of Counsel Assisting's Submissions in Chief, the Commission issued a notice to produce to the TWU of NSW seeking documents to support the explanation offered by Mr Sheldon in the passage extracted above.

60. Additionally, on 3 September 2014, the Commission issued Notice to Produce number 538 to the Proper Officer of the Australian Labor Party (NSW Branch). The Notice required production of:⁶⁸

1. All correspondence, reports and records of deliberations created in the Period concerning the number of members of the NSW TWU for the purpose of calculating union delegation sizes and affiliation fees.

Definitions and interpretation:

In the above Schedule:

NSW TWU means the:

- (a) Transport Workers' Union of Australia, New South Wales Branch; and
- (b) Transport Workers' Union of New South Wales.

Period means 1 July 2012 to date or any part of that period

61. It is not correct to infer (as the TWU appears to do in paragraph 268) that the Commission has taken no steps to make inquiries of the ALP as to whether there is any documentation (including the 'report ... given ... to the Secretary of the ALP' described by Mr Sheldon in his evidence) held by the ALP concerning the number of members of the TWU NSW Branch and TWU of NSW for the purpose of calculating union delegation sizes and affiliation fees. The Australian Labor Party (NSW Branch) did not produce any report to the General Secretary, or

⁶⁸ TWU NSW Membership Numbers Tender Bundle, 25/11/14, p 2.

any other documents, which support the explanation put forward by Mr Sheldon that there was a report to the General Secretary.⁶⁹ However, the minutes of a meeting on 6 December 2013 do record that in response to a question asked of the General Secretary concerning ‘union affiliation’ a ‘report’ (presumably a verbal report given the absence of any hard copy reports produced) was given by the General Secretary to the meeting. The minutes themselves simply note the content of that report as being that ‘the General Secretary advised that he was working with relevant unions.’⁷⁰ Even if that verbal report may properly be considered a ‘report’ it does not answer the description given by Mr Sheldon. The proper finding is that there are no documents to support Mr Sheldon’s explanation.

62. The auditor verifying the most recent declaration of numbers was Grant Thornton. It endeavoured to explain the radical decrease in relevant member numbers on the following basis:⁷¹

...the definition of what constitutes a financial member has changed for the year. For the 2014/15 ALP affiliation return all members that have made a contribution in the year are considered financial, whereas in previous returns any members that made a contribution less than \$100 was excluded from the financial members report.

63. However, that note is more confusing than helpful. There was no change in the TWU of NSW rules as to what constitutes a financial member. Hence the basis upon which Grant Thornton relied upon this new definition for the purposes of its audit is entirely unclear. Further, it was entirely incorrect in any event – in previous years non-financial

⁶⁹ TWU NSW Membership Numbers Tender Bundle, 25/11/14, pp 6-46.

⁷⁰ TWU NSW Membership Numbers Tender Bundle, 25/11/14, p 24.

⁷¹ TWU NSW Membership Numbers Tender Bundle, 21/8/14, p 60.

members had been included in the category of members who satisfied the requirements of Rule A.42.

64. There is simply no credible explanation that has been given by any person as to why the TWU of NSW numbers were so wildly inflated when assessed against – as they must be – the true position under Rule A.42.
65. No analysis was put forward to explain how Rule A.42 could be construed so as to enable non-financial members to be treated as members for the purposes of that rule. Mr Sheldon did not suggest that no consideration had been given to Rule A.42. However, if consideration was given as to the proper construction of Rule A.42 it seems surprising that experienced union officers took the view that a non-financial member of the union, who could not vote in a union election, could somehow be treated as a member for the purposes of Rule A.42. In the absence of other explanation, the only possible inference is that the TWU of NSW was knowingly, or at best recklessly, inflating its membership numbers to NSW Labor in order to procure an advantage by having an increased number of delegates at NSW Labor Annual Conferences.
66. The TWU argued that the Committee of Management regularly resolves to allow groups of unfinancial members to participate in elections so as to enfranchise as many members as possible with a

view to their participation in the union.⁷² The TWU referred to the following evidence of Mr Sheldon:⁷³

It may assist the Commission, even in the case where we had – and we’ll do it with – we did this regularly with our elections, is that there may be people unfinancial for a variety of reasons and a group of those people will be – by resolution of the Branch Committee of Management we’ve successfully gained through the amounts of money that are owed, will be enfranchised to vote. The reason why – and I’ll explain this – is how unions operate and it’s how we try to get enfranchised people to vote. That’s certainly how our union operates which I think is appropriate. So somebody might be on sick leave, they might be on workers’ comp, they might go on annual leave, and contributions on payroll deductions, their direct-debit might have been, not enough money in their account that week, those things could potentially disenfranchise somebody from voting, and the last thing we want to do is have people who are actually considered as members of the union, that are active in the union, making regular contributions to the union, not being able to participate in ballots.

67. There are two points to be made in answer to this.
68. First, that evidence did not establish that in each year in which the TWU of NSW included all unfinancial members in its calculation of members who fell within the requirements of rule A.42 of the NSW Labor Rules, that those members all satisfied the first limb of rule A.42, namely ‘eligible to vote in a ballot for an office in that union at 31 December as conducted by the Australian Electoral Commission or NSW Electoral Commission’. Mr Sheldon’s evidence did not raise that point. All that Mr Sheldon said was as follows:⁷⁴

Q. The position was as at February 2008 that there were approximately 19,000 financial members of the TWU; is that right?

⁷² Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 264.

⁷³ Anthony Sheldon, 21/8/14, T:102.13-32.

⁷⁴ Anthony Sheldon, 21/8/2014, T: 111.19-35.

A. I'm happy to accept the figure, but you have to --

Q. Approximately?

A. -- also say, as I've given in evidence this afternoon, there was the capacity for the union in a number of circumstances, we have wiped back fees for people, so --

Q. You didn't wipe back fees for 20,000 people, did you, Mr Sheldon?

A. No, I'm not trying to misrepresent anything here. I'm actually saying exactly what I said before and that is that we would look at a category of people that could have their fees wiped. In this case, the interpretation of the ALP now is correct.

69. The second point is that even if the union had permitted some unfinancial members to vote in some union elections (and passed a resolution to that effect) that would not assist the union in satisfying the second necessary limb of rule A.42, namely that the members declared were all ones 'for whom the union received an amount of dues in relation to the period between 1 October and 31 December inclusive for that year'. If members did not pay their dues for that period they simply were not eligible to be included in the membership numbers declared to the NSW Labor (and used thereafter for the purpose of calculating delegation sizes and hence voting power for the union and any associated faction).

70. The TWU also submitted:⁷⁵

There is absolutely no foundation for an inference that the TWU of NSW knowingly reported its membership numbers of an incorrect basis to obtain some unspecified advantage.^[76] Such a proposition was not put to Mr Sheldon or any other witness by Counsel Assisting. Fairness prevents

⁷⁵ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 270.

⁷⁶ Counsel Assisting's Submissions, Ch 14.2, para 50.

such a finding being made. In any event, such a conclusion would require the conclusion that independent auditors also deliberately misrepresented membership figures over a period of years. In addition, the manner in which membership numbers were reported presumably resulted in higher affiliation fees to the ALP and it could not be inferred this would be done deliberately. The true explanation was that the practice occurred due to error.

71. It was plain throughout the examination of Mr Sheldon on this topic over 15 pages of transcript⁷⁷ that senior counsel assisting was extremely sceptical about Mr Sheldon's evidence on this topic. Mr Sheldon can have been in no doubt that his claim that what happened was an innocent mistake shared by others was not being accepted and that senior counsel assisting was contending, as lame explanation succeeded lame explanation, that Mr Sheldon knew the errors were persistently being made. The background to the cross-examination was that Mr Sheldon's statement first asserted: 'The ALP does not have the capacity for national affiliation based on its structure. Affiliation is done on a State by State basis'.⁷⁸ He then moved to the New South Wales position. He said:⁷⁹

The NSW Branch reports to the NSW Branch of the ALP merely because that determines the number of delegates it is required to send to the ALP state conference. The union determines how many members it has, and as required under the ALP rules, they are audited for the purpose of affiliation.

72. He then said:⁸⁰

There was no error in membership numbers. The TWU had 38,000 members. Under the TWU rules, members include financial and non-financial members. My understanding is that the TWU of NSW adopted a

⁷⁷ Anthony Sheldon, 21/8/14, T:99.8-113.31.

⁷⁸ Anthony Sheldon, witness statement, 20/8/14, para 54.

⁷⁹ Anthony Sheldon, witness statement, 20/8/14, para 56.

⁸⁰ Anthony Sheldon, witness statement, 20/8/14, para 58.

consistent approach and proceeded on the basis that a union member, as defined in the TWU rules, was a member for the purposes of the ALP rule. I understand that independent auditors agreed with the TWU's interpretation, and this approach was accepted by the ALP for a long period of time.

73. The TWU may have had 38,000 members, but only 19,000 of them were financial. The last paragraph of the statement is suggesting that it is the ALP which has changed its position very recently. In the examination, senior counsel assisting drew attention to the statement that the TWU had 38,000 members. Mr Sheldon then admitted that there were only 19,000 financial members. Mr Sheldon again accepted that the 39,000 included about 20,000 unfinancial members.⁸¹
74. Mr Sheldon was then taken to a statement by the auditor of the number of members for the year 30 June 2007. That contained a statement that the union 'had 39,212 members eligible to vote in a ballot for an office in the union'. Senior counsel assisting then asked:⁸²

Q. That statement is not correct, is it?

A. Could you just scroll down from the top because I just want to make sure it's sent to – I'm sorry. Sorry, down the other way, if you could – sorry, if you go back to the top of the letter.

Q. Go back to the top? Yes.

A. The top of the letter, thanks. This was the document that was sent to the ALP.

Q. Yes, it appears to be the document attached to your independent membership audit form that was sent to the ALP?

A. I have said that the calculation has been decided by the ALP and the interpretation we've accepted. Also, it might help the Commission as well, that the numbers that come through from

⁸¹ Anthony Sheldon, 21/8/14, T:107.39-46, 108.1-3, 108.21-23.

⁸² Anthony Sheldon, 21/8/14, T:109.30-111.17.

the affiliated organisations are also dealt with by – are looked at by various parties within the party. I suspect – and I can't speak on behalf of the ALP – that the audited figures would also be looked at by various people within the party as well. Until we approached to say that we thought there was a – there might have been an inquiry that took place, that there may have been – there's a different interpretation and could the ALP ... re-look at this matter, that, as a result of that, which we're not disagreeing with, the ALP made a decision. In light of the ALP's decision, for the Administrative Committee to say this is the appropriate interpretation, which is the new figures. If there had been an interpretation prior to that then we would have accepted that interpretation as well. We unwittingly turned around and put these figures in on the basis of what the auditor said was appropriate and we've since rectified that and the parties also made it very clear about what the auditing process is.

Q. I know that things have changed in the last few months. I'm looking at a form dated or a letter dated 12 April 2008 which was attached to a form signed by you back in that time, and my question was the statement contained under the heading "Audit Opinion" that the union had 39,212 members eligible to vote in a ballot for an office in the union at 30 June 2007, is not correct, is it?

A. Well, if – there wasn't 39,212 people that actually voted in an election and looking at this sheet, the way it's been written, it's obviously been an oversight with regards to what the figures were, particularly when you come to the ALP interpretation. When it comes to – if you're saying an interpretation for voting purposes in the ALP which this document was prepared for, then that's the reference; if you're referencing to the ALP, that is the reference. I gather the auditor has attached the document too because that's what it says. They have made the interpretation, along with ourselves up until recent times, that that was an appropriate way to calculate the membership as for the party. In light of the fact that the discussions have taken place, as I've said now on several occasions, that we accept that the party has a different interpretation than what we had and the correct interpretation is the one that's now taking place.

Q. When you say there's an oversight, I take it you're agreeing with me that the statement

... the union had 39,212 members eligible to vote in a ballot for an office in the union at 30 June ...

Is not correct? Do you agree?

A. Well, I can't say what the chartered accountants – when they wrote that letter they had that interpretation of saying it was in the – my assumption is it was in the terms of saying regards the ALP, but your interpretation is your interpretation. I can only say what the auditors were referring to in the cover document. But if you're asking me about people who could vote in a union ballot, there was not 39,212 that could vote in a union ballot, which is separate from interpretation or with regards the ALP ballot unless, as we had done in past practices, wiped the back fees of all those ones that were considered technically under the rules unfinancial even though they might still be members of the union.

75. Then Mr Sheldon was asked:⁸³

Q. You were secretary of the NSW Branch?

A. If you're asking me to say did I get the figures wrong, or the auditor got the figures wrong and interpretation was incorrect and we're accepting what the ALP is saying now, yes, I do.

76. Then he accepted that he, the auditors, and the Branch Committee of Management had 'got it wrong for quite a number of years'.⁸⁴

77. Then the examination proceeded as follows:⁸⁵

Q. I take it in the period February 2008, you were still the secretary of the union and you knew how many members were financial and how many were unfinancial?

A. Did I know the exact figure? No. I knew there was a difference between the two. You know, obviously I did.

Q. You knew that roughly half of the 39,000 odd were unfinancial?

A. That would be correct, yes.

Q. You knew that when you filled out this form on 8 February 2008?

⁸³ Anthony Sheldon, 21/8/14, T:111.37-41.

⁸⁴ Anthony Sheldon, 21/8/14, T:112.1-3.

⁸⁵ Anthony Sheldon, 21/8/14, T:112.16-113.5.

A. Well, I knew that there was – that people in terms of the – the way that we interpreted the party rules, there was a capacity for those people to be included in terms of creation of the party. That’s what I believed at the time and subsequently to the issue being raised with the party in recent times, that interpretation has been deemed by the party to be incorrect. It’s subsequently been rectified as a result of those inquiries, which is my same answer to the same question you’ve asked me in several different ways for the last half hour.

Q. I take it that you read the independent audit report, did you, before you signed this document?

A. I would have glanced over it, yes.

Q. Did you read it or not?

A. Well, it’s 2008. It’s six years ago. Would I have looked at the document? Yes. Would I have glanced over it? Yes. Would I have had the interpretation for the purposes of the party rules that unfinancial members for purposes of the party to have people have the right to vote for the party, that’s the way I [would have] interpreted it, and that’s the way I did interpret it, but it’s subsequently been said by the party that was not the way to interpret it and we’ve rectified it.

78. These are non-credible answers and senior counsel assisting was indicating his incapacity to believe them.

79. The examination concluded with the following gratuitous comment from the witness, not in answer to any question:⁸⁶

THE WITNESS: You’ve probably asked me the same question about 10 different ways. I can give you a few suggestions. You’ll get the same answer.

MR STOLJAR: You haven’t answered yet, Mr Sheldon.

80. The argument of counsel for the TWU is an argument resting on an appeal to the rule in *Browne v Dunn*.⁸⁷ That rule requires a party or

⁸⁶ Anthony Sheldon, 21/8/14, T:113.10-14.

⁸⁷ (1893) 6 R 67.

witness against whom an allegation will be made in final address to be given notice of it by being asked appropriate questions in cross-examination. In light of the exchanges set out above the witness was sufficiently on notice of the allegation. But in any event, notice is not required to be given in the course of questioning if prior notice has been received in some other way.

81. On 30 July 2014 the Solicitor Assisting the Royal Commission wrote to Mr Michael Doherty of Maurice Blackburn in his capacity as solicitor for the TWU 'and Mr Anthony Sheldon'.⁸⁸ That letter gave notice that from 19-22 August 2014 the Commission would be calling evidence concerning, inter alia, the TWU. The letter requested a statement from Mr Sheldon on various topics. The last two were:⁸⁹

8. The circumstances in which the TWU is required to report to the Australian Labor Party on membership numbers.
9. The reasons for the errors in membership numbers the subject of the enclosed media article.

82. The enclosed article was from a mass circulation newspaper. It was by Ben Schneiders and Royce Millar. Its heading had three components. One was 'Union investigation'. The next was 'Power base eroded'. The boldest part of the headline was: 'TWU forced to correct falsified membership'. The article stated:⁹⁰

A powerful right-wing union under investigation by the royal commission into union corruption has had its formal influence in the Labor Party slashed after it was caught grossly inflating its membership numbers.

⁸⁸ TWU McLean Forum Tender Bundle, 20/8/14, pp. 507-509.

⁸⁹ TWU McLean Forum Tender Bundle, 20/8/14, p 509.

⁹⁰ TWU McLean Forum Tender Bundle, 20/8/14, p 510.

The Transport Workers Union has been forced to write down by more than half the number of members it claims in NSW, the branch from where the union draws much of its influence and nearly half its national members. The admission follows reports in Fairfax Media last December that revealed the TWU rorting as part of an investigative series into union slush funds.

Labor sources said the TWU was now claiming just 17,800 members in NSW; it had previously told Labor it had more than 88,000 members.

That will mean at next week's NSW state Labor conference the TWU will have just 23 delegates, down from 43 last time. There are 429 union delegates in total. Under ALP rules, delegates at the state conferences elect key committees including the powerful party administrative committees, and the public office selection committees that play a key role in choosing candidates for Parliament. Unions control half the delegates.

A senior Labor source confirmed the TWU had been forced to confess to the rort and as a result there would be a factional realignment within the right of the party with the conservative shop assistants' union likely to benefit while the left will also pick up some delegates.

A TWU spokesman said it had "amended" its affiliation to NSW Labor "in line with a clarification of party requirements". It confirmed it would have just 23 delegates but declined to comment further on why it had inflated its membership numbers.

The NSW ALP right has been dogged by corruption with the royal commission looking at activities of the Health Services Union and TWU in particular.

The TWU is the power base of present and past factional powerbrokers such as ALP vice-president Tony Sheldon, Senator Stephen Conroy, former senator and party official Mark Arbib and former NSW minister and party operative John Della Bosca.

Fairfax Media's reporting also revealed the involvement of the TWU's national and NSW branches in a \$500,000 takeover of its own Queensland branch in 2010. The elaborate campaign was partly paid for by a secretive slush fund, with staff and funds supplied by jailed HSU leader Michael Williamson and staff members from the offices of Labor MPs including federal opposition front-bencher David Feeney.

Mr Sheldon has sought to deflect attention away from the investigation into his union saying the commission has misrepresented facts around its superannuation scheme. He has also won an apology from Employment Minister Eric Abetz for misrepresenting the union's role in a slush fund it operates.

83. Words like ‘forced to correct falsified’, ‘grossly inflating’, ‘rorting’, ‘forced to confess to the rort’, ‘dogged by corruption’ and ‘secretive slush fund’ made it plain that the focus of the Commission’s interest in the statement requested was not limited to an inquiry into some accidental error or some change in ALP policy. It extended to the possibility of deliberate falsification in order to increase the TWU’s voting power. The statement was requested by 6 August 2014. In fact, because of Mr Sheldon’s overseas travel, it was not provided until 20 August 2014. He gave oral evidence on 21 August 2014.
84. Those documents, coupled with the sceptical tone of senior counsel assisting’s examination and the conduct of that examination – which involved repeated attempts to have Mr Sheldon explain why inflated numbers were given – can have left Mr Sheldon in no doubt as to one possible submission that might be made.
85. There was no unfairness. The evidence permitted an inference that Mr Sheldon was giving knowingly false answers, and that he had known for years that false membership numbers were being put forward. From that flows a further inference: that there was some advantage to be gained from doing this. The relevant advantage was an increase in TWU voting power at the ALP Conference and an advantage to Mr Sheldon as leader of the TWU delegates.

PART 11: THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA

CHAPTER 11

INTRODUCTION

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A – PRELIMINARY

1. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) is an employee association nominated in the Terms of Reference.

2. The Commission conducted a number of inquiries involving a number of case studies relating to the CEPU and its officers. Those case studies were as follows:
 - (a) The Protect Scheme: this relevant entity is the subject of a discrete chapter, being Chapter 5.3 of this Interim Report.
 - (b) The Electrical Trades Union (ETU) officers' fund. This relevant entity formed part of the Commission's inquiries the subject of Chapter 4.4 into the TWU Team Fund.
 - (c) The funding of Ms Diana Asmar's election campaigns, the subject of analysis in Chapter 4.7.
3. As the case studies identified above are the subject of treatment elsewhere in these submissions, they are not separately addressed in this chapter. This chapter will set out some background information pertaining to the CEPU.

B – BACKGROUND TO THE CEPU

History of the CEPU

4. The origins of the CEPU lie in the formation of various unions in the electrical, plumbing and communications industries.

5. The Federated Electrical Trades Union became federally registered in 1912. That union re-registered as the Electrical Trades Union of Australia on 24 December 1919, which is considered the official date of registration of the CEPU.¹
6. In 1912 the State-based plumbers' unions in Victoria, Queensland and South Australia merged and became federally registered as the Australian Plumbers and Gasfitters Employees Union. It was later joined by the plumbers' unions in New South Wales, Tasmania and Western Australia.²
7. In the early 1990s the Australian Plumbers and Gasfitters Employees Union merged with the Electrical Trades Union, which then became the Electrical, Electronic, Plumbing and Allied Workers Union of Australia.
8. Meanwhile, an amalgamation of unions in the communications trades resulted in the formation of the Communication Workers' Union of Australia. In 1994 that amalgamated union merged with the Electrical, Electronic, Plumbing and Allied Workers Union of Australia, and it was then renamed as the CEPU.³

¹ Electrical Trades Union, *Our History*, <http://www.etunational.asn.au/AboutETUNational/OurHistory.html>, accessed 12/8/14.

² Plumbing Trades Employees Union, *Our History*, <http://www.pteu.asn.au/history> accessed 12/8/14.

³ Communication Workers Union, *Our History*, <http://www.cwu.org.au/CWU-National-History.html>, accessed 12/8/14.

Current structure

9. The objects of the CEPU include increasing its membership and developing the interests of members such as appropriate wage classification, access to appropriate training and provision of legal protection in industrial matters. Other objects include: making financial provision for carrying out the objects; establishing an employment bureau for members; contributing to charitable organisations of the members' choosing; involvement in socially responsible actions; and increasing the number of female union employees and members. The objects also provide for the establishment and contribution of trust funds to further the objects of the union.⁴
10. The CEPU is a federally registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth). The CEPU is structured as a federation with three divisions:
 - (a) the Electrical, Energy and Services Division;
 - (b) the Plumbing Division; and
 - (c) the Communications Division.
11. These divisions represent the major areas of trade of the originating unions. Each division consists of a number of divisional branches. The most recent figures indicate that, at the

⁴ Fair Work Commission, *CEPU rules*, <http://www.e-airc.gov.au/128v/rules>, accessed 12/8/14.

end of 2013, the CEPU had 112,049 members in total. The Electrical, Energy and Services Division had 71,272 members; the Communications Division had 23,703 members; and the Plumbing Division had 17,074 members.⁵

12. The following table shows the number of members in each of the Electrical, Energy and Services divisional branches at the end of 2013:⁶

BRANCH	NUMBER OF MEMBERS
New South Wales Divisional Branch	22,055
Victorian Divisional Branch	19,406
Queensland Divisional Branch	16,195
South Australian Divisional Branch	4,093
Western Australian Divisional Branch	7,916
Tasmanian Divisional Branch	1,607

⁵ Fair Work Commission, *CEPU Annual Returns 2014*, <http://www.e-airc.gov.au/128v/annual>, accessed 12/8/14.

⁶ Fair Work Commission, *CEPU Annual Returns 2014*, <http://www.e-airc.gov.au/128v/annual>, accessed 12/8/14.

13. Between 17 April 2002 and 3 March 2009, the Victorian and Tasmanian divisional branches of the Electrical, Energy and Services Division merged and became the Southern States Divisional Branch, but on 3 March 2009 the two branches were re-established.⁷

14. The following table shows the number of members in each of the divisional branches of the Communications Division at the end of 2013:⁸

BRANCH	NUMBER OF MEMBERS
New South Wales Postal and Telecommunications Divisional Branch	8,412
New South Wales Telecommunications and Services Branch	1,140
Victorian Postal and Telecommunications Divisional Branch	4,388
Victorian Telecommunications and Services Branch	1,965
Queensland Divisional Branch	3,764
South Australian/ Northern Territory Branch	1,761
Western Australian Divisional Branch	1,762
Tasmanian Divisional Branch	511

⁷ Fair Work Commission, *CEPU Electrical Energy and Services Division*, <http://www.e-airc.gov.au/128vele>, accessed 12/8/14.

⁸ Fair Work Commission, *CEPU Annual Returns 2014*, <http://www.e-airc.gov.au/128v/annual>, accessed 12/8/14.

15. The following table shows the number of members in each of the four divisional branches of the Plumbing Division at the end of 2013:⁹

BRANCH	NUMBER OF MEMBERS
New South Wales Divisional Branch	2,085
Victorian Divisional Branch	11,557
Queensland Divisional Branch	3,432
Western Australian Divisional Branch	No data available

16. No data is available for the Western Australian Divisional Branch, which previously merged with the Electrical, Energy and Services Division and was re-established as an individual branch on 3 February 2014.¹⁰ The Plumbing Division previously had divisional branches in the ACT, South Australia and Tasmania. The ACT Divisional Branch merged with the NSW Divisional Branch and the South Australian and Tasmanian Divisional

⁹ Fair Work Commission, *CEPU Annual Return 2014*, <http://www.e-airc.gov.au/128v/annual>, accessed 12/8/14.

¹⁰ Fair Work Commission, *CEPU, Plumbing Division*, <http://www.e-airc.gov.au/128vplu>, accessed 12/8/14.

Branches merged with the Electrical, Energy and Services Division.¹¹

Rules and governance

17. The CEPU has five rulebooks: a federal rulebook; a divisional rulebook for each of its three divisions; and one rulebook for the NSW Divisional Branch of the Electrical, Energy and Services Division.¹²
18. The federal rulebook of the CEPU provides the eligibility rules for membership of the union and the basis of allocating members to divisions. It also includes the objects of the union as a whole, the structure of National Council and National Executive bodies, rules for meetings and duties of the members of governing bodies, election of officers and financial disclosure requirements for officers of the union. It also provides rules for the expenditure of union funds for union objectives and the management of funds and assets of the union.¹³
19. The federal rulebook applies to all members of the union, while the three divisional rulebooks apply only to members of the respective division. For any matter on which a divisional rulebook is silent, but is provided for in the federal rulebook, the

¹¹ Fair Work Commission, *CEPU, Plumbing Division*, <http://www.e-airc.gov.au/128vplu>, accessed 12/8/14.

¹² Fair Work Commission, *CEPU rules*, <http://www.e-airc.gov.au/128v/rules>, accessed 12/8/14.

¹³ Fair Work Commission, *CEPU rules*, <http://www.e-airc.gov.au/128v/rules>, accessed 12/8/14.

federal rulebook is the appropriate reference. The divisions are autonomous in relation to all matters that do not affect the members of any other division.¹⁴ Each divisional rulebook includes provision for the division's internal governance structure, meetings of its governing bodies and the duties of its officers. Matters affecting the members of more than one division are dealt with by the National Council.

20. The highest governing body of the union is the National Council. It comprises a broad range of officers and delegates from the divisions and divisional branches, as specified in the rules.¹⁵ The powers of the National Council include:

- (a) determination of policy matters that concern more than one division;
- (b) alterations of the national rules;
- (c) authorisation of legal proceedings that concern more than one division;
- (d) determination of any divisional matter that has been referred to it by a divisional council;

¹⁴ Fair Work Commission, *CEPU rules*, <http://www.e-airc.gov.au/128v/rules>, accessed 12/8/14, rule 6.2.1.

¹⁵ Fair Work Commission, *CEPU rules*, <http://www.e-airc.gov.au/128v/rules>, accessed 12/8/14, rule 7.10.

- (e) authorising expenditure on property from the funds of a division or divisional branch;
 - (f) dealing with claims concerning the misconduct of office holders and imposing the appropriate sanction in accordance with the rules;
 - (g) appointing of its auditors and of returning officers for its elections; and
 - (h) delegating of its powers in accordance with the rules.
21. Meetings of the National Council are held annually and Special National Council meetings are held when deemed necessary.¹⁶
22. Voting power on the National Council is proportional to the number of financial members attached to a divisional branch.¹⁷ Divisional branches have the right to exercise one vote for every 100 members at National Council meetings.¹⁸
23. The National Executive is the next highest governing body of the union. It consists of four National Executive Officers and twelve National Executive Members, representing each of the Divisions. With the exception of altering the federal rulebook and dealing

¹⁶ Fair Work Commission, *CEPU rules*, <http://www.e-airc.gov.au/128v/rules>, accessed 12/8/14, rule 7.6.

¹⁷ Fair Work Commission, *CEPU rules*, <http://www.e-airc.gov.au/128v/rules>, accessed 12/8/14, rule 7.14.1.

¹⁸ Fair Work Commission, *CEPU rules*, <http://www.e-airc.gov.au/128v/rules>, accessed 12/8/14, rule 7.14.4.1.

with claims concerning the misconduct of office holders, the National Executive may exercise the powers of the National Council when the National Council is not in session. It is, nevertheless, subordinate to the National Council.¹⁹

¹⁹ Fair Work Commission, *CEPU rules*, <http://www.e-airc.gov.au/128v/rules>, accessed 12/8/14, rule 7A.

PART 12: SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION

CHAPTER 12

MISCELLANEOUS PROBLEMS FOR SDA QUEENSLAND

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A – INTRODUCTION

1. The Terms of Reference are not limited to inquiries relating only to the five unions specified. The Commission has inquired into the conduct of officials of numerous employee organisations. One case studied selected for public hearing as a representative case study of the kinds of practices common across the union sectors related to the affairs of the Shop, Distributive and Allied Employees Association, Queensland Branch (**SDA Queensland**).
2. This chapter concerns:

- (a) the dismissal of individuals who challenge incumbents within the SDA Queensland;
- (b) possible discrimination and breaches of privacy by the SDA Queensland against its shop stewards; and
- (c) the disclosure of donations to ALP electoral offices.

B – RELEVANT FACTS

Termination of rivals: Mr Swetman’s nomination for Secretary-Treasurer

- 3. As discussed in Chapter 4.8, Senator Ketter was not challenged for the position of Secretary-Treasurer of the SDA Queensland between his election in July 1996 and 2013.¹
- 4. On 6 May 2013, nominations opened for election to the position of Secretary-Treasurer of the SDA Queensland.² Nominations were to remain open until 12.00 noon on 24 May 2013.³
- 5. On 15 May 2013, Mr Swetman completed his nomination form.⁴
- 6. Mr Swetman knew Senator Ketter was concerned about people running against him and so he deliberately kept his nomination quiet.⁵

¹ Chris Ketter, 18/8/14, T:88.6-8.

² Ketter MFI-2, p 16.

³ Ketter MFI-2, p 16.

⁴ SDA Tender Bundle, p 1.

⁵ Alan Swetman, witness statement, 18/8/14, para 15.

However, Mr Swetman did tell Wade Lange, one of his fellow organisers, that he had submitted a nomination.⁶

7. Senator Ketter became aware of rumours that Mr Swetman had submitted a nomination.⁷ In response to these rumours, and prior to the close of nominations, Senator Ketter, Senator Hogg and Rocco Mimmo, spoke to Tony Stapleton, another organiser.⁸ Mr Mimmo is a consultant who provides legal advice to the SDA Queensland.⁹ His role within the SDA Queensland is discussed in more detail below.
8. Mr Swetman's evidence is that Mr Stapleton told him that on 20 May 2013, after an organiser's meeting, Mr Stapleton was called into a meeting with Senator Ketter, Senator Hogg and Mr Mimmo. He was asked to see Mr Swetman the following day.¹⁰ Senator Ketter does not concede that he told Mr Stapleton to go and speak to Mr Swetman.¹¹
9. On 21 May 2013, Mr Stapleton contacted Mr Swetman and arranged a meeting with him for that day.¹² At the meeting, Mr Swetman informed Mr Stapleton of his reasons for contesting the position. One reason was that in his view the SDA Queensland had forgotten about the needs of its members.¹³ Mr Stapleton agreed with Mr Swetman's concerns about the direction that the SDA Queensland was taking but

⁶ Alan Swetman, 18/8/14, T:13.38-39.

⁷ Chris Ketter, 18/8/14, T:88.10-14.

⁸ Chris Ketter, 18/8/14, T:88.16-21.

⁹ Chris Ketter, 18/8/14, T:92.34-35.

¹⁰ Alan Swetman, witness statement, 18/8/14, para 20.

¹¹ Chris Ketter, 18/8/14, T:88.23-25.

¹² Alan Swetman, witness statement, 18/8/14, para 16.

¹³ Alan Swetman, witness statement, 18/8/14, para 17.

did not think contesting the position of Secretary-Treasurer was the correct path to take.¹⁴

10. After this meeting, Mr Stapleton reported back to Senator Ketter that he had been unsuccessful in persuading Mr Swetman to withdraw his nomination.¹⁵

Termination of rivals: dismissal of Mr Swetman

11. The news that Mr Stapleton was unsuccessful in dissuading Mr Swetman from contesting the election spurred Senator Ketter and his supporters into action.
12. At around 9.00am on 22 May 2013, the day after Mr Stapleton's meeting with Mr Swetman, Senator Ketter and two other representatives of the SDA Queensland, Mr Gazenbeek and Mr Martin, arrived at Mr Swetman's house unannounced.¹⁶ Mr Swetman was at home sick.¹⁷ Mr Swetman's son opened the door and advised Senator Ketter that his father was unwell and was not prepared to talk with him.¹⁸ Shortly later, Senator Ketter yelled through the window 'we're taking your car, Alan', before pulling everything out of the car, putting it on the ground and driving away.¹⁹ Senator Ketter testified that this confiscation of the car took place because he was concerned about Mr

¹⁴ Alan Swetman, witness statement, 18/8/14, para 19.

¹⁵ Chris Ketter, 18/8/14, T:89.24-30.

¹⁶ Chris Ketter, 18/8/14, T:89.45, 90.8.

¹⁷ Alan Swetman, witness statement, 18/8/14, para 21.

¹⁸ Chris Ketter, 18/8/14, T:90.33-37.

¹⁹ Alan Swetman, 18/8/14, T:17.6-18.

Swetman's unauthorised use of some union property, a mobile phone.
No prior allegation of this had been put to Mr Swetman.²⁰

13. Was it just a coincidence in time that this rather startling event took place early on the first working day after Mr Stapleton's attempts to persuade Mr Swetman not to run had failed?
14. Mr Swetman had been provided with the car by the SDA Queensland for work purposes.²¹ Mr Swetman testified that it would be very difficult to carry on his duties as an organiser without a car.²² Senator Ketter agreed that it would have been difficult.²³
15. Later that same day, around lunchtime, a man in a utility vehicle delivered a letter to Mr Swetman.²⁴ The letter, dated 22 May 2012, and signed by Senator Ketter, set out the following:²⁵

I write to advise of my serious concerns about the suitability of your ongoing employment ... and that you are suspended immediately from all union duties pending your response to the matters listed below ...

As you know, on 2 occasions last year I raised my concerns about your work performance.

16. The occasions on which Senator Ketter raised these purported 'concerns' with Mr Swetman warrant further explanation. Both occasions were meetings with Mr Swetman.

²⁰ Chris Ketter, 18/8/14, T:91.8-25.

²¹ Alan Swetman, 18/8/14, T:17.20-24.

²² Alan Swetman, 18/8/14, T:17.26-28.

²³ Chris Ketter, 18/8/14, T:91.31-33.

²⁴ Alan Swetman, 18/8/14, T:18.4-14.

²⁵ Swetman MFI-1, 18/8/14, p 1.

17. The first meeting, in February or March 2012, was more than 12 months prior to Mr Swetman receiving this letter.²⁶ According to Mr Swetman, this meeting was ‘just a normal chat’, in the nature of a performance review.²⁷
18. The second meeting, held in August 2012, was more aggressive and at that meeting Senator Ketter asked why Mr Swetman was not signing more people up to the union.²⁸
19. The 22 May letter alleged that Mr Swetman had:²⁹
- (a) exhibited ‘a pattern of absenteeism’;
 - (b) used his SDA Queensland issued phone whilst on sick leave in a manner ‘inconsistent with genuine sickness’; and
 - (c) been operating a private commercial business – ‘Home Business Personal Development’ – advertising his SDA Queensland mobile phone to further his personal business interests.
20. Mr Swetman acknowledged that, around this time, he had embarked on ‘Home Business Personal Development’, which involved the distribution of personal development books and DVDs.³⁰ He said that

²⁶ Alan Swetman, 18/8/14, T:19.25-26.

²⁷ Alan Swetman, 18/8/14, T:18.39-47.

²⁸ Alan Swetman, 18/8/14, T:19.1-2.

²⁹ Swetman, MFI-1, 18/8/14, p 1.

³⁰ Alan Swetman, 18/8/14, T:20.35-47.

this endeavour was something of a hobby. He did not levy any charges for services, receive any money or have any clients or customers.³¹ Was it just a coincidence that the allegations in the 22 May letter were made in the middle of the first working day after Mr Stapleton's failure?

21. The 22 May letter, on which Mr Mimmo provided advice,³² required Mr Swetman to respond by 12.00pm the following day and provide reasons why his employment should not be terminated immediately and he should not be expelled from the SDA Queensland.³³
22. This left Mr Swetman with approximately 24 hours to respond. He responded in an email sent to Senator Ketter at 11.56am on 23 May 2013. In that email, Mr Swetman stated: 'As a member of the SDA Queensland I'm saddened you have taken these extraordinary measures against someone who is running against you, Chris'.³⁴
23. Later in the afternoon on 23 May 2013, Mr Swetman received a letter from Senator Ketter which stated:³⁵

You have failed to respond to the serious matters of misconduct which I have raised with you and therefore as per our letter you are terminated effective 12 noon today. Further, the Committee of Management has resolved that you are not a person worthy of membership of the union due to your use of union property for personal gain.

³¹ Alan Swetman, 18/8/14, T:21.1-10.

³² Chris Ketter, 18/8/14, T:92.28-29.

³³ Swetman MFI-1, p 1.

³⁴ Swetman MFI-1, p 3.

³⁵ Swetman MFI-1, p 4.

24. Was this very speedy response by the Committee of Management just a coincidence?
25. In the letter, Senator Ketter required Mr Swetman to hand over all SDA Queensland property. He said: 'I personally will come to your home to collect the said material'.³⁶
26. At the time of Mr Swetman's dismissal he had provided the SDA with a medical certificate covering the period of his absence.³⁷
27. In his examination, Senator Ketter denied that he was seeking to remove Mr Swetman from the SDA Queensland prior to the close of nominations.³⁸ Senator Ketter's evidence was:³⁹

Q. ...you were seeking to remove [Mr Swetman] from the union prior to the close of nominations; is that right?

A. That's incorrect.

Q. It's just complete coincidence, is it, that this happened on 22 May, with nominations closing a day or two later?

A. There were a number of other issues that came up which were pressing.

Q. Do you say this was just complete coincidence?

A. This was complete coincidence, yes.

Q. That is your sworn evidence to this Commission, that it was just coincidence that this occurred two days before the close of nominations?

³⁶ Swetman MFI-1, p 5.

³⁷ Chris Ketter, 18/8/14, T:99.14-37.

³⁸ Chris Ketter, 18/8/14, T:93.17-19.

³⁹ Chris Ketter, 18/8/14, T:93.21-33.

A. That is a coincidence.

28. It is not, with respect, possible to accept that these events fell out as they did only as a matter of coincidence. It would be a wearisome consumption of space, and not advantageous to Senator Ketter, to analyse his evidence in detail from this point of view, but both the content of Senator Ketter's evidence on these matters and the way it was given did not inspire confidence in his explanations.
29. Mr Swetman brought an unfair dismissal claim against the SDA Queensland and those proceedings were settled.⁴⁰

Termination of rivals: Federal Court challenge to Mr Swetman's nomination

30. Mr Swetman notified the Australian Electoral Commission (AEC) that his employment had been terminated and that he was no longer a member of the SDA Queensland.⁴¹ The AEC representative to whom Mr Swetman spoke advised Mr Swetman that he would make enquiries about whether he was a member.⁴²
31. In early June 2013, Mr Swetman received a call from the AEC and was informed that his nomination for Secretary-Treasurer stood and that the election was going ahead.⁴³

⁴⁰ Alan Swetman, 18/8/14, T:24.3-7.

⁴¹ Alan Swetman, 18/8/14, T:24.15-16.

⁴² Alan Swetman, 18/8/14, T:24.19-20.

⁴³ Alan Swetman, witness statement, 18/8/14, para 28.

32. On 5 June 2013, the AEC wrote to Chris Gazenbeek, the First Assistant Secretary of the SDA Queensland, and informed him of the need to hold an election for the position of Secretary-Treasurer and that the ballot was to be open from 8 July 2013 and close on 26 July 2013.⁴⁴
33. On 12 June 2013, Ms Beswick filed proceedings in the Federal Court of Australia alleging that Mr Swetman was not eligible to be a candidate because, amongst other things, he was not and never had been eligible to be a member of the SDA Queensland.⁴⁵ This was the first time that it had ever been asserted that Mr Swetman was not a member.⁴⁶
34. At the hearing of the application, the SDA Queensland was granted leave to appear and adopted Ms Beswick's submission that Mr Swetman was not eligible to be a member of the SDA Queensland.⁴⁷
35. The Federal Court found that:⁴⁸
- (a) Mr Swetman had joined the SDA Queensland without objection;

⁴⁴ Ketter MFI-2, pp 33-34.

⁴⁵ Ketter MFI-2, pp 19-21.

⁴⁶ Alan Swetman, 18/8/14, T:24.36-47.

⁴⁷ *Beswick, in the matter of an Election for an Office in the Shop, Distributive & Allied Employees' Association v Swetman* [2013] FCA 642, [40].

⁴⁸ *Beswick, in the matter of an Election for an Office in the Shop, Distributive & Allied Employees' Association v Swetman* [2013] FCA 642, [31].

- (b) Mr Swetman had paid his SDA Queensland dues year after year without question and received a membership identity card; and
- (c) Mr Swetman attended members' meetings and, very likely, voted at those meetings, without challenge.

36. Despite these factors, the Federal Court found that, under the rules of SDA Queensland, as an employed organiser, Mr Swetman was not entitled to be a member of the SDA Queensland, except perhaps in an honorary capacity.⁴⁹ Accordingly, Mr Swetman's nomination was held invalid.⁵⁰
37. Senator Ketter's evidence was that he believed Mr Swetman was not a full member with full member entitlements and that therefore he was not eligible to contest the election.⁵¹ Senator Ketter had understood this for 18 years (ie, the entire period Mr Swetman had been paying membership dues).⁵² Yet no-one had ever suggested to Mr Swetman that he was not a member until Senator Ketter caused the Federal Court proceedings to be brought to defeat Mr Swetman's capacity to stand for election.⁵³

⁴⁹ *Beswick, in the matter of an Election for an Office in the Shop, Distributive & Allied Employees' Association v Swetman* [2013] FCA 642, [41].

⁵⁰ *Beswick, in the matter of an Election for an Office in the Shop, Distributive & Allied Employees' Association v Swetman* [2013] FCA 642, [46].

⁵¹ Chris Ketter, 18/8/14, T:104.42-105.1.

⁵² Chris Ketter, 18/8/14, T:105.35-41.

⁵³ Alan Swetman, 18/8/14, T:24.45-47; Chris Ketter, 18/8/14, T: 107.35-39.

38. Mr Swetman has not had his membership fees returned.⁵⁴

Termination of rivals: dismissal of Ms Perry

39. On 24 May 2013, a newspaper article was published in the Brisbane Times which reported the dismissal of Mr Swetman and the role which Mr Mimmo played at the SDA Queensland.⁵⁵ The article included quotations from an anonymous second union organiser to the effect that Mr Mimmo gave lectures to SDA Queensland organisers opposing gay rights, euthanasia and abortion and that Mr Swetman would have won the election if he had not been dismissed.⁵⁶ The source of these quotes was Rosa Perry.⁵⁷

40. At the time, Ms Perry was employed as an organiser with the SDA Queensland and had been since 19 June 2006.⁵⁸

41. In addition to the comments provided for the Brisbane Times article, Ms Perry was involved in re-posting the article on a 'Facebook' page directed to members of the SDA Queensland dissatisfied with the way the SDA Queensland was being run,⁵⁹ and she may have published similar criticisms through her Twitter account.⁶⁰

⁵⁴ Chris Ketter, 18/8/14, T:108.42-44.

⁵⁵ Perry MFI-1, pp 21-22.

⁵⁶ Perry MFI-1, pp 21-22.

⁵⁷ Rosa Perry, witness statement, 18/8/14, para 17.

⁵⁸ Rosa Perry, 18/8/14, T:40.10-11.

⁵⁹ Rosa Perry, 18/8/14, T:50.19-28.

⁶⁰ Rosa Perry, 18/8/14, T:51.35-40.

42. On 27 May 2013, a Special Meeting of the State Council of the SDA Queensland was convened. During that meeting Senator Ketter moved a resolution that, amongst other things, the Special Meeting of the State Council:⁶¹

- notes that organiser Rosa Perry has not worked since 21 February 2013 and has provided medical certificates advising that she is suffering from a medical condition,
- however also notes that in the past two weeks she has been active in assisting in the attacks on the union
- is alarmed at this unacceptable behaviour and further notes that this is inconsistent with the behaviour of a person who is suffering a medical condition,

directs the Secretary to offer Rosa Perry seven (7) days to explain her action in writing, or alternatively should she choose, she may request to appear before a Special Meeting of State Council in seven (7) days to provide her explanation.

43. The following day, on 28 May 2013, Senator Ketter wrote to Ms Perry advising her of the resolution of the State Council and seeking her written response within seven days.⁶²

44. Ms Perry did not respond to this letter. On 12 June 2013, Senator Ketter sent Ms Perry a letter advising that in the absence of a response from her the SDA Queensland had granted her a further opportunity to respond.⁶³

⁶¹ Ketter MFI-4, p 2.

⁶² Perry MF-1, p 20.

⁶³ Perry MF-1, p 23.

45. Again, Ms Perry did not respond and her employment was terminated with effect from 18 June 2013.⁶⁴
46. Ms Perry filed an application for unfair dismissal with the Fair Work Commission but ultimately withdrew her application.⁶⁵

Discrimination and breach of privacy: role of Mr Mimmo in the SDA

47. As described above, Mr Mimmo provided legal advice to the SDA Queensland.⁶⁶ In addition, Mr Mimmo also conducted induction courses for shop stewards appointed by the SDA Queensland.⁶⁷
48. Ms Perry's evidence was that she had around three or four interviews for her position as an organiser with the SDA Queensland, and that each interview was attended by Mr Mimmo. Ms Perry said that at that time she thought Mr Mimmo was part of the SDA Queensland.⁶⁸ Several months later Ms Perry realised that Mr Mimmo was not employed by the SDA Queensland.⁶⁹
49. In her statement, Ms Perry said that she had a meeting with Senator Ketter and Mr Mimmo after she gained her position with the SDA Queensland. At that meeting, Mr Mimmo said:⁷⁰

⁶⁴ Perry MFI-1, p 24.

⁶⁵ Rosa Perry, 18/8/14, T:55.9-13.

⁶⁶ Chris Ketter, 18/8/14, T:92.34-35.

⁶⁷ Rosa Perry, 18/8/14, T:61.38-41.

⁶⁸ Rosa Perry, witness statement, 18/8/14, para 36.

⁶⁹ Rosa Perry, witness statement, 18/8/14, para 38.

⁷⁰ Rosa Perry, witness statement, 18/8/14, para 37.

There will be occasions when I will call meetings and you will have to drop what you are doing and attend them, when you come to these meetings, I'm the one who is in charge, not Chris.

50. Ms Perry gave evidence that the meetings were held once a month.⁷¹ Invitations to the meetings were sent by Mr Mimmo.⁷²
51. At these meetings, Mr Mimmo would discuss his ideas about social and ethical issues such as same sex marriage, euthanasia, abortion, homosexuality and stem cell research. The topic for the discussions would often reflect what was being discussed in the media. For example, when the issue of same sex marriage was being debated in public and in the Parliament, Mr Mimmo spoke at one of these meetings opposing same sex marriage. At the end of the meeting, Mr Mimmo encouraged those attending to go into the community and make sure that people understood that the *Marriage Act* 1961 (Cth) should not change.⁷³
52. Senator Ketter's evidence was that these meetings were and are voluntary meetings and people participate in the meetings in their own time;⁷⁴ and there was and is no retribution if people did not or do not attend.⁷⁵

⁷¹ Rosa Perry, witness statement, 18/8/14, para 39.

⁷² Chris Ketter, 18/8/14, T:127.7.

⁷³ Rosa Perry, witness statement, 18/8/14, para 40.

⁷⁴ Chris Ketter, 18/8/14, T:127.7-9.

⁷⁵ Chris Ketter, 18/8/14, T:127.9-10.

53. Ms Perry did not agree that union officials needed to be informed of the various arguments of Mr Mimmo in relation to issues such as euthanasia in order to perform the task of an organiser.⁷⁶ She said that she had no real choice but to participate actively in the meetings.⁷⁷
54. Ms Perry gave evidence that not all officials were involved in these meetings even though those running the branch may have had the view that officials should be exposed to debate at them.⁷⁸

Discrimination and breach of privacy: collection of information on SDA Queensland delegates

55. The SDA Queensland website explains the role of a delegate as follows:⁷⁹

Shop Stewards or Delegates are unpaid representatives [of] SDA members in the workplace. They are members whose major responsibilities include:

- Recruiting new members into the union
- Communication
- Enforcement of Enterprise Agreements or Awards
- Enforcement of statutory entitlements
- Promoting the union
- Solving members' problems
- Attending meetings
- Self-education.

A Shop Steward or Delegate receives training on issues related to the Union and its members. We supply Shop Stewards or Delegates with a copy of the relevant award or agreement, a handbook on how to approach various issues and other helpful material.

⁷⁶ Rosa Perry, 18/8/14, T:58.31-35.

⁷⁷ Rosa Perry, 18/8/14, T:59.17-18.

⁷⁸ Rosa Perry, 18/8/14, T:58.40-47.

⁷⁹ Unknown author, *General FAQ*, <http://www.sdaq.asn.au/about-us/general-faq/>, accessed 20/10/14.

56. Most organisers at the SDA Queensland are sourced from the ranks of SDA Queensland delegates.⁸⁰ The typical career path to become an organiser at the SDA Queensland follows the following progression: shop assistant; union member; union delegate; and then employed organiser.⁸¹
57. Ms Perry was asked to prepare reports that dealt with, among other things, the political party affiliations of existing delegates.⁸² Ms Perry gave evidence on the circumstances which led to her preparing the reports:⁸³

I was also advised by former Assistant Secretary Paul Denahy to keep a file/dossier on the shop stewards that were engaged by the SDA in my area. The dossier was prepared in case there was a contested election in the SDA and the shop stewards needed to be called upon to drum up support for Mr Ketter. The dossier included information on each shop steward's marital status, religious views, affiliation with other organisations as well as rankings on the stewards' reliability, honesty and performance.

...

In addition to the dossier, when an individual put himself or herself forward as a possible shop steward, the organiser in the relevant area was expected to vet the individual based on the topics mentioned ... above. Organisers were trained to obtain information from applicants about these topics by referring to recent media coverage of relevant ethical or political issues. Again, using the example of same sex marriage, an organiser would refer to the recent debate about same sex marriage and consider the individual's response. If the individual expressed a view that was contrary to Mr Mimmo's view, then the person would not be considered suitable as a shop steward and would not be engaged.

⁸⁰ Alan Swetman, 18/8/14, T:26.19-22.

⁸¹ Alan Swetman, 18/8/14, T:27.6-12.

⁸² Rosa Perry, 18/8/14, T:59.24-27.

⁸³ Rosa Perry, witness statement, 18/8/14, paras 42-43.

58. The report took the following form:⁸⁴

Shop Steward Details								
Name	DOB	Marital Status	Political View	Affiliation with other Organisations	Religious Views	Reliability	Honesty	Energetic Performance

59. Ms Perry testified that before the close of nominations in SDA Queensland elections the reports were to be provided to Mr Mimmo or Mr Gazenbeek.⁸⁵ Ms Perry's understanding was that she should not email the documents but she did so.⁸⁶

60. In her oral evidence, Ms Perry said that the information was collected at the request of Mr Mimmo.⁸⁷ The SDA Queensland did have regard to the information. Mr Mimmo was acting as an agent of SDA Queensland in requesting the information and compiling it. In acquiescing in the collection of such information, officials of SDA Queensland were complicit in the arrangement and authorised this conduct.

⁸⁴ Rosa Perry, MFI-1, p 60.

⁸⁵ Rosa Perry, witness statement, 18/8/14, para 42.

⁸⁶ Rosa Perry, 18/8/14, T:64.33-39.

⁸⁷ Rosa Perry, 18/8/14, T:64.33-34.

The SDA's need for information on its stewards

61. What is the purpose underlying the practice by which the SDA Queensland obtains information on the marital status, religious views, political views and affiliations with other organisations of shop stewards?

62. Senator Ketter offered the following explanation in his evidence:⁸⁸

... it's very important that we're in a position to understand that we have support from our stewards and delegates; that they understand the direction of the union and are focused on the work of the union. From time to time you do get people coming along with a particular single issue that they want to champion, and our view is that we want our delegates to be focused on the work of the union. The policy of the union is very much that it should be focused on the bread and butter needs, industrial needs of our members, so we do want to ensure that our stewards reflect that general attitude of the union.

63. Later on in his evidence, Senator Ketter offered further explanation in response to a question by his senior counsel:⁸⁹

Q. ... you will recall that Ms Perry in her evidence suggested that there may be a tendency to disadvantage persons from advancement as shop stewards if those persons didn't have particular political affiliations or particular religious views, or that they had other attributes. What, if anything, do you say about that?

A. Well, those of themselves are not a reason as to why we would have concern about that particular person being appointed as a steward. What we are concerned about is the fact, as I said earlier, that our stewards have to be focused on the industrial needs of our members. We don't want stewards who perhaps have single interest views and seeking to impose that on others, and also the person must be of reasonably high standing amongst their fellow members and able to maintain confidentiality. We are

⁸⁸ Chris Ketter, 18/8/14, T:125.23-34.

⁸⁹ Chris Ketter, 18/8/14, T:127.12-31.

aware, from time to time, that there are organisations out there that, you know, potentially can be looking for inroads into our union and so, as I say, we are wanting to focus on having stewards in place who are more interested in dealing with the day-to-day issues of our members.

64. These goals may be understandable. But did the conduct which flowed from them comply with the law?

Donation of labour to the ALP: staffers for the ALP in Rankin and Blair

65. On 22 August 2012, the National Executive of the Shop, Distributive and Allied Employees Association considered the following proposal:⁹⁰

... in order to assist Labor in winning the next election, the Association should fund the employment of a suitable person chosen in an electorate in the area of each Branch. Each such person should work full-time at the direction of the Party or the local ALP candidate for the election of that ALP candidate in the seat. The person would be paid the same rate as an organiser in a local branch. The employment would finish after the federal election was held.

66. The National Executive then passed a resolution to this effect.⁹¹ This arrangement was known as the ‘target seat coordinator’ arrangement.⁹²
67. In respect of the SDA Queensland, the effect of the target seat coordinator arrangement was that two full-time employees were organised to work on the campaign of the Labor candidate in each of the seats of Blair and Rankin.⁹³ Chris Forrester and Brett Raguse were

⁹⁰ Ketter MFI-2, p 45.

⁹¹ Ketter, 18/8/14, T:110.7-9.

⁹² Ketter, 18/8/14, T:110.24-26.

⁹³ Ketter MFI-2, p 49.

both employed by SDA Queensland, and placed in the campaign offices of candidates in Blair and Rankin respectively.⁹⁴

68. Mr Forrester began his employment with SDA Queensland on 5 November 2012, but did not work in the branch before beginning work in the seat of Blair. Senator Ketter's evidence was that he was brought on specifically for the purpose of working in the campaign office of the candidate for Blair.⁹⁵ He worked in the campaign office through until September 2013 and then continued on with the SDA Queensland afterwards.⁹⁶
69. Mr Raguse's experience was slightly different. Mr Raguse was working for Dr Craig Emerson, who was the incumbent in the seat of Rankin, and Dr Emerson announced his resignation three or four months prior to the election.⁹⁷ After Dr Emerson's resignation, Mr Raguse sought pre-selection in the seat of Rankin but was unsuccessful in obtaining it.⁹⁸ After Mr Raguse's unsuccessful attempt for pre-selection he moved across to the seat of Blair to assist in that campaign.⁹⁹
70. The National Office of the Shop, Distributive and Allied Employees Association (SDA National Office) paid the SDA Queensland an

⁹⁴ Chris Ketter, 18/8/14, T:111.11-20.

⁹⁵ Chris Ketter, 18/8/14, T:112.24-38.

⁹⁶ Chris Ketter, 18/8/14, T:114.17-19.

⁹⁷ Chris Ketter, 18/8/14, T:114.33-42.

⁹⁸ Chris Ketter, 18/8/14, T:115.21-30.

⁹⁹ Chris Ketter, 18/8/14, T:115.32-33.

amount reflecting the amount expended by the SDA Queensland in payment of wages and benefits to Mr Raguse and Mr Forrester.¹⁰⁰

71. Amongst a bundle of documents produced by the SDA National Office was a document, created on 29 July 2014, labelled ‘payments to the Qld Branch re target seat co-ordinators’.¹⁰¹ The total amount recorded on that document, which Senator Ketter agreed was correct, was \$179,825.27.¹⁰²
72. Senator Ketter gave evidence that the SDA Queensland decided to support the election of the ALP candidates in Rankin and Blair by employing Mr Raguse and Mr Forrester, rather than simply donating the money to the ALP or the candidates, because they considered that providing the employees would allow the SDA Queensland to be more effective in its support for the Labor cause.¹⁰³

Disclosure of arrangements

73. On 23 August 2013, Senator Ketter, on behalf of the SDA Queensland, completed a ‘Disclosure Return – Donor to Registered Political Party’.¹⁰⁴ The disclosure recorded that for the period 1 January 2013 to 30 June 2013, SDA Queensland made donations to:¹⁰⁵

¹⁰⁰ Chris Ketter, 18/8/14, T:111.22-28.

¹⁰¹ Ketter MFI-2, p 50.

¹⁰² Chris Ketter, 18/8/14, T:111.30-33.

¹⁰³ Chris Ketter, 18/8/14, T:116.2-13.

¹⁰⁴ SDA Tender Bundle, pp 2-4.

¹⁰⁵ SDA Tender Bundle, p 3.

- (a) ALP – Blair in the amount of \$68,463.04 with the description of ‘Chris Forrester labour’; and
- (b) ALP – Rankin in the amount of \$44,107.48 with the description of ‘Brett Raguse labour’.

74. The Annual Financial Report for the SDA National Office for the year ending 30 June 2013 was provided to members before 20 September 2013.¹⁰⁶ The Financial Report recorded, in the notes to financial statements, that the National Office made payments of \$108,238 to the Queensland branch for ‘Target seat coordinator employment reimbursements’.¹⁰⁷

75. On 20 February 2014, Senator Ketter, on behalf of the SDA Queensland, completed a further ‘Disclosure Return – Donor to Registered Political Party’.¹⁰⁸ This disclosure recorded that for the period 1 July 2013 to 31 December 2013, SDA Queensland made donations to:¹⁰⁹

- (a) ALP – Blair in the amount of \$11,369.50 with the description of ‘Chris Forrester labour’; and
- (b) ALP – Rankin in the amount of \$17,571.82 with the description of ‘Brett Raguse labour’.

¹⁰⁶ Ketter MFI-2, p 145.

¹⁰⁷ Ketter MFI-2, p 181.

¹⁰⁸ SDA Tender Bundle, pp 5-7.

¹⁰⁹ SDA Tender Bundle, p 6.

76. Section 237 of the *Fair Work (Registered Organisations) Act 2009* (Cth) requires that organisations lodge with the Fair Work Commission a statement showing the relevant particulars of each loan, grant or donation of an amount exceeding \$1,000. Three statements made under s 237 of the *Fair Work (Registered Organisations) Act 2009* (Cth):
- (a) SDA Queensland statement for the year ending 30 June 2013;¹¹⁰
 - (b) National Office statement for the year ending 30 June 2013;¹¹¹ and
 - (c) National Office statement for the year ending 30 June 2014.¹¹²
77. None of these statements referred to the donation of the labour of Mr Forrester or Mr Raguse to the ALP.
78. Senator Ketter was asked whether there had been any disclosure to the members. He said that there ‘might have been a journal article in respect of that issue, but it's not something we were not proud of’.¹¹³

¹¹⁰ Ketter MFI-2, pp 225-226.

¹¹¹ Ketter MFI-2, pp 140-141.

¹¹² SDA Tender Bundle, pp 8-9.

¹¹³ Chris Ketter, 18/8/14, T:116.41-43.

C – LEGAL ISSUES

Removal of opponents

79. Mr Swetman and Ms Perry both brought unfair dismissal claims under the *Fair Work Act* 2009 (Cth).
80. Mr Swetman's claim was settled. However, Ms Perry withdrew her claim as she 'didn't want to be silenced.' If she settled her claim a condition of any settlement would be silence with respect to her employment at the SDA.¹¹⁴
81. Having respectively settled and withdrawn their unfair dismissal claims, neither Mr Swetman nor Ms Perry can bring claims under the *Fair Work Act* 2009 (Cth).¹¹⁵ Despite this, it is still worthwhile examining the SDA's conduct, in respect of Mr Swetman, against the adverse action provisions of the legislation.

Circumstances of Mr Swetman's dismissal

82. Senator Ketter contended that Mr Swetman was dismissed because of poor work performance, absenteeism, failure to attend a pre-arranged meeting with a long-term shop steward and pursuing personal business

¹¹⁴ Rosa Perry, 18/8/14, T:66.11-22.

¹¹⁵ The effect of s 725 -732 of the *Fair Work Act* 2009 (Cth) is that, when dismissed, an employee must choose one option to challenge the dismissal (and cannot, for example, bring an unfair dismissal claim as well as a general protections claim). Furthermore, any dismissal related claims would be significantly outside of the 21 day time limit: see s 366 of the *Fair Work Act* 2009 (Cth).

interests while a salaried organiser.¹¹⁶ These are points made in Senator Ketter's letter of 22 May 2013 suspending Mr Swetman.¹¹⁷ To some extent they were repeated in Senator Ketter's letter of 23 May 2013 informing Mr Swetman of the Committee of Management's decision. Grounds of this kind were assigned in the minutes of the special meeting of the Committee of Management held on 22 May 2013 endorsing Senator Ketter's actions.

83. One problem is that these documents were either from Senator Ketter's pen or from the Committee on which he had considerable influence. These documents do not establish that the facts on which Senator Ketter relies were in fact correct. Nor do they establish that even if the facts were correct, it was those facts, rather than the need to prevent Mr Swetman from running, which caused Mr Swetman's dismissal.

84. Senator Ketter drew attention to one of Mr Swetman's answers:¹¹⁸

I knew basically my time was coming close to the end of the SDA. My ideas of how to run the place was a bit different than theirs, so I was looking for something a little bit different. I came across a personal development site. I purchased their books and DVDs, and if you wanted to further that, you could become a distributor. I certainly – if I had started making money out of that business, I would have left the SDA straight away, but no money was ever made out of that business at all.

85. Senator Ketter submitted that this was not the statement of a person with a 'genuine or bona fide interest in continuing his employment with the SDA or in nominating for office in the Branch'.¹¹⁹ There are

¹¹⁶ Senator Ketter's submissions, 14/11/14, para 16.

¹¹⁷ Swetman MFI-1, pp 1-2.

¹¹⁸ Alan Swetman, 18/8/14, T:20.38-46.

¹¹⁹ Senator Ketter's submissions, 14/11/14, para 13.

problems with this submission. One is that on any view Mr Swetman's 'business' was neither substantial nor successful. Hence Mr Swetman would scarcely welcome entering the ranks of the unemployed. A second problem is that not only did Mr Swetman have a genuine, bona fide interest in nominating for office, but he did nominate for office. The third problem is that the answer quoted does not support Senator Ketter's contentions. The quoted passage, read in context, demonstrated that Mr Swetman understood that his time at the SDA under the current leadership was limited. That was because his ideas for leading the union were 'a bit different' from those of the incumbent officials. Indeed, Mr Swetman's nomination for office, and his decision to contest (without the backing of the SDA Fighting Fund and as a self-represented litigant) the validity of his nomination in response to the Federal Court challenge brought against him by the incumbent leadership team under the supervision of Senator Ketter and Senator Hogg indicate his genuine and bona fide interest in continuing his employment with the SDA and in nominating for office in the Branch. It is not inconsistent with an interest of that kind that a person also has a genuine and bona fide desire to lead the branch into a different direction from the direction set by the incumbents.

86. Mr Swetman had his employment terminated because he was threatening to challenge Senator Ketter for the position of Secretary-Treasurer. There is no other plausible explanation. At the time of his dismissal, Mr Swetman had almost 18 years' service, had not been subject to any meaningful performance counselling, was away from the workplace for medical reasons, and had provided a medical certificate to his employer.

87. In these circumstances, Mr Swetman's immediate dismissal one day prior to the close of the nominations for Secretary-Treasurer must be seen as designed to protect Senator Ketter's position in that role. The suggestion that either Mr Swetman's performance, or the alleged inappropriate use of his SDA Queensland issued mobile telephone, provided the justification for Mr Swetman's dismissal and expulsion from the SDA Queensland cannot be accepted.
88. The reasons Senator Ketter assigned for the dismissal both at the time and now, whether or not there was anything in them, were relied on in great haste. If they were good reasons, they would probably not needed to have been acted on in a flurry of activity just before 23 May 2013, shortly before nominations were to close. Senator Ketter did say that one recent matter was the failure of Mr Swetman to turn up at a pre-arranged meeting with a shop steward the previous Friday.¹²⁰ However, this does not explain why he was called on to justify himself on 24 hours' notice or why the sanction was termination of employment in such haste.
89. Both in evidence and in submissions, Senator Ketter advanced the view that the misuse of a mobile phone provided to Mr Swetman by the union by seeking to 'obtain personal gain' was a 'serious matter' and that Mr Swetman did not get 'immunity from disciplinary action by the Union' that employed him merely because he had nominated for office.¹²¹ This amounts to a contention that by Mr Swetman providing his SDA-issued mobile phone number in connection with

¹²⁰ Chris Ketter, 18/8/14, T:95.36-96.15.

¹²¹ Senator Ketter's submissions, 14/11/14, para 18; Chris Ketter, 18/8/14, T:96.24-30.

advertisements for his hobby of distributing personal developments DVDs, he misused union property to such a grave extent as to warrant not *disciplinary measures* by the union but *summary dismissal*. The SDA, and Senator Ketter, had access to the mobile phone records for Mr Swetman's SDA-issued mobile phone.¹²² They were not put in evidence. There is no suggestion in the evidence that Mr Swetman made a profit from the SDA-issued mobile phone. The highest the evidence goes is that he listed that number as his point of contact. If that was a breach of the terms on which Mr Swetman had been given the phone, it was a trivial breach. It did not warrant summary dismissal from employment.

90. Senator Ketter's contention that the timing of Mr Swetman's dismissal was a 'coincidence' cannot be accepted.
91. Senator Ketter stood to benefit significantly from the removal of Mr Swetman. He must have known that termination of Mr Swetman would cause or be likely to cause damage to Mr Swetman's credibility and credentials as a candidate standing against Senator Ketter. Furthermore, once dismissed from his employment Mr Swetman would be without an income. That would make it significantly more difficult for him to service the expenses associated with a contested election campaign. Mr Swetman was removed in a swift manner. Yet there were no circumstances of urgency (other than the need of removing a rival candidate from the forthcoming election). All these considerations point against Senator Ketter's contention that the timing of the removal was a coincidence.

¹²² Chris Ketter, 18/8/14, T:96.36-39.

Possible claims

92. Mr Swetman could have, in the alternative to his unfair dismissal claim, brought a general protections claim under s 346(b) of the *Fair Work Act 2009* (Cth). That section prohibits an employer taking adverse action against an employee because of the employee's involvement in industrial activities.
93. Mr Swetman could have argued that his employment was terminated because, by nominating for the election, he was engaging in a lawful activity organised or promoted by the SDA.¹²³
94. In order to defend such a claim the SDA would have been required to rebut the presumption that Mr Swetman was dismissed because of his participation in the election.¹²⁴
95. If Mr Swetman had brought a claim he would probably have succeeded.

Governance concerns

96. There are significant governance concerns in relation to the conduct of Senator Ketter in his swift removal of dissenting voices from the SDA.
97. The dismissal of Mr Swetman worked for the benefit of Senator Ketter. However, the costs associated with dismissing Mr Swetman, including the costs of settling his unfair dismissal, were probably borne by the

¹²³ *Fair Work Act 2009* (Cth), s 347(b)(iii).

¹²⁴ *Fair Work Act 2009* (Cth), s 361.

SDA Queensland as the employer of Mr Swetman. In these circumstances, Senator Ketter was clearly in a position of conflict between his duty to benefit the SDA and his own personal interest in ensuring he was re-elected.

98. It is possible that Mr Swetman may have a claim in restitution for the repayment of his membership dues on the basis that they were paid in the mistaken belief that he was obtaining the benefits of membership, when in fact he was receiving something different.¹²⁵ Regardless of whether or not Mr Swetman is eligible to recover his membership dues, he appears to have been the victim of a ploy which raises significant concerns about the governance for the SDA Queensland. Senator Ketter facilitated the payment of membership dues by Mr Swetman for almost 18 years when he knew that Mr Swetman was not eligible to be a member of the SDA Queensland.

99. Senator Ketter responded to this by contending that it would be surprising if Mr Swetman were not fully aware that his membership status made him ineligible to continue for election. He continued:¹²⁶

The lodgement of a nomination although invalid did enable Mr Swetman ... to depict his dismissal and expulsion as a reprisal for his nominating for election to office.

100. This contention cannot be accepted. There is no evidence to support it. Senior counsel for Senator Ketter at the hearing did not cross-examine Mr Swetman to suggest that the contention was correct. Indeed Mr Swetman said in answer to the questions of senior counsel for Senator

¹²⁵ *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662, 673.

¹²⁶ Senator Ketter's submissions, 14/11/14, para 15.

Ketter that he took out his SDA membership at the time he commenced as an organiser, and ‘was advised that [he] was a member, not an honorary member’.¹²⁷ Mr Swetman’s conduct in paying *full* (not honorary) membership fees, having a membership card which suggested *full* (not honorary) membership, nominating for office, and then contesting the Federal Court challenge on the grounds that he did and relying on the evidence that he did, are contrary to any inference that he had any inkling, prior to the Federal Court challenge to his nomination, that he was anything other than a full member of the SDA.

101. Senator Hogg advanced the following argument against the view that Mr Swetman was entitled to repayment of fees:¹²⁸

If Mr Swetman was an honorary member of the SDA, the Federal Court in construing the identical counterpart to the Conditions of Eligibility of the SDA has said an honorary member is not exempt under such a rule from the payment of membership contributions nor excluded from other rights of membership except eligibility to hold office ...

102. He referred to an authority:¹²⁹

If the analysis of the Federal Court is correct ... [the] allegation that the SDA is wrongly holding a refund due to Mr Swetman is not correct. The correct position is as explained by the Federal Court of Australia ... An honorary member is obliged to pay membership dues and has most of the rights of “ordinary” members except he or she is not eligible to hold office.

103. Neither the SDA nor any officeholder has contended that Mr Swetman was only an honorary member. In *Beswick, in the Matter of the*

¹²⁷ Alan Swetman, 18/8/14, T:29.37-41.

¹²⁸ Senator Hogg’s submissions, 13/11/14, para 18.

¹²⁹ Senator Hogg’s submissions, 13/11/14, para 19.

*Election for an Office in the Shop, Distributive & Allied Employees' Association v Swetman*¹³⁰ Logan J said:

It is further common ground that Mr Swetman did attend members' meetings of the SDA without challenge and further that he may well, at such meetings, have signed a members' attendance register, again without challenge. It is likewise agreed that Mr Swetman did, upon being employed by the SDA in its Queensland Branch as an organiser, submit an application form of the kind referred to in the Queensland Branch Rules.

It is further agreed, as I have indicated earlier, that he paid from time to time membership fees as fixed under the SDA's Queensland Branch Rules.

The submission made on behalf of Ms Beswick [which was supported by the SDA] was that Mr Swetman was not eligible to be nominated as a candidate, or to be accepted as a nominee, because he was not eligible to be a member of the union. I can well understand why it was that Mr Swetman at least thought, in good faith, that he was eligible to stand for election and to be nominated as a candidate for the position of Secretary/Treasurer.

Why that is so should be apparent enough from these facts. He submitted an application form. It was not rejected. He paid his dues year after year without question and he received a membership identity card. He also attended members' meetings without challenge and, very likely, although it is not the subject of express agreement, voted, again without challenge.

104. Those reasons make it plain that Mr Swetman had not submitted a membership application form for 'honorary' membership, but membership in the full sense of the word. Even if Senator Ketter and other officials such as Senator Hogg knew themselves that Mr Swetman was not entitled to full membership, there is no suggestion in the evidence that Mr Swetman was at any point made aware that he was not a full member of the SDA. Nor have those individuals or the

¹³⁰ [2013] FCA 642 at 28-31.

SDA itself produced any materials which would tend to establish that suggestion.

Breach of privacy of delegates

105. Ms Perry gave evidence about the SDA Queensland's practice of collecting information on shop stewards or delegates. It may be that the SDA Queensland's collection of this information is a breach of the *Privacy Act* 1988 (Cth).
106. Guidelines to the National Privacy Principles were prepared in September 2001 by the then-Office of the Federal Privacy Commissioner (Privacy Guidelines) under s 27(1)(e) of the *Privacy Act* 1988 (Cth) to help organisations comply with the National Privacy Principles.

Breach of privacy of delegates: sensitive information

107. At all relevant times *Privacy Act* 1988 (Cth) included a set of National Privacy Principles that, amongst other things, govern the collection, use, disclosure and other handling of 'sensitive information'. Importantly, the National Privacy Principles are not prescriptive, but are principles-based legislation. 'Sensitive information' was defined at the relevant time as follows:¹³¹

sensitive information means:

- (a) information or an opinion about an individual's:

¹³¹ *Privacy Act* 1988 (Cth), s 6.

- (i) racial or ethnic origin; or
- (ii) political opinions; or
- (iii) membership of a political association; or
- (iv) religious beliefs or affiliations; or
- (v) philosophical beliefs; or
- (vi) membership of a professional or trade association; or
- (vii) membership of a trade union; or
- (viii) sexual preferences or practices; or
- (ix) criminal record;

that is also personal information; or

- (b) health information about an individual; or
- (c) genetic information about an individual that is not otherwise health information.

108. Information in the nature of marital status, religious views, political views and affiliation with organisations all are likely to be covered by the definition of sensitive information.

109. National Privacy Principle states:¹³²

NPP 10 Sensitive information

10.1 An organisation must not collect sensitive information about an individual unless:

- (a) the individual has consented; or
- (b) the collection is required by law; or
- (c) the collection is necessary to prevent or lessen a serious and imminent threat to the life or health of any individual, where the individual whom the information concerns:
 - (i) is physically or legally incapable of giving consent to the collection; or
 - (ii) physically cannot communicate consent to the collection; or
- (d) if the information is collected in the course of the activities of a non-profit organisation—the following conditions are satisfied:
 - (i) the information relates solely to the members of the organisation or to individuals who have

¹³² *Privacy Act* 1988 (Cth), clause 10, Schedule 3.

regular contact with it in connection with its activities;

(ii) at or before the time of collecting the information, the organisation undertakes to the individual whom the information concerns that the organisation will not disclose the information without the individual's consent; or

(e) the collection is necessary for the establishment, exercise or defence of a legal or equitable claim.

...

10.5 In this clause:

non profit organisation means a non-profit organisation that has only racial, ethnic, political, religious, philosophical, professional, trade, or trade union aims.

110. There is no evidence that the sensitive information was obtained by the SDA Queensland with the consent of the relevant shop stewards.¹³³ The Guidelines provide that ordinarily an organisation would need clear evidence that an individual had consented to the collection of sensitive information by the organisation.

111. There are very few circumstances where sensitive information about individuals may be collected without their consent. Relevantly,

¹³³ *Privacy Act* 1988 (Cth), clause 10, Schedule 3.

National Privacy Principle 10.1(d) provides that where the information is collected in the course of the activities of a non-profit organisation, the collection of sensitive information will be permitted where certain conditions are satisfied.

112. Senator Ketter contended that the Branch ‘is a non-profit organisation that has trade union aims, within National Privacy Principle, 10.5’.¹³⁴ The SDA Queensland, as a trade union, may well be a non-profit organisation for the purposes of clause 10.1(d). However, the submission did not demonstrate compliance with National Privacy Principle 10.1(d)(ii).
113. It is recommended that this Interim Report be referred to Australian Information Commissioner in order that consideration may be given to whether the Queensland Branch of the Shop, Distributive, Allied and Employees’ Association contravened National Privacy Principle 10.1 or any provision of the *Privacy Act* 1988 (Cth).

Discrimination against delegates

114. Senator Ketter’s evidence was that the SDA Queensland does not want ‘stewards who perhaps have single interest views’.¹³⁵
115. Mr Swetman gave evidence that most of the organisers at the SDA Queensland are recruited from the ranks of shop stewards. Ms Perry’s evidence was that organisers were required to keep a dossier on each steward in their area. It follows that, if the SDA Queensland was

¹³⁴ Senator Ketter’s submissions, 14/11/14, para 24.

¹³⁵ Chris Ketter, 18/8/14, T:127.23.

looking to employ an organiser it would know, from the research done on that person, his or her marital status, religious and political views and various other matters irrelevant to his or her employment.

116. Senator Ketter insisted that the SDA Queensland does not refuse to engage stewards on the basis of factors such as particular political affiliations or particular religious views.¹³⁶ Despite the fact that his evidence about Mr Swetman's dismissal has not been accepted, it would be a serious step to reject his evidence on the present point. It cannot be concluded that the information prepared in Ms Perry's report was actually used to discriminate against potential employees.
117. Section 124 of the *Anti-Discrimination Act 1991 (Qld)* prohibits a person from asking another person to supply information on which unlawful discrimination might be based. That creates difficulties for the SDA, irrespective of whether the information in the report prepared by Ms Perry was actually used to discriminate directly against shop stewards. The mere requests to supply the information may have breached the *Anti-Discrimination Act 1991 (Qld)*. This is a matter which the SDA will have to consider carefully in future.

Donations to the ALP

118. No finding is made that the SDA Queensland or the National Office of the SDA breached any disclosure obligations in relation to the target seat coordinator arrangements. However, the case study does invite a consideration of whether or not the current legislative arrangements are adequate.

¹³⁶ Chris Ketter, 18/8/14, T:127.18-20.

119. The current regime for disclosure of donations of this kind seems inadequate. The reference in the SDA National Office financial reports to ‘target seat coordinator employment reimbursements’ was obscure. It is unlikely that those references would have assisted a member in understanding how the union was spending union members’ money.
120. Under the current system, a member seeking information on the donations of a union is required to review numerous sources, which may include:
- (a) the union’s financial reports;
 - (b) the returns lodged with Fair Work Commission under the *Fair Work Act 2009* (Cth) and the *Fair Work (Registered Organisations) Act 2009* (Cth);
 - (c) returns lodged with the Australian Electoral Commission; and
 - (d) returns lodged with a state electoral commission.
121. An alternative disclosure regime should be considered which requires organisations registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) to make disclosure of all donations whether of money or in-kind goods or services, and whether made by the organisation in its own right or on behalf of any other person or entity. Such a regime might include the following information:
- (a) the beneficiary of the donation;

- (b) the date the donation was made;
- (c) the relationship between the donor and the beneficiary;
- (d) the capacity in which the donation was made and if made on behalf of any person or entity, the identity of the principal donor(s);
- (e) the amount of the donation or value of good or service; and
- (f) the nature of the goods or services donated.

122. The question of precisely what regime should be recommended is left over to the Final Report.

APPENDICES

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APPENDIX 1 - LETTERS PATENT ISSUED ON 13 MARCH 2014 BY THE GOVERNOR-GENERAL



ENTERED ON RECORD by me in Register of Patents No. 49, page 7, on 13 March 2014

Secretary to the Federal Executive Council

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO

The Honourable John Dyson Heydon AC QC

GREETING

WE do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you, to inquire into the following matters:

- (a) the governance arrangements of separate entities established by employee associations or their officers (*relevant entities*), with particular regard to:
 - (i) the financial management of relevant entities; and
 - (ii) the adequacy of existing laws as they relate to relevant entities with respect to:
 - (A) the integrity of financial management; and
 - (B) the accountability of officers of employee associations to their members in respect of the use of funds or other assets in relation to relevant entities; and
 - (iii) whether relevant entities are used, or have been used, for any form of unlawful purpose; and
 - (iv) the use of funds solicited in the name of relevant entities, for the purpose of furthering the interests of:
 - (A) an employee association; or
 - (B) an officer of an employee association; or
 - (C) a member of an employee association; or
 - (D) any other person or organisation;

- (b) without limiting the matters in paragraph (a), activities relating to the establishment or operation of any relevant entity as it relates to the following employee associations or any of their branches:
 - (i) The Australian Workers Union;
 - (ii) the Construction Forestry Mining and Energy Union;
 - (iii) the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;
 - (iv) the Health Services Union;
 - (v) the Transport Workers Union of Australia;
- (c) without also limiting the matters in paragraph (a), activities of any other person or organisation in respect of which you consider that there are credible allegations of involvement in activities mentioned in paragraph (b);
- (d) the circumstances in which funds are, or have been, sought from any third parties and paid to relevant entities;
- (e) the extent to which persons represented by employee associations:
 - (i) are protected from any adverse effects or negative consequences arising from matters associated with, or related to, the existence of relevant entities or activities relating to their establishment or operation; or
 - (ii) are informed of those matters; or
 - (iii) are able to influence or exercise control over those matters; or
 - (iv) have the opportunity to hold officers of the association accountable for wrongdoing in relation to those matters;
- (f) any conduct in relation to a relevant entity which may amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity;
- (g) any conduct which may amount to a breach of any law, regulation or professional standard by any officer of an employee association in order to:
 - (i) procure an advantage for the officer or another person or organisation; or
 - (ii) cause a detriment to a person or organisation;
- (h) any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party;

- (i) the participation of any person or organisation (other than an employee association or an officer of an employee association) in a matter mentioned in paragraphs (a) to (h);
- (j) the adequacy and effectiveness of existing systems of regulation and law enforcement in dealing with matters mentioned in paragraphs (a) to (i) and, in particular, the means of redress available to employee associations and their members who suffer a detriment as a result of such a matter;
- (k) any matter reasonably incidental to a matter mentioned in paragraphs (a) to (j).

AND We further declare that you may inquire into any of these matters to the extent that the matter relates to or is connected with the peace, order, and good government of the Commonwealth and any public purpose or any power of the Commonwealth.

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate.

AND We declare that you are a relevant Commission for the purposes of sections 4 and 5 of the *Royal Commissions Act 1902*.

AND We declare that you are a Royal Commission to which item 5 of the table in subsection 355-70(1) in Schedule 1 to the *Taxation Administration Act 1953* applies.

AND We declare that you are authorised to conduct your inquiry into any matter under these Our Letters Patent in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission, or under any order or appointment, made by any of Our Governors of the States or by the Government of any of Our Territories.

AND We declare that in these Our Letters Patent:

employee association means:

- (a) an employee organisation as defined in section 12 of the *Fair Work Act 2009*; or
- (b) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under the *Fair Work (Registered Organisations) Act 2009* or any other Commonwealth law; or
- (c) a recognised State-registered association, or a transitionally recognised association, as defined in section 6 of the *Fair Work (Registered Organisations) Act 2009*, if the association is, or was at any time, entitled to represent the industrial interests of employees under an industrial law as defined in section 12 of the *Fair Work Act 2009*; or

- (d) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under a State or Territory law or instrument that is a State or Territory industrial law as defined in subsection 26(2) of the *Fair Work Act 2009*.

law means a law of the Commonwealth or of a State or Territory.

office, in relation to an employee association, means:

- (a) an office as defined in section 12 of the *Fair Work Act 2009*; or
- (b) an office within the ordinary meaning of that term.

officer, of an employee association, means a person who is, or was at any time:

- (a) the holder of an office in the association; or
- (b) an employee of the association; or
- (c) a delegate or other representative of the association.

organisation includes any of the following:

- (a) an employee association;
- (b) a corporate entity;
- (c) an association, whether incorporated or not.

separate entity means an entity that is, or was at any time:

- (a) a fund, organisation, account or other financial arrangement; and
- (b) established for, or purportedly for, an industrial purpose or the welfare of members of an employee association; and
- (c) a separate legal entity from any employee association;

whether or not the entity is, or has at any time been, covered by the financial reporting obligations to which an employee association is, or was at any time, subject under the *Fair Work (Registered Organisations) Act 2009*.

AND We:

- (l) require you to begin your inquiry as soon as practicable; and
- (m) require you to make your inquiry as expeditiously as possible; and
- (n) authorise you to submit to Our Governor-General any interim report that you consider appropriate; and
- (o) require you to submit to Our Governor-General a report of the results of your inquiry, and your recommendations, not later than 31 December 2014.

IN WITNESS, We have caused these Our Letters to be made Patent.

WITNESS Quentin Bryce, Governor-General of the
Commonwealth of Australia.

Dated



2014


Governor-General

By Her Excellency's Command


Attorney-General

APPENDIX 2 - LETTERS PATENT ISSUED ON 30 OCTOBER 2014 BY THE GOVERNOR-GENERAL



ENTERED ON RECORD by me in Register of Patents No. 49, page 27, on 30 October 2014

Secretary to the Federal Executive Council

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO

The Honourable John Dyson Heydon AC QC

GREETING

WHEREAS We, by Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia, appointed you to be a Commission of inquiry, required and authorised you to inquire into certain matters, and required you to submit to Our Governor-General a report of the results of your inquiry, and your recommendations, not later than 31 December 2014.

AND it is desired to amend Our Letters Patent.

NOW THEREFORE We do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and every other enabling power, amend the Letters Patent issued to you:

- (a) by inserting before paragraph (j) of the Letters Patent, the paragraph:
“(ia) any criminal or otherwise unlawful act or omission undertaken for the purpose of facilitating or concealing any conduct or matter mentioned in paragraphs (g) to (i);” and
- (b) by omitting from paragraph (j) of the Letters Patent “(a) to (i)” and substituting “(a) to (ia)”;
- (c) by omitting from paragraph (o) of the Letters Patent “31 December 2014” and substituting “31 December 2015”.

IN WITNESS, We have caused these Our Letters to be made Patent.

WITNESS General the Honourable Sir Peter Cosgrove AK MC
(Ret'd), Governor-General of the Commonwealth of Australia.

Dated *30th October* 2014

By His Excellency's Command


Attorney-General


Governor-General

APPENDIX 3 - LETTERS PATENT ISSUED ON 24 MARCH 2014 BY THE GOVERNOR OF QUEENSLAND

1

ELIZABETH THE SECOND, by the Grace of God, Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO:

The Honourable John Dyson Heydon AC QC

GREETING:

WE do, by these Our Letters Patent issued in Our name by Our Governor in and over Our State of Queensland acting by and with the advice of Our Executive Council of Our State of Queensland and in pursuance of the *Commissions of Inquiry Act 1950* and all other powers her thereto enabling HEREBY APPOINT YOU to be a Commissioner to inquire into the following matters:

- (a) the governance arrangements of separate entities established by employee associations or their officers (*relevant entities*), with particular regard to:
 - (i) the financial management of relevant entities; and
 - (ii) the adequacy of existing laws as they relate to relevant entities with respect to:
 - (A) the integrity of financial management; and
 - (B) the accountability of officers of employee associations to their members in respect of the use of funds or other assets in relation to relevant entities; and
 - (iii) whether relevant entities are used, or have been used, for any form of unlawful purpose; and
 - (iv) the use of funds solicited in the name of relevant entities, for the purpose of furthering the interests of:
 - (A) an employee association; or
 - (B) an officer of an employee association; or
 - (C) a member of an employee association; or
 - (D) any other person or organisation;
- (b) without limiting the matters in paragraph (a), activities relating to the establishment or operation of any relevant entity as it relates to the following employee associations or any of their branches:
 - (i) The Australian Workers Union;
 - (ii) the Construction Forestry Mining and Energy Union;
 - (iii) the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;
 - (iv) the Health Services Union;
 - (v) the Transport Workers Union of Australia;
- (c) without also limiting the matters in paragraph (a), activities of any other person or organisation in respect of which you consider that there are credible allegations of involvement in activities mentioned in paragraph (b);

- (d) the circumstances in which funds are, or have been, sought from any third parties and paid to relevant entities;
- (e) the extent to which persons represented by employee associations:
 - (i) are protected from any adverse effects or negative consequences arising from matters associated with, or related to, the existence of relevant entities or activities relating to their establishment or operation; or
 - (ii) are informed of those matters; or
 - (iii) are able to influence or exercise control over those matters; or
 - (iv) have the opportunity to hold officers of the association accountable for wrongdoing in relation to those matters;
- (f) any conduct in relation to a relevant entity which may amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity;
- (g) any conduct which may amount to a breach of any law, regulation or professional standard by any officer of an employee association in order to:
 - (i) procure an advantage for the officer or another person or organisation; or
 - (ii) cause a detriment to a person or organisation;
- (h) any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party;
- (i) the participation of any person or organisation (other than an employee association or an officer of an employee association) in a matter mentioned in paragraphs (a) to (h);
- (j) the adequacy and effectiveness of existing systems of regulation and law enforcement in dealing with matters mentioned in paragraphs (a) to (i) and, in particular, the means of redress available to employee associations and their members who suffer a detriment as a result of such a matter;
- (k) any matter reasonably incidental to a matter mentioned in paragraphs (a) to (j).

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate.

AND We declare that you are authorised to conduct your inquiry into any matter under these Our Letters Patent in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission, or under any order or appointment, made by Our Governor-General of the Commonwealth of Australia or any of Our Governors of the States or by the Government of any of Our Territories.

AND We declare that in these Our Letters Patent;

employee association means:

- (a) an employee organisation as defined in section 12 of the *Fair Work Act 2009* of the Commonwealth; or
- (b) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth or any other Commonwealth law; or
- (c) a recognised State-registered association, or a transitionally recognised association, as defined in section 6 of the *Fair Work (Registered Organisations) Act 2009*, if the association is, or was at any time, entitled to represent the industrial interests of employees under an industrial law as defined in section 12 of the *Fair Work Act 2009*; or
- (d) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under a State or Territory law or instrument that is a State or Territory industrial law as defined in subsection 26(2) of the *Fair Work Act 2009*.

law means a law of the Commonwealth or of a State or Territory.

office, in relation to an employee association, means:

- (a) an office as defined in section 12 of the *Fair Work Act 2009*; or
- (b) an office within the ordinary meaning of that term.

officer, of an employee association, means a person who is, or was at any time:

- (a) the holder of an office in the association; or
- (b) an employee of the association; or
- (c) a delegate or other representative of the association.

organisation includes any of the following:

- (a) an employee association;
- (b) a corporate entity;
- (c) an association, whether incorporated or not.

separate entity means an entity that is, or was at any time:

- (a) a fund, organisation, account or other financial arrangement; and
- (b) established for, or purportedly for, an industrial purpose or the welfare of members of an employee association; and
- (c) a separate legal entity from any employee association:

whether or not the entity is, or has at any time been, covered by the financial reporting obligations to which an employee association is, or was at any time, subject under the *Fair Work (Registered Organisations) Act 2009*.

AND We:

- (l) require you to begin your inquiry as soon as practicable; and
- (m) require you to make your inquiry as expeditiously as possible; and
- (n) authorise you to submit to Our Governor any interim report that you consider appropriate; and
- (o) require you to submit to Our Governor a report of the results of your inquiry, and your recommendations, not later than 31 December 2014.

IN TESTIMONY WHEREOF We have caused the Public Seal of Our said State to be hereunto affixed.

[L.S.]

PENELOPE WENSLEY

Governor

WITNESS Our Trusty and Well-beloved Her Excellency Penelope Anne Wensley, Companion of the Order of Australia, Governor in and over the State of Queensland and its Dependencies in the Commonwealth of Australia, at Government House, Brisbane this twenty-seventh day of March in the year of Our Lord Two thousand and fourteen and in the Sixty-third year of Our Reign.

By Command

Campbell Newman

RECORDED in the Register of Patents, No. 49, page 112, on 27 March 2014.

Leighton Craig

Clerk of the Executive Council

APPENDIX 4 - LETTERS PATENT ISSUED ON 9 APRIL 2014 BY THE GOVERNOR OF NEW SOUTH WALES

NEW SOUTH WALES

ENTERED ON RECORD by me in Register of Patents No. 91, page 181, on this 9th day of APRIL 2014


Secretary of the Department of Premier and Cabinet

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO

The Honourable John Dyson Heydon AC QC

GREETING

WE do, by these Our Letters Patent issued in Our name by Our Governor on the advice of the Executive Council and under the *Royal Commissions Act 1923* and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you, to inquire into the following matters:

- (a) the governance arrangements of separate entities established by employee associations or their officers (*relevant entities*), with particular regard to:
 - (i) the financial management of relevant entities; and
 - (ii) the adequacy of existing laws as they relate to relevant entities with respect to:
 - (A) the integrity of financial management; and
 - (B) the accountability of officers of employee associations to their members in respect of the use of funds or other assets in relation to relevant entities; and
 - (iii) whether relevant entities are used, or have been used, for any form of unlawful purpose; and
 - (iv) the use of funds solicited in the name of relevant entities, for the purpose of furthering the interests of:
 - (A) an employee association; or
 - (B) an officer of an employee association; or
 - (C) a member of an employee association; or
 - (D) any other person or organisation;

- (b) without limiting the matters in paragraph (a), activities relating to the establishment or operation of any relevant entity as it relates to the following employee associations or any of their branches:
 - (i) The Australian Workers Union;
 - (ii) the Construction Forestry Mining and Energy Union;
 - (iii) the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;
 - (iv) the Health Services Union;
 - (v) the Transport Workers Union of Australia;
- (c) without also limiting the matters in paragraph (a), activities of any other person or organisation in respect of which you consider that there are credible allegations of involvement in activities mentioned in paragraph (b);
- (d) the circumstances in which funds are, or have been, sought from any third parties and paid to relevant entities;
- (e) the extent to which persons represented by employee associations:
 - (i) are protected from any adverse effects or negative consequences arising from matters associated with, or related to, the existence of relevant entities or activities relating to their establishment or operation; or
 - (ii) are informed of those matters; or
 - (iii) are able to influence or exercise control over those matters; or
 - (iv) have the opportunity to hold officers of the association accountable for wrongdoing in relation to those matters;
- (f) any conduct in relation to a relevant entity which may amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity;
- (g) any conduct which may amount to a breach of any law, regulation or professional standard by any officer of an employee association in order to:
 - (i) procure an advantage for the officer or another person or organisation; or
 - (ii) cause a detriment to a person or organisation;
- (h) any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party;

- (i) the participation of any person or organisation (other than an employee association or an officer of an employee association) in a matter mentioned in paragraphs (a) to (h);
- (j) the adequacy and effectiveness of existing systems of regulation and law enforcement in dealing with matters mentioned in paragraphs (a) to (i) and, in particular, the means of redress available to employee associations and their members who suffer a detriment as a result of such a matter;
- (k) any matter reasonably incidental to a matter mentioned in paragraphs (a) to (j).

AND We further declare that you may inquire into any of these matters to the extent that the matter relates to or is connected with the peace, order, and good government of New South Wales and any public purpose or any power of New South Wales.

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate.

AND We declare that the provisions of Division 2 of Part 2 of the *Royal Commissions Act 1923* are to have effect in relation to this Commission AND IT IS FURTHER declared that section 17 of the Act shall apply to and with respect to your inquiry.

AND We declare that in these Our Letters Patent:

employee association means:

- (a) an employee organisation as defined in section 12 of the *Fair Work Act 2009*; or
- (b) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under the *Fair Work (Registered Organisations) Act 2009* or any other Commonwealth law; or
- (c) a recognised State-registered association, or a transitionally recognised association, as defined in section 6 of the *Fair Work (Registered Organisations) Act 2009*, if the association is, or was at any time, entitled to represent the industrial interests of employees under an industrial law as defined in section 12 of the *Fair Work Act 2009*; or

- (d) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under a State or Territory law or instrument that is a State or Territory industrial law as defined in subsection 26(2) of the *Fair Work Act 2009*.

law means a law of the Commonwealth or of a State or Territory.

office, in relation to an employee association, means:

- (a) an office as defined in section 12 of the *Fair Work Act 2009*; or
- (b) an office within the ordinary meaning of that term.

officer, of an employee association, means a person who is, or was at any time:

- (a) the holder of an office in the association; or
- (b) an employee of the association; or
- (c) a delegate or other representative of the association.

organisation includes any of the following:

- (a) an employee association;
- (b) a corporate entity;
- (c) an association, whether incorporated or not.

separate entity means an entity that is, or was at any time:

- (a) a fund, organisation, account or other financial arrangement; and
- (b) established for, or purportedly for, an industrial purpose or the welfare of members of an employee association; and
- (c) a separate legal entity from any employee association;

whether or not the entity is, or has at any time been, covered by the financial reporting obligations to which an employee association is, or was at any time, subject under the *Fair Work (Registered Organisations) Act 2009*.

AND We:

- (l) require you to begin your inquiry as soon as practicable; and
- (m) require you to make your inquiry as expeditiously as possible; and
- (n) authorise you to submit to Our Governor any interim report that you consider appropriate; and
- (o) require you to submit to Our Governor a report of the results of your inquiry, and your recommendations, not later than 31 December 2014.

IN WITNESS, We have caused these Our Letters to be made Patent and the Public Seal of Our State to be hereunto affixed.



WITNESS Her Excellency Professor Marie Bashir, Companion of the Order of Australia, Commander of the Royal Victorian Order, Governor of the State of New South Wales in the Commonwealth of Australia.

Dated this 9th day of April 2014.

A handwritten signature in black ink, reading "Marie Bashir".

Governor

By Her Excellency's Command,

A handwritten signature in blue ink, reading "Barry Jones".

Premier.

APPENDIX 5 - LETTERS PATENT ISSUED ON 15 APRIL 2014 BY THE GOVERNOR OF VICTORIA

ELIZABETH THE SECOND, BY THE GRACE OF GOD
QUEEN OF AUSTRALIA AND HER OTHER REALMS AND TERRITORIES,
HEAD OF THE COMMONWEALTH:

TO The Honourable John Dyson Heydon AC QC

GREETINGS:

WHEREAS the Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the *Constitution of the Commonwealth of Australia*, the *Royal Commissions Act 1902* (Cth) and every other enabling power, has by Letters Patent appointed you to be a Commission of inquiry to inquire into, and report upon, certain matters relating to trade union governance and corruption.

AND the Governor-General has declared that you are authorised to conduct that inquiry in combination with any inquiry into the same matter, or a matter related to that matter, that it is directed or authorised to conduct by any Commission issued, or under any order or appointment made, by any of the Governors of the States or the Government of any Territory.

AND the Governor of the State of Victoria, in the Commonwealth of Australia, by and with the advice of the Executive Council, has deemed it expedient that a Commission should issue to you in the terms set out below.

NOW THEREFORE the Governor of the State of Victoria, in the Commonwealth of Australia, by and with the advice of the Executive Council and acting pursuant to section 88B of the *Constitution Act 1975* and all other enabling powers, appoints and constitutes you to be Our Commissioner.

FOR THE PURPOSE OF inquiring into the following matters:

- (a) the governance arrangements of separate entities established by employee associations or their officers (*relevant entities*), with particular regard to:
 - (i) the financial management of relevant entities; and
 - (ii) the adequacy of existing laws as they relate to relevant entities with respect to:

- (A) the integrity of financial management; and
 - (B) the accountability of officers of employee associations to their members in respect of the use of funds or other assets in relation to relevant entities; and
- (iii) whether relevant entities are used, or have been used, for any form of unlawful purpose; and
- (iv) the use of funds solicited in the name of relevant entities, for the purpose of furthering the interests of:
 - (A) an employee association; or
 - (B) an officer of an employee association; or
 - (C) a member of an employee association; or
 - (D) any other person or organisation;
- (b) without limiting the matters in paragraph (a), activities relating to the establishment or operation of any relevant entity as it relates to the following employee associations or any of their branches:
 - (i) The Australian Workers Union;
 - (ii) the Construction Forestry Mining and Energy Union;
 - (iii) the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;
 - (iv) the Health Services Union;
 - (v) the Transport Workers Union of Australia;
- (c) without also limiting the matters in paragraph (a), activities of any other person or organisation in respect of which you consider that there are credible allegations of involvement in activities mentioned in paragraph (b);

- (d) the circumstances in which funds are, or have been, sought from any third parties and paid to relevant entities;
- (e) the extent to which persons represented by employee associations:
 - (i) are protected from any adverse effects or negative consequences arising from matters associated with, or related to, the existence of relevant entities or activities relating to their establishment or operation; or
 - (ii) are informed of those matters; or
 - (iii) are able to influence or exercise control over those matters; or
 - (iv) have the opportunity to hold officers of the association accountable for wrongdoing in relation to those matters;
- (f) any conduct in relation to a relevant entity which may amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity;
- (g) any conduct which may amount to a breach of any law, regulation or professional standard by any officer of an employee association in order to:
 - (i) procure an advantage for the officer or another person or organisation; or
 - (ii) cause a detriment to a person or organisation;
- (h) any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party;
- (i) the participation of any person or organisation (other than an employee association or an officer of an employee association) in a matter mentioned in paragraphs (a) to (h);

(j) the adequacy and effectiveness of existing systems of regulation and law enforcement in dealing with matters mentioned in paragraphs (a) to (i) and, in particular, the means of redress available to employee associations and their members who suffer a detriment as a result of such a matter;

(k) any matter reasonably incidental to a matter mentioned in paragraphs (a) to (j).

AND WE direct you to make any recommendations arising out of your inquiry that you consider appropriate.

AND WE declare that you are authorised to conduct your inquiry into any matter under these Our Letters Patent in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission issued, or under any order or appointment made, by the Governor-General of the Commonwealth or the Governor of any other State or by the Government of any Territory.

AND WE give and grant you full power and authority to inquire of and concerning any matter under these Our Letters Patent by all other lawful ways and means whatsoever, including by receiving evidence, either upon oath or affirmation, or otherwise.

AND WE declare that in these Our Letters Patent:

employee association means:

- (a) an employee organisation as defined in section 12 of the *Fair Work Act 2009* (Cth); or
- (b) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under the *Fair Work (Registered Organisations) Act 2009* (Cth) or any other Commonwealth law; or
- (c) a recognised State-registered association, or a transitionally recognised association, as defined in section 6 of the *Fair Work (Registered Organisations) Act 2009* (Cth), if the association is, or was at any time, entitled to represent the industrial interests of employees under an

industrial law as defined in section 12 of the *Fair Work Act 2009* (Cth);
or

- (d) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under a State or Territory law or instrument that is a State or Territory industrial law as defined in subsection 26(2) of the *Fair Work Act 2009* (Cth).

law means a law of the Commonwealth or of a State or Territory.

office, in relation to an employee association, means:

- (a) an office as defined in section 12 of the *Fair Work Act 2009* (Cth); or
- (b) an office within the ordinary meaning of that term.

officer, of an employee association, means a person who is, or was at any time:

- (a) the holder of an office in the association; or
- (b) an employee of the association; or
- (c) a delegate or other representative of the association.

organisation includes any of the following:

- (a) an employee association;
- (b) a corporate entity;
- (c) an association, whether incorporated or not.

separate entity means an entity that is, or was at any time:

- (a) a fund, organisation, account or other financial arrangement; and
- (b) established for, or purportedly for, an industrial purpose or the welfare of members of an employee association; and
- (c) a separate legal entity from any employee association;

whether or not the entity is, or has at any time been, covered by the financial reporting obligations to which an employee association is, or was at any time, subject under the *Fair Work (Registered Organisations) Act 2009* (Cth).

AND WE:

- (l) require you to begin your inquiry as soon as practicable; and
- (m) require you to make your inquiry as expeditiously as possible; and
- (n) authorise you to submit to the Governor any interim report that you consider appropriate; and
- (o) require you to submit to the Governor a report of the results of your inquiry, and your recommendations, not later than 31 December 2014.

IN TESTIMONY WHEREOF WE have caused these Our Letters to be made Patent and the Seal of the State to be hereunder affixed.



WITNESS His Excellency the Honourable Alex Chernov, Companion of the Order of Australia, one of Her Majesty's Counsel, Governor of the State of Victoria in the Commonwealth of Australia at Melbourne this *16th* day of April Two thousand and fourteen.

Alex Chernov

By His Excellency's Command

Denis Naphthine

THE HON DR DENIS NAPHTHINE MP
Premier of Victoria

Entered on the record by me in the Register of Patents Book No 45 Page No 123
on the 16th day of April 2014.

[Signature]
Secretary, Department of Premier and Cabinet

APPENDIX 6 - LETTERS PATENT ISSUED ON 13 MAY 2014 BY THE GOVERNOR OF TASMANIA

Order Under the *Commissions of Inquiry Act 1995*

I, the Governor in and over the State of Tasmania and its Dependencies in the Commonwealth of Australia, acting with the advice of the Executive Council, being satisfied that it is in the public interest and expedient to do so, by this my order made under Section 4 of the *Commissions of Inquiry Act 1995* –

DIRECT that an Inquiry be made into

- (a) the governance arrangements of separate entities established by employee associations or their officers (relevant entities), with particular regard to:
 - (i) the financial management of relevant entities; and
 - (ii) the adequacy of existing laws as they relate to relevant entities with respect to:
 - (A) the integrity of financial management; and
 - (B) the accountability of officers of employee associations to their members in respect of the use of funds or other assets in relation to relevant entities; and
 - (iii) whether relevant entities are used, or have been used, for any form of unlawful purpose; and
 - (iv) the use of funds solicited in the name of relevant entities, for the purpose of furthering the interests of:
 - (A) an employee association; or
 - (B) an officer of an employee association; or
 - (C) a member of an employee association; or
 - (D) any other person or organisation;
- (b) without limiting the matters in paragraph (a), activities relating to the establishment or operation of any relevant entity as it relates to the following employee associations or any of their branches:
 - (i) The Australian Workers Union;

- (ii) the Construction Forestry Mining and Energy Union;
- (iii) the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;
- (iv) the Health Services Union;
- (v) the Transport Workers Union of Australia;
- (c) without also limiting the matters in paragraph (a), activities of any other person or organisation in respect of which there are credible allegations of involvement in activities mentioned in paragraph (b);
- (d) the circumstances in which funds are, or have been, sought from any third parties and paid to relevant entities;
- (e) the extent to which persons represented by employee associations:
 - (i) are protected from any adverse effects or negative consequences arising from matters associated with, or related to, the existence of relevant entities or activities relating to their establishment or operation; or
 - (ii) are informed of those matters; or
 - (iii) are able to influence or exercise control over those matters; or
 - (iv) have the opportunity to hold officers of the association accountable for wrongdoing in relation to those matters;
- (f) any conduct in relation to a relevant entity which may amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity;
- (g) any conduct which may amount to a breach of any law, regulation or professional standard by any officer of an employee association in order to:
 - (i) procure an advantage for the officer or another person or organisation; or
 - (ii) cause a detriment to a person or organisation;
- (h) any bribe, secret commission or other unlawful payment or benefit arising from contracts;

- (i) arrangements or understandings between an employee association, or an officer of an employee association, and any other party;
- (j) the participation of any person or organisation (other than an employee association or an officer of an employee association) in a matter mentioned in paragraphs (a) to (h);
- (k) the adequacy and effectiveness of existing systems of regulation and law enforcement in dealing with matters mentioned in paragraphs (a) to (i) and, in particular, the means of redress available to employee associations and their members who suffer a detriment as a result of such a matter;
- (l) any matter reasonably incidental to a matter mentioned in paragraphs (a) to (j).

ESTABLISH a Commission to conduct and report, with such recommendations as it may consider appropriate, on the Inquiry;

And I APPOINT the Honourable John Dyson Heydon AC QC as Commissioner;

And I DIRECT the Commissioner to make any recommendations arising out of the inquiry that he considers appropriate;

And I DECLARE that the Commissioner is authorised to conduct the inquiry into any matter under this Order in combination with any inquiry into the same matter, or a matter related to that matter, that he is directed or authorised to conduct by any Commission, or under any order or appointment, made by the Governor-General of the Commonwealth of Australia or any of the Governors of the States or Territories;

And I DECLARE that in this Order:

employee association means:

- (a) an employee organisation as defined in section 12 of the *Fair Work Act 2009* of the Commonwealth; or
- (b) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth or any other Commonwealth law; or
- (c) a recognised State-registered association, or a transitionally recognised association, as defined in section 6 of the *Fair Work (Registered*

Organisations) Act 2009, if the association is, or was at any time, entitled to represent the industrial interests of employees under an industrial law as defined in section 12 of the *Fair Work Act 2009*; or

(d) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under a State or Territory law or instrument that is a State or Territory industrial law as defined in subsection 26(2) of the *Fair Work Act 2009*.

law means a law of the Commonwealth or of a State or Territory.

office, in relation to an employee association, means:

- (a) an office as defined in section 12 of the *Fair Work Act 2009*; or
- (b) an office within the ordinary meaning of that term.

officer, of an employee association, means a person who is, or was at any time:

- (a) the holder of an office in the association; or
- (b) an employee of the association; or
- (c) a delegate or other representative of the association.

organisation includes any of the following:

- (a) an employee association;
- (b) a corporate entity;
- (c) an association, whether incorporated or not.

separate entity means an entity that is, or was at any time;

- (a) a fund, organisation, account or other financial arrangement; and
- (b) established for, or purportedly for, an industrial purpose or the welfare of members of an employee association; and
- (c) a separate legal entity from any employee association:

whether or not the entity is, or has at any time been, covered by the financial reporting obligations to which an employee association is, or was at any time, subject under the *Fair Work (Registered Organisations) Act 2009*.

And I REQUIRE the Commissioner:

to begin the inquiry as soon as practicable; and

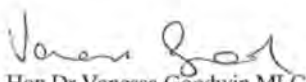
to make the inquiry as expeditiously as possible; and
to submit to me any interim report that he considers appropriate; and
to submit to me a report of the results of his inquiry, and his recommendations, not
later than 31 December 2014.

Dated 13 MAY 2014





Governor

By His Excellency's Command



Hon Dr Vanessa Goodwin MLC
Attorney-General

APPENDIX 7 - LETTERS PATENT ISSUED ON 22 MAY 2014 BY THE GOVERNOR OF SOUTH AUSTRALIA

 South  Australia
(TO WIT)

HIS EXCELLENCY REAR ADMIRAL KEVIN JOHN SCARCE, Companion in the Order of Australia, Conspicuous Service Cross, Governor in and over the State of South Australia;

TO

THE HONOURABLE JOHN DYSON HEYDON AC QC

GREETING

I, the Governor, with the advice and consent of Executive Council and under the *Royal Commissions Act 1917*, DO HEREBY APPOINT YOU to be Commissioner and require and authorise you to inquire into the following matters:

- (a) the governance arrangements of separate entities established by employee associations or their officers (*relevant entities*), with particular regard to:
 - (i) the financial management of relevant entities; and
 - (ii) the adequacy of existing laws as they relate to relevant entities with respect to:
 - (A) the integrity of financial management; and
 - (B) the accountability of officers of employee associations to their members in respect of the use of funds or other assets in relation to relevant entities; and
 - (iii) whether relevant entities are used, or have been used, for any form of unlawful purpose; and
 - (iv) the use of funds solicited in the name of relevant entities, for the purpose of furthering the interests of:
 - (A) an employee association; or
 - (B) an officer of an employee association; or
 - (C) a member of an employee association; or
 - (D) any other person or organisation;
- (b) without limiting the matters in paragraph (a), activities relating to the establishment or operation of any relevant entity as it relates to the following employee associations or any of their branches:
 - (i) The Australian Workers Union;
 - (ii) the Construction Forestry Mining and Energy Union;

- (iii) the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;
 - (iv) the Health Services Union;
 - (v) the Transport Workers Union of Australia;
- (c) without also limiting the matters in paragraph (a), activities of any other person or organisation in respect of which you consider that there are credible allegations of involvement in activities mentioned in paragraph (b);
- (d) the circumstances in which funds are, or have been, sought from any third parties and paid to relevant entities;
- (e) the extent to which persons represented by employee associations:
 - (i) are protected from any adverse effects or negative consequences arising from matters associated with, or related to, the existence of relevant entities or activities relating to their establishment or operation; or
 - (ii) are informed of those matters; or
 - (iii) are able to influence or exercise control over those matters; or
 - (iv) have the opportunity to hold officers of the association accountable for wrongdoing in relation to those matters;
- (f) any conduct in relation to a relevant entity which may amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity;
- (g) any conduct which may amount to a breach of any law, regulation or professional standard by any officer of an employee association in order to:
 - (i) procure an advantage for the officer or another person or organisation; or
 - (ii) cause a detriment to a person or organisation;
- (h) any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party;
- (i) the participation of any person or organisation (other than an employee association or an officer of an employee association) in a matter mentioned in paragraphs (a) to (h);
- (j) the adequacy and effectiveness of existing systems of regulation and law enforcement in dealing with matters mentioned in paragraphs (a) to (i) and, in particular, the means of redress available to employee associations and their members who suffer a detriment as a result of such a matter;
- (k) any matter reasonably incidental to a matter mentioned in paragraphs (a) to (j).

AND I further declare that you may inquire into any of these matters to the extent that the matter relates to or is connected with the peace, order, and good government of the State and any public purpose or any power of the State.

AND I direct you to make any recommendations arising out of your inquiry that you consider appropriate.

AND I declare that you are authorised to conduct your inquiry into any matter under this Commission in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission, or under any order or appointment, made by the Governor-General or any of the Governors of the States or by the Government of any of the Territories.

AND I declare that in this Commission:

employee association means:

- (a) an employee organisation as defined in section 12 of the *Fair Work Act 2009*; or
- (b) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under the *Fair Work (Registered Organisations) Act 2009* or any other Commonwealth law; or
- (c) a recognised State-registered association, or a transitionally recognised association, as defined in section 6 of the *Fair Work (Registered Organisations) Act 2009*, if the association is, or was at any time, entitled to represent the industrial interests of employees under an industrial law as defined in section 12 of the *Fair Work Act 2009*; or
- (d) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under a State or Territory law or instrument that is a State or Territory industrial law as defined in subsection 26(2) of the *Fair Work Act 2009*.

law means a law of the Commonwealth or of a State or Territory.

office, in relation to an employee association, means:

- (a) an office as defined in section 12 of the *Fair Work Act 2009*; or
- (b) an office within the ordinary meaning of that term.

officer, of an employee association, means a person who is, or was at any time:

- (a) the holder of an office in the association; or
- (b) an employee of the association; or
- (c) a delegate or other representative of the association.

organisation includes any of the following:

- (a) an employee association;
- (b) a corporate entity;
- (c) an association, whether incorporated or not.

separate entity means an entity that is, or was at any time:

- (a) a fund, organisation, account or other financial arrangement; and
 - (b) established for, or purportedly for, an industrial purpose or the welfare of members of an employee association; and
 - (c) a separate legal entity from any employee association;
- whether or not the entity is, or has at any time been, covered by the financial reporting obligations to which an employee association is, or was at any time, subject under the *Fair Work (Registered Organisations) Act 2009*.

AND I:

- (I) require you to begin your inquiry as soon as practicable; and

- (m) require you to make your inquiry as expeditiously as possible; and
- (n) authorise you to submit to me any interim report that you consider appropriate; and
- (o) require you to submit to me a report of the results of your inquiry, and your recommendations, not later than 31 December 2014.

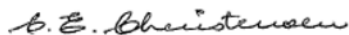
GIVEN under my hand and the Public Seal of South Australia, at Adelaide, this 22nd day of May 2014.

By command,



for Premier

Recorded in Register of Commissions,
Letters Patent, Etc., Vol. XXVII



Clerk of Executive Council

GOD SAVE THE QUEEN!

Department of the Premier and Cabinet
Adelaide, 22 May 2014

HIS Excellency the Governor in Executive Council has revoked the appointment of Rodney Hook, Chief Executive, Department of Planning, Transport and Infrastructure, as State Coordinator-General for the purposes of the Affordable Housing Stimulus Package with effect from 22 May 2014, pursuant to Section 68 of the Constitution Act 1934 and Section 36 of the Acts Interpretation Act 1915.

By command,

JOHN JAMES SNELLING, for Premier

PLN0089/14CS

Department of the Premier and Cabinet
Adelaide, 22 May 2014

HIS Excellency the Governor in Executive Council has been pleased to appoint John Hanlon, Acting Chief Executive, Department of Planning, Transport and Infrastructure, as State Coordinator-General for the purposes of the Affordable Housing Stimulus Package for a term commencing on 22 May 2014 and expiring on 31 December 2014, pursuant to Section 68 of the Constitution Act 1934.

By command,

JOHN JAMES SNELLING, for Premier

PLN0089/14CS

Department of the Premier and Cabinet
Adelaide, 22 May 2014

HIS Excellency the Governor in Executive Council has been pleased to appoint Andrew McKeegan, Acting Deputy Chief Executive, Department of Planning, Transport and Infrastructure, as Assistant State Coordinator-General for the purposes of the Affordable Housing Stimulus Package for a term commencing on 22 May 2014 and expiring on 31 December 2014, pursuant to Section 68 of the Constitution Act 1934.

By command,

JOHN JAMES SNELLING, for Premier

PLN0089/14CS

Department of the Premier and Cabinet
Adelaide, 22 May 2014

HIS Excellency the Governor in Executive Council has been pleased to appoint the Honourable John Dyson Heydon AC QC to be a Commissioner to enquire into and report upon the matters set out in the commission issued to the said the Honourable John Dyson Heydon AC QC on 22 May 2014, pursuant to the Royal Commissions Act 1917.

By command,

JOHN JAMES SNELLING, for Premier

AGO0072/14CS

HIS Excellency Rear Admiral Kevin John Scarce, Companion in the Order of Australia, Conspicuous Service Cross, Governor in and over the State of South Australia:

TO

THE HONOURABLE JOHN DYSON HEYDON AC QC

Greeting:

I, the Governor, with the advice and consent of Executive Council and under the Royal Commissions Act 1917, DO HEREBY APPOINT YOU to be Commissioner and require and authorise you to inquire into the following matters:

- (a) the governance arrangements of separate entities established by employee associations or their officers (relevant entities), with particular regard to:
 - (i) the financial management of relevant entities; and
 - (ii) the adequacy of existing laws as they relate to relevant entities with respect to:

- (A) the integrity of financial management; and
- (B) the accountability of officers of employee associations to their members in respect of the use of funds or other assets in relation to relevant entities; and
- (iii) whether relevant entities are used, or have been used, for any form of unlawful purpose; and
- (iv) the use of funds solicited in the name of relevant entities, for the purpose of furthering the interests of:
 - (A) an employee association; or
 - (B) an officer of an employee association; or
 - (C) a member of an employee association; or
 - (D) any other person or organisation;
- (b) without limiting the matters in paragraph (a), activities relating to the establishment or operation of any relevant entity as it relates to the following employee associations or any of their branches:
 - (i) The Australian Workers Union;
 - (ii) the Construction Forestry Mining and Energy Union;
 - (iii) the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;
 - (iv) the Health Services Union;
 - (v) the Transport Workers Union of Australia;
- (c) without also limiting the matters in paragraph (a), activities of any other person or organisation in respect of which you consider that there are credible allegations of involvement in activities mentioned in paragraph (b);
- (d) the circumstances in which funds are, or have been, sought from any third parties and paid to relevant entities;
- (e) the extent to which persons represented by employee associations:
 - (i) are protected from any adverse effects or negative consequences arising from matters associated with, or related to, the existence of relevant entities or activities relating to their establishment or operation; or
 - (ii) are informed of those matters; or
 - (iii) are able to influence or exercise control over those matters; or
 - (iv) have the opportunity to hold officers of the association accountable for wrongdoing in relation to those matters;
- (f) any conduct in relation to a relevant entity which may amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity;
- (g) any conduct which may amount to a breach of any law, regulation or professional standard by any officer of an employee association in order to:
 - (i) procure an advantage for the officer or another person or organisation; or
 - (ii) cause a detriment to a person or organisation;
- (h) any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party;
- (i) the participation of any person or organisation (other than an employee association or an officer of an employee association) in a matter mentioned in paragraphs (a) to (h);
- (j) the adequacy and effectiveness of existing systems of regulation and law enforcement in dealing with matters mentioned in paragraphs (a) to (i) and, in particular, the means of redress available to employee associations and

their members who suffer a detriment as a result of such a matter;

- (k) any matter reasonably incidental to a matter mentioned in paragraphs (a) to (j).

AND I further declare that you may inquire into any of these matters to the extent that the matter relates to or is connected with the peace, order, and good government of the State and any public purpose or any power of the State.

AND I direct you to make any recommendations arising out of your inquiry that you consider appropriate.

AND I declare that you are authorised to conduct your inquiry into any matter under this Commission in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission, or under any order or appointment, made by the Governor-General or any of the Governors of the States or by the Government of any of the Territories.

AND I declare that in this Commission:

employee association means:

- (a) an employee organisation as defined in Section 12 of the Fair Work Act 2009; or
- (b) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under the Fair Work (Registered Organisations) Act 2009 or any other Commonwealth law; or
- (c) a recognised State-registered association, or a transitionally recognised association, as defined in Section 6 of the Fair Work (Registered Organisations) Act 2009, if the association is, or was at any time, entitled to represent the industrial interests of employees under an industrial law as defined in Section 12 of the Fair Work Act 2009; or
- (d) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under a State or Territory law or instrument that is a State or Territory industrial law as defined in subsection 26 (2) of the Fair Work Act 2009.

law means a law of the Commonwealth or of a State or Territory.

office, in relation to an employee association, means:

- (a) an office as defined in section 12 of the Fair Work Act 2009; or
- (b) an office within the ordinary meaning of that term.

officer, of an employee association, means a person who is, or was at any time:

- (a) the holder of an office in the association; or
- (b) an employee of the association; or
- (c) a delegate or other representative of the association.

organisation includes any of the following:

- (a) an employee association;
- (b) a corporate entity;
- (c) an association, whether incorporated or not.

separate entity means an entity that is, or was at any time:

- (a) a fund, organisation, account or other financial arrangement; and
- (b) established for, or purportedly for, an industrial purpose or the welfare of members of an employee association; and
- (c) a separate legal entity from any employee association; whether or not the entity is, or has at any time been, covered by the financial reporting obligations to which an employee association is, or was at any time, subject under the Fair Work (Registered Organisations) Act 2009.

AND I:

- (i) require you to begin your inquiry as soon as practicable; and

(ni) require you to make your inquiry as expeditiously as possible; and

(nj) authorise you to submit to me any interim report that you consider appropriate; and

(o) require you to submit to me a report of the results of your inquiry, and your recommendations, not later than 31 December 2014.

GIVEN under my hand and the Public Seal of South Australia, at Adelaide, 22 May 2014.

By command,

JOHN JAMES SNELLING, for Premier

Recorded in Register of Commissions,

Letters Patent, Etc., Vol. XXVII

C. CHRISTENSEN, Clerk of Executive Council

GOD SAVE THE QUEEN!

Department of the Premier and Cabinet
Adelaide, 22 May 2014

HIS Excellency the Governor in Executive Council has been pleased to appoint Michael Leslie Brum Ardle to the office of Acting Deputy President of the Workers Compensation Tribunal of South Australia for a period of one year commencing on 22 May 2014 and expiring on 21 May 2015, pursuant to the Workers Rehabilitation and Compensation Act 1986.

By command,

JOHN JAMES SNELLING, for Premier

MIR0014/14CS

Department of the Premier and Cabinet
Adelaide, 22 May 2014

HIS Excellency the Governor in Executive Council has been pleased to designate the office of Industrial Magistrate as the primary judicial office of Michael Leslie Brum Ardle, pursuant to Section 6(2) of the Judicial Administration (Auxiliary Appointments and Powers) Act 1988.

By command,

JOHN JAMES SNELLING, for Premier

MIR0014/14CS

Department of the Premier and Cabinet
Adelaide, 22 May 2014

HIS Excellency the Governor in Executive Council has been pleased to appoint the SafeWork SA officers, David James Carey and Simon Bradshaw Ridings as Inspectors for the purposes of the Shop Trading Hours Act 1977, commencing on 22 May 2014, pursuant to Section 7 of the Shop Trading Hours Act 1977.

By command,

JOHN JAMES SNELLING, for Premier

MIR0016/14CS

Department of the Premier and Cabinet
Adelaide, 22 May 2014

HIS Excellency the Governor in Executive Council has been pleased to appoint the people listed as Justices of the Peace for South Australia for a period of ten years commencing from 22 May 2014 and expiring on 21 May 2024, it being a condition of appointment that the Justices of the Peace must take the oaths required of a Justice under the Oaths Act 1936 and return the oaths form to the Justice of the Peace Services within 3 months of the date of appointment, pursuant to Section 4 of the Justices of the Peace Act 2005.

Joyce Jean Allison
George Apostolou
Michael Charles Asker
Maurice James Barclay
Bruno Basso
Paul Bennison

APPENDIX 8 - LETTERS PATENT ISSUED ON 8 JULY 2014 BY THE ADMINISTRATOR OF WESTERN AUSTRALIA

Western Australia

Commission

appointing

The Honourable John Dyson Heydon AC QC

to be a Royal Commission

To: **The Honourable John Dyson Heydon AC QC**

By this commission under the Public Seal of the State, I, the Administrator, acting under the *Royal Commissions Act 1968* (WA) and all other enabling powers and with the advice and consent of the Executive Council —

- (a) appoint you to be a Royal Commission to inquire into the following matters —
 - (i) the governance arrangements of separate entities established by employee associations or their officers (*relevant entities*), with particular regard to —
 - (A) the financial management of relevant entities; and
 - (B) the adequacy of existing laws as they relate to relevant entities with respect to —
 - (I) the integrity of financial management; and
 - (II) the accountability of officers of employee associations to their members in respect of the use of funds or other assets in relation to relevant entities;and
 - (C) whether relevant entities are used, or have been used, for any form of unlawful purpose; and
 - (D) the use of funds solicited in the name of relevant entities, for the purpose of furthering the interests of —
 - (I) an employee association; or
 - (II) an officer of an employee association; or
 - (III) a member of an employee association; or
 - (IV) any other person or organisation;
- (ii) without limiting the matters in subparagraph (i), activities relating to the establishment or operation of any relevant entity as it relates to the following employee associations or any of their branches —
 - (A) the Australian Workers Union;
 - (B) the Construction Forestry Mining and Energy Union;
 - (C) the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;
 - (D) the Health Services Union;
 - (E) the Transport Workers Union of Australia;
- (iii) without also limiting the matters in subparagraph (i), activities of any other person or organisation in respect of which you consider that there are credible allegations of involvement in activities mentioned in subparagraph (ii):

- (iv) the circumstances in which funds are, or have been, sought from any third parties and paid to relevant entities;
 - (v) the extent to which persons represented by employee associations —
 - (A) are protected from any adverse effects or negative consequences arising from matters associated with, or related to, the existence of relevant entities or activities relating to their establishment or operation; or
 - (B) are informed of those matters; or
 - (C) are able to influence or exercise control over those matters; or
 - (D) have the opportunity to hold officers of the association accountable for wrongdoing in relation to those matters;
 - (vi) any conduct in relation to a relevant entity which may amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity;
 - (vii) 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 —
 - (A) procure an advantage for the officer or another person or organisation; or
 - (B) cause a detriment to a person or organisation;
 - (viii) any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party;
 - (ix) the participation of any person or organisation (other than an employee association or an officer of an employee association) in a matter mentioned in subparagraphs (i) to (viii);
 - (x) the adequacy and effectiveness of existing systems of regulation and law enforcement in dealing with matters mentioned in subparagraphs (i) to (ix) and, in particular, the means of redress available to employee associations and their members who suffer a detriment as a result of such a matter;
 - (xi) any matter reasonably incidental to a matter mentioned in subparagraphs (i) to (x);
- and
- (b) direct you to make any recommendations arising out of your inquiry that you consider appropriate; and
 - (c) declare that the *Royal Commissions Act 1968* (WA) section 18 applies to the Royal Commission; and
 - (d) declare that you are authorised to conduct your inquiry into any matter under this commission in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any commission, letters patent, order or appointment issued or made by the Commonwealth, another State or a Territory; and
 - (e) declare that in this commission —
 - employee association** means —
 - (a) an employee organisation as defined in section 12 of the *Fair Work Act 2009* (Commonwealth); or

- (b) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under the *Fair Work (Registered Organisations) Act 2009* (Commonwealth) or any other Commonwealth law;
- (c) a recognised State-registered association, or a transitionally recognised association, as defined in section 6 of the *Fair Work (Registered Organisations) Act 2009* (Commonwealth), if the association is, or was at any time, entitled to represent the industrial interests of employees under an industrial law as defined in section 12 of the *Fair Work Act 2009* (Commonwealth); or
- (d) any other association of employees that is, or was at any time, registered or recognised as such an association (however described) under a State or Territory law or instrument that is a State or Territory industrial law as defined in section 26(2) of the *Fair Work Act 2009* (Commonwealth);

law means a law of the Commonwealth or of a State or Territory;

office, in relation to an employee association, means —

- (a) an office as defined in section 12 of the *Fair Work Act 2009* (Commonwealth); or
- (b) an office within the ordinary meaning of that term;

officer, of an employee association, means a person who is, or was at any time —

- (a) the holder of an office in the association; or
- (b) an employee of the association; or
- (c) a delegate or other representative of the association;

organisation includes any of the following —

- (a) an employee association;
- (b) a corporate entity;
- (c) an association, whether incorporated or not;

separate entity means an entity that is, or was at any time —

- (a) a fund, organisation, account or other financial arrangement; and
- (b) established for, or purportedly for, an industrial purpose or the welfare of members of an employee association; and
- (c) a separate legal entity from any employee association,

whether or not the entity is, or has at any time been, covered by the financial reporting obligations to which an employee association is, or was at any time, subject under the *Fair Work (Registered Organisations) Act 2009* (Commonwealth);

and

- (f) require you to begin your inquiry as soon as practicable; and
- (g) require you to make your inquiry as expeditiously as possible; and
- (h) authorise you to submit to the Governor any interim report that you consider appropriate; and
- (i) require you to submit to the Governor a report of the results of your inquiry, and your recommendations, not later than 31 December 2014.

- 4 -

Issued under the Public Seal of the State
at Perth on 8 July 2014.

Wayne Martin

Administrator

Colin Barnett

Premier



APPENDIX 9 – PRACTICE DIRECTION 1



Royal Commission into Trade Union Governance and Corruption

PRACTICE DIRECTION 1

General

1. The Commissioner considers that it is desirable to establish procedures for the orderly conduct of the inquiry that are likely to assist in the efficient discharge of his task.
2. These practice directions are intended to provide guidance to all persons as to the procedures that the Commissioner will adopt in the ordinary course, and give interested persons a fair opportunity to understand the practices that the Commissioner expects to follow and be followed in the ordinary course of events.
3. Where the Commissioner thinks it appropriate, he may dispense with or vary these practices and procedures, and any other practices or procedures that are subsequently published or adopted.
4. In these practice directions, references to the "Act" are references to the *Royal Commission Act 1902* (Cth).
5. Where these practice directions provide for a document or other thing to be filed with the Office of the Commission, that may be done by personally delivering the document or thing to the Office of the Commission, by email addressed to Legal.TradeUnion@ag.gov.au, or by post. Where a document or thing is to be filed by a specified time or date and a person intends to file by post, the person must ensure the document or thing is posted in sufficient time for it to be received by the Office of the Commission before that specified time or date.



Royal Commission into Trade Union Governance and Corruption

Public hearing dates and times

6. The usual hearing hours for public hearings will be from 10.00am to 1.00pm and from 2.00pm to 4.00pm.
7. Details of the public hearings arranged from time to time can be obtained by calling the Commission's hotline 1800 221 245 or from the Commission's website at www.tradeunionroyalcommission.gov.au.
8. The Commission accepts no obligation to notify persons, organisations or corporations (hereinafter referred to as "persons") with authorisation to appear, or other interested parties, of the times and places of its hearings.
9. However a person who, in the opinion of Counsel Assisting, may be substantially and directly interested in evidence to be produced to the Commission at a hearing will, if reasonably possible and practicable, be notified in advance that it is intended to produce that evidence to the Commission.

Authorisation to appear

To represent a witness while giving evidence

10. Where a legal practitioner seeks authorisation to appear before the Commission for the limited purpose of representing an individual while that individual is giving evidence at a public hearing of the Commission:
 - (a) such an application is to be made orally immediately prior to the individual being called to give evidence;



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- (b) the legal practitioner must indicate whether he or she (and in the case of Counsel, his or her instructing solicitors) act for any other person in relation to the Commission and the matters it is inquiring into, and if so, why it is appropriate for the practitioner to be authorised to appear; and
- (c) unless the Commissioner determines otherwise, the legal practitioner will be authorised to appear before the Commission for the limited purpose of representing the individual while the individual is giving evidence.

Applications in all other cases

- 11. Paragraphs 12 to 16 apply in any case other than that described in paragraph 10 above.
- 12. Subject to paragraph 16, any person or legal practitioner wishing to obtain authorisation to appear before the Commissioner at public hearings should file with the Office of the Commission a written application form by 1 May 2014. The form of application is annexed to these practice directions.
- 13. Any application lodged within the time required will be considered by the Commissioner, who will make a ruling on the application and notify the applicant of his decision.
- 14. Public hearings of the Commission are unlikely to be adjourned or otherwise delayed for the purpose of entertaining and determining:
 - (a) any late application for authorisation; or



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- (b) any further application for authorisation from an applicant who, in consequence of the Commissioner's ruling on the initial application, has not obtained the authorisation sought.

15. Applications to which paragraphs 14(a) and (b) apply will be dealt with by the Commissioner at such time as the Commissioner considers appropriate having regard to all relevant considerations.
16. Nothing in the above practice directions prevents a person from seeking authorisation to appear at any time if something occurs which leads the person to believe that the person's interests may be affected. Such an application should address the matters identified in the form of application annexed to these practice directions.

Terms of authorisation

17. Unless the Commissioner otherwise determines, every authorisation to appear is granted on the following conditions:
 - (a) authorisation may be withdrawn by the Commissioner, or made subject to altered or additional limitations or conditions at any time;
 - (b) the nature and extent of the participation of the authorised person or authorised legal practitioner (as the case may be) in the hearing before the Commissioner is subject to the Commissioner's control from time to time;
 - (c) the authorised person or authorised legal practitioner (as the case may be) has no automatic right to examine or cross-examine any witness. Amongst other things, the Commissioner may, depending on the circumstances at the relevant time, direct that there should be no cross-



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examination of a particular witness by the authorised person or authorised legal representative (as the case may be), or that any such cross-examination shall be limited as to topic, time or otherwise;

- (d) the authorised person or authorised legal practitioner (as the case may be) is expected to follow the practice and other directions of, and rulings from, the Commissioner, and not to disrupt the proceedings.

- 18. The Commissioner will determine the nature and extent of any other conditions attaching to any grant of authorisation taking into account all relevant considerations, including the individual circumstances of the applicant and the contents of the person's application for authorisation.

Production of materials to the Commission

- 19. The following practice directions relate to the production of materials to the Commission, whether in answer to a Summons, a Notice to Produce, or otherwise. A person's obligations in relation to the production of documents are governed by the Act, other legislation and the general law, and nothing in these practice directions modifies those obligations.
- 20. All electronic documents must be produced electronically in their native file – that is, in the file format in which they exist on the system or systems of the person producing the documents. For example, Microsoft Outlook emails are to be produced as .msg files and Microsoft Word documents are to be produced as .docx files.



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21. There may be circumstances in which production of electronic documents will be particularly difficult (for example, an original 'native' file may be contained on a hard drive of, or otherwise within, a computer system that is not capable of being physically produced by virtue of its size or location). In such a case the person producing documents may, in the first instance, respond to the notice to produce by creating and producing an exact electronic copy of the original native file, such copy to be saved onto an electronic storage device. Where a person chooses to proceed in this way:
 - (a) they are to give the Commission written notice of fact they have done so; and
 - (b) the notice to produce shall be treated as having been complied with in part only, and the person will remain obliged to preserve the original native file on the computer system from which it has been copied, pending any further call on the notice to produce.
22. In relation to the production of an electronic copy of any electronic file or files on an electronic storage device, the following practice is encouraged in relation to the selection of the device to be used:
 - CD - for data productions less than 600MB
 - DVD - for data productions between 600MB and 4GB
 - Portable USB Hard Drive (NTFS format) - for data productions between 4GB and 32GB
 - External Hard drive - for productions over 32GB.

If production exceeds available media's capacity, production should be split between media.



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23. Persons required to produce electronic documents must ensure they produce all parts of the document. For example, where the electronic file is an email chain, all parts of that chain are to be produced, and where the electronic file is an email with an attachment, both the email and its attachment are to be produced.
24. Where a person served with a notice to produce is required to produce a document which is an electronic file and the only version of that document which the person has is an electronic file, the person is not required to (and should not) convert the 'native' electronic file to paper for the purposes of production in response to the notice to produce. (However if a paper copy of the electronic file already exists when the notice to produce is served and is caught by the notice to produce, both the electronic file and the paper copy are to be produced.)
25. Persons obliged to produce hard copy documents must produce the original hard copy documents. It is not permissible to keep the original and create and produce a copy.

Legal professional privilege

26. The following practice directions address the way the Commission will receive and consider a claim under s 6AA(1) of the Act that a person has a reasonable excuse for failing to produce a document on the ground of legal professional privilege.
27. Where an assertion is made that a person has a reasonable excuse for not producing a document by reason of the matter set out in s 6AA(1)(a) of the Act – that is, that a court has found the document (or the relevant part of the document) to be subject to legal professional privilege – the person must, as



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soon as is reasonably practicable and in any event before the production of the document to the Commission, file with the Office of the Commission:

- (a) a document which sufficiently describes the document in question (or the relevant part of the document) so as to enable the Commissioner to be satisfied that the document is identical to that which is the subject of the court's previous finding;
- (b) a copy of the judgment or order recording the finding of the court relied upon; and
- (c) such evidence as the person is able to provide to demonstrate that there has been no waiver or loss of privilege since the date of the court's finding.

- 28. Where a claim is made under s 6AA(1)(b) of the Act that a document or part of a document is subject to legal professional privilege, the person making the claim is to do so by written notice filed with the Office of the Commission as soon as reasonably practicable and in all cases within the time provided for under the Act, together with any and all evidence and written submissions as the person relies upon in support of the claim.
- 29. The Commissioner will then proceed to consider and determine the claim (where he thinks it appropriate, after exercising his power under s 6AA(3) of the Act to require production of the document) and notify the claimant of his decision.



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Self incrimination

30. The following practice directions set out the way the Commission will receive and consider a claim under s 6A of the Act that a person has a reasonable excuse for failing to produce a document on the grounds of self incrimination.
31. In the event any person claims to be excused from producing any document or other thing by reason of the operation of s 6A(3) or (4) of the Act, the person must file with the Office of the Commission either at or prior to the time for producing the document or other thing:
 - (a) the court and other documents demonstrating that the person has been charged with an offence or is a party to proceedings for the imposition of a penalty against that person;
 - (b) a written description of the stage at which the charge or penalty proceedings are up to, and any documents to support that;
 - (c) written submissions as to how the production of the document or thing might tend to either incriminate the person or make the person liable to a penalty; and
 - (d) such evidence as the person wishes to rely upon in support of the claim.

Electronic court book

32. The Commission will maintain an electronic court book (**Court Book**). The Court Book will contain tendered exhibits and transcripts of public hearings (appropriately redacted in light of non-publication directions), and possibly other documents.



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33. Appropriate access to the Court Book will be granted to persons authorised to appear before the Commission, and to such other persons who seek access and in respect of whom the Commissioner thinks it appropriate that access be granted.
34. The Court Book will be available to those persons to whom access has been granted both inside the hearing room and via the internet outside the hearing room.
35. When a witness statement or other document is tendered, it will appear in the Court Book and be identified as an exhibit.
36. Documents in the Court Book will be able to be displayed on screens in the hearing room.
37. Documents which have not been tendered but which are intended to be tendered may, in some cases, be placed on the Court Book for review by persons with access to the Court Book prior to a particular witness being called to give evidence or a particular document being tendered. The Commissioner will determine whether this is to occur on a case-by-case basis. Otherwise details of evidence to be produced to the Commission will not be published before it is called.
38. Pursuant to section 6D(3)(b) of the Act, the Commissioner directs that:
 - (a) until their tender, the contents of documents placed onto the Court Book are not to be published to any persons other than persons to whom the Commission has granted access to the Court Book as recorded in a register of such persons kept by the Commission, and are to be kept confidential and not to be used for purposes other than in connection with the proceedings of the Royal Commission;

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- (b) persons who are granted access to the Court Book are not to make available their access details to other persons who have not been granted access to the Court Book, or otherwise facilitate persons who have not been granted access to the Court Book obtaining access to the Court Book.

Transcripts of public hearings

- 39. An edited transcript, which is revised by the Commission's transcript contractor and revised by the Commission for confidentiality issues only, will be placed on the Court Book when reasonably practicable.
- 40. Any person seeking the making of corrections to the edited transcript (that is, the transcript referred to in paragraph 39 above) should do so by way of notice in writing to the Commissioner's Associate. Those applications will be dealt with administratively within the Commission and the party seeking the correction will be notified of the Commissioner's determination by his Associate, and details of any corrections so made will be placed on either or both of Court Book and the Commission's website from time to time.
- 41. Oral applications for transcript corrections during hearings will not be entertained except in exceptional circumstances.
- 42. Following the making of any corrections, the authorised transcript will be held by the Commissioner's Associate. A copy of the authorised transcript will be published on the Commission's website in PDF and Word format as and when it is available.



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Witnesses and evidence

43. Subject to the control of the Commissioner, Counsel Assisting the Commission will determine what witnesses are called during public hearings, what documents are tendered during public hearings, and in what order witnesses will be called and examined.
44. All witnesses who give evidence to the Commission at a public hearing will be called and examined by Counsel Assisting the Commission.
45. At the conclusion of the examination of a witness (**Witness A**) by Counsel Assisting at a public hearing, the public hearing of Witness A's evidence will be adjourned and there will be no cross-examination of Witness A at that time.
46. The Commissioner will subsequently make directions giving persons the opportunity to file with the Office of the Commission the following documents within a designated time:
 - (a) a signed statement of evidence from any witness (**Witness B**) advancing material bearing on the accuracy of the evidence given by Witness A, being a statement setting out the evidence that Witness B would give under oath or on affirmation if called as a witness;
 - (b) any and all submissions as to why the evidence of Witness B should be led before the Commission;
 - (c) a document identifying, with precision, the topics in respect of which that person or his or her legal representative wishes to cross-examine Witness A;



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- (d) any document the person or the person's legal representative might wish to put to or show Witness A, or otherwise use, for the purposes of cross-examination;
- (e) any and all submissions as to why the person or the person's legal representative should be permitted to cross-examine Witness A in respect of the topics so identified, including by reference to (amongst other things) the nature and extent of any differences between the evidence given by Witness A and the contents of the signed statement of evidence of Witness B.

A person who lodges any such material is referred to below as an **Applicant**.

- 47. Counsel Assisting will read and consider documents so filed by an Applicant and form an opinion about the extent to which the Applicant should be permitted to cross-examine Witness A, and notify the Applicant and the Commissioner of that opinion.
- 48. Unless the Commissioner otherwise determines, when the public hearings resume:
 - (a) Witness B will be called to give evidence by Counsel Assisting, will be asked to adopt his or her statement provided in accordance with the above regime, and will be examined by Counsel Assisting;
 - (b) the Commissioner will permit cross-examination of Witness B by such persons and to such extent as he considers appropriate. In such cases, the usual approach will be that:
 - (i) where the Commissioner thinks it appropriate, Witness B's legal representative will examine Witness B on any matters set out in



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Witness B's statement of evidence that have not been dealt with through Counsel Assisting's examination;

(ii) other parties who are permitted to cross-examine will do so;

(iii) Witness B's legal representative will re-examine;

(iv) Counsel Assisting will re-examine;

(c) the Commissioner will, to the extent necessary, give rulings on whether, and if so to what extent, the Applicant or its legal representative may cross-examine Witness A having regard to the materials submitted by the Applicant and the views expressed by Counsel Assisting;

(d) where appropriate, Witness A will be recalled by Counsel Assisting to be cross-examined by the Applicant or their legal representative to the extent permitted by the Commissioner's ruling.

49. Any witness may be re-examined by Counsel Assisting.

50. In any circumstance other than that contemplated by paragraph 46(d), a copy of any document proposed to be put or shown to a witness in cross-examination must be provided to Counsel Assisting as soon as possible after a decision is made to use a document for this purpose, and in all cases prior to its intended use.

Prior notification of certain issues

51. Any person being authorised to appear should, wherever practical, give the Office of the Royal Commission written notice of the following matters as soon as possible:



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- (a) any issues of law which that person proposes to raise;
- (b) any procedural matter that person proposes to raise (including, by way of example only, any objections to evidence, confidentiality issues, non-publication concerns and administrative arrangements).

52. The written notice should identify the issue or matter to be raised and set out a short outline of the submissions the person wishes to make in relation to that matter or issue.

Final submissions

53. In due course the Commissioner is likely to make further directions in relation to the making of final submissions to the Commissioner. The Commissioner will most likely make directions for the filing of written submissions. The question of whether oral submissions are required is to be determined in due course, and there is a possibility that the Commissioner will take the view that oral submissions are not required. Having regard to the reporting timeframe in respect of this Royal Commission, it is expected that there will only be a limited time available to interested parties to finalise their written submissions following the completion of the taking of evidence by way of public hearings. This indication has been given in order to assist interested parties in planning and preparing any written submissions.

26 March 2014

The Honourable John Dyson Heydon AC QC



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APPLICATION FOR AUTHORISATION TO APPEAR

Part 1 – Name and contact details

Name: [Name of the person seeking authorisation to appear, or the name of the person who proposes to be represented by a legal practitioner (as the case may be)]

Address:

Contact person:

Telephone:

Fax:

Email:

Part 2 – Name and contact details of legal practitioner

Name:

Address:

Telephone:

Fax:

Email:

Details of instructing solicitors:

Firm name:

Contact person:

Address:

Telephone:

Fax:

Email:

Part 3 – Terms of reference

Which particular term or terms of reference does the person in question claim to have an interest?



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Part 4 – Nature and extent of interest

In respect of each term of reference identified in answer to Part 3, what is the nature and extent of the person's asserted interest in that matter?

Part 5 – Assistance to the Commission

- (a) Will the person appearing or to be represented be in a better position to assist the Commission if authorisation to appear is granted? If so, how?

- (b) Please specify precisely the nature and extent of any assistance that will be provided to the Commission if authorisation is granted?

- (c) Will the person (or in the case of a legal practitioner seeking authorisation to appear for a person, both the practitioner and the party he or she is representing) agree to follow the published practice directions, follow the directions of, and rulings from, the Commissioner during the conduct of the inquiry and not disrupt or disturb the proceedings, or attempt to do so?



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Part 6 - Conflicts

In the case of an application for authorisation for a legal practitioner to appear, does the practitioner (and in the case of Counsel, his or her instructing solicitors) act for any other person in relation to the Commission and the matters it is inquiring into? If so, what information can be provided to the Commission such as to enable the Commissioner to determine whether it is appropriate for authorisation to be granted?

Part 7 - Submissions

What submissions do you wish to make, and what other matters do you wish to rely upon, in support of the application for authorisation?

Part 8 - Court Book

Do you agree that, if authorisation is granted, you will not make available your log on access details to Court Book to any other person who has not been granted log on access, and will not otherwise facilitate persons who have not been granted log on access to Court Book obtaining access to Court Book?



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If authorisation is granted, do you agree that, save in respect of documents which have already been tendered at a public hearing, you will not cause or permit the contents of documents on Court Book to be published to any persons other than persons to whom the Commission has granted log on access to Court Book as recorded in a register of such persons kept by the Commission, and will not use those documents for purposes other than in connection with the proceedings of the Royal Commission?

Please note that the Commission may seek further information from applicants for authorisation to appear prior to any decision being made as to whether such authorisation will be granted.

APPENDIX 10 – PRACTICE DIRECTION 2



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PRACTICE DIRECTION 2

1. This Practice Note applies in place of paragraphs 45 to 48 of Practice Direction 1 in respect of the public hearings to which paragraph 2 below applies. Save for this change, Practice Direction 1 will continue to apply to all hearings in the Commission.
2. It may be appropriate in some instances for the Commission, in advance of a witness being called to give evidence at a public hearing (**Witness A**), to provide to persons who may be substantially and directly interested in Witness A's evidence, a statement of the evidence Witness A is likely to give, together with the documents to which Witness A will refer (**Statement**).
3. In the event paragraph 2 applies, the Office of the Commission will, where reasonably practicable, send to persons (or their legal representatives) who the Commission considers may be substantially and directly interested in the evidence of Witness A:
 - (a) notice that this Practice Direction 2 applies;
 - (b) the Statement;
 - (c) directions as to the time for compliance with paragraph 5 below; and
 - (d) details as to the date and location of the hearing of the evidence of Witness A and such other evidence as shall be adduced by virtue of the operation of paragraphs 5 and 6 below.
4. In the event paragraph 2 applies, the Office of the Commission will, where reasonably practicable, advertise by way of publication on its website the fact that there will be a public hearing and the general subject matter of that



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hearing. Any person who considers that they may be substantially and directly interested in the subject matter of the advertised hearing (**Matters**) may apply in writing to the Office of the Commission for access to the Statement. The application should identify the person and the nature and extent of their interest in the Matters. If the Commission is satisfied that it is appropriate to do so in all of the circumstances, it will provide a copy of the Statement in whole or in part to the applicant.

5. Any person wishing to cross-examine Witness A and/or have any other evidence placed before the Commission in respect of the Matters must file with the Office of the Commission by no later than the date specified in the directions referred to in paragraph 3(c) above:

- (a) in the case of documentary evidence, the documents;

- (b) in the case of oral evidence, a signed statement from the witness in question setting out, in detail, the precise evidence that witness would give on oath or affirmation if called as a witness (**Other Witness**);

- (c) any and all submissions as to why the evidence so identified above should be placed before the Commission;

- (d) a document identifying, with precision, the topics in respect of which that person or his or her legal representative wishes to cross-examine Witness A;

- (e) any and all submissions as to why the person or the person's legal representative should be permitted to cross-examine Witness A in respect of the topics so identified, including by reference to (amongst other things) the nature and extent of any differences between the



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anticipated evidence of the Witness A and the contents of a document or statement identified in (a) and (b) above.

A person who lodges any such material is referred to below as an **Applicant**.

6. Unless the Commissioner otherwise determines, at the hearing scheduled and notified in accordance with paragraph 3(d) above:

(a) Witness A will be called and examined by Counsel Assisting;

(b) the Commissioner will permit cross-examination of Witness A by such persons, to such extent and in such order as he considers appropriate;

(c) Counsel Assisting will re-examine Witness A;

(d) any Applicant must, if they wish to place the evidence of the Other Witness before the Commission, arrange for the Other Witness to attend at the hearing for that purpose;

(e) any Other Witness who is made available in accordance with (d) above will be called to give evidence by Counsel Assisting, will be asked to adopt his or her statement filed in accordance with paragraph 5 above, and will be examined by Counsel Assisting;

(f) where the Commissioner thinks it appropriate, he will permit examination of the Other Witness by the Applicant who filed the Other Witness' statement (or that Applicant's legal representative) on any matters set out in the witness' statement that have not been dealt with through Counsel Assisting's examination;



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- (g) other parties who are permitted to cross-examine the Other Witness will do so;
 - (h) the Applicant (or the Applicant's legal representative) will re-examine the Other Witness;
 - (i) Counsel Assisting will re-examine the Other Witness.
7. Where the Commissioner thinks it appropriate, he may dispense with or vary these practices and procedures.

APPENDIX 11 - PRACTICE DIRECTION 3



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PRACTICE DIRECTION 3

1. This Practice Note applies in place of paragraphs 45 to 48 of Practice Direction 1 in respect of the public hearings to which paragraph 2 below applies. Save for this change, Practice Direction 1 will continue to apply to all hearings in the Commission.
2. On 11, 15 and 16 September 2014 the Office of the Commission proposes to hold public hearings into the operations of the following relevant entities:
 - a. IR 21 Limited;
 - b. Industry 2020 Pty Ltd; and
 - c. Building Industry 2000 Limited.
3. In conducting the hearings referred to in paragraph 2, persons who appear to have knowledge of the operations and finances of those entities will be examined by Counsel Assisting about such matters. There will be no statements tendered on behalf of any witness called by the Commission.
4. Those authorised to appear at those hearings may make oral application for authorisation to cross-examine those examinees on the day, and such applications (and any other applications) will be dealt with when made.
5. Where the Commissioner thinks it appropriate, he may dispense with or vary these practices and procedures.

4 September 2014

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

The Honourable John Dyson Heydon AC QC

APPENDIX 12 - LIST OF WITNESSES AND THEIR COUNSEL

ALPHABETICAL LIST OF WITNESSES AND THEIR COUNSEL

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
1.	John Agostinelli	HSU	17/06/2014 27/08/2014	
2.	Joseph Agostino	AWU	18/09/2014	
3.	Leigh Ainsworth	AWU	09/09/2014	
4.	Sarah Aird	HSU	16/09/2014	
5.	Christopher Anderson	ETU	05/09/2014	Neil Clelland QC, instructed by Holding Redlich Lawyers
6.	Diana Asmar	HSU	26/08/2014 19/09/2014	Remy Van de Wiel QC & Mark Champion of Counsel, instructed by Koutsantoni & Associates Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
7.	David Atkin	CFMEU	3/10/2014	Initial representatives: Chris Caleo QC & Georgie Coleman of Counsel, instructed by Holding Redlich Lawyers New representatives: Philip Crutchfield QC & Georgie Coleman of Counsel instructed by Holding Redlich
8.	Lee Atkinson	HSU	19/09/2014	
9.	Matthew Barr	CFMEU	02/09/2014	John Fernon SC, instructed by Gadens Lawyers
10.	Jose Barrios	CFMEU	01/09/2014	Ian Latham of Counsel, instructed by Turner Freeman Lawyers
11.	John Bastemeyer	CFMEU	03/09/2014	
12.	Sakib Begic	CFMEU	18/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
13.	John Berger	TWU Vic/Tas Branch	02/07/2014 19/08/2014	J L Glissan ESM QC of Counsel, instructed by Maurice Blackburn Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
14.	Peter Biagini	TWU	21/08/2014	J L Glissan ESM QC & Mark Gibian of Counsel, instructed by Maurice Blackburn Lawyers
15.	Ralph Blewitt	AWU	12/05/2014 13/05/2014	Robert Galbally, Solicitor, of Galbally Rolfe Lawyers
16.	Zoran Bogunovic	CFMEU	02/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
17.	Marco Bolano	HSU	16/06/2014	
18.	Michael Bonnici	CFMEU	18/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
19.	Tony Borgeest	HSU	27/08/2014	
20.	Ian Bourner	CFMEU	03/09/2014	
21.	Paul Anthony Bracegirdle	TWU	23/06/2014	
22.	Guido Bressani	MUA	29/09/2014	Nicholas Ellery, Solicitor, of Corrs Chambers Westgarth Lawyers
23.	Christopher Brown	HSU	27/08/2014	

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
24.	Ante Buhin	CFMEU	17/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
25.	Zeljko Buhin	CFMEU	17/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
26.	Michael Burns	TWU	21/08/2014	William McNally of McNally Jones Staff Lawyers
27.	Ian Robert Busch	CFMEU	05/08/2014 06/08/2014	
28.	Maria Butera	CFMEU	07/07/2014 23/10/2014 28/10/2014	Initial representatives: Philip Crutchfield QC, Chris Caleo QC & Georgie Coleman of Counsel, instructed by Holding Redlich Lawyers
29. 30.	Maria Butera James Byrnes	CFMEU CFMEU	07/07/2014 23/10/2014 28/10/2014 03/10/2014 17/10/2014	New representatives (from 14 Oct 14): Constantine Heliotis QC & Louie Hawas of Counsel, instructed By Rigby Cooke Lawyers Alastair McKeough, Solicitor, of Whitten & McKeough Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
31.	Christopher Cain	MUA	29/09/2014	Steven Crawshaw SC, instructed by Slater & Gordon Lawyers
32.	John Cain	AWU	09/09/2014	
33.	Ian Cambridge	AWU	10/06/2014	
34.	Christine Campbell	AWU	23/06/2014	
35.	Leah Charlson	CFMEU	24/10/2014	Initial representatives: John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers New representatives (from 7/11/2014): Miles Condon SC, instructed by Hall Payne Lawyers
36.	Stephen Chenoweth	AWU	15/09/2014	
37.	Leigh Chiavaroli	CFMEU	08/07/2014 17/09/2014	
38.	Peter Chiavaroli	CFMEU	08/07/2014	
39.	Gregg Churchman	CFMEU	04/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
40.	Peter Close	CFMEU	04/09/2014 23/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
41.	Michael Cohen	CFMEU	01/09/2014	Raymond Perkes, Solicitor, of Gillis Delaney Lawyers
42.	Katherine Cole	NUW	11/09/2014	
43.	Scott James Peter Connolly	TWU	21/08/2014	J L Glissan ESM QC & Mark Gibian of Counsel, instructed by Maurice Blackburn Lawyers
44.	Brian Cook	HSU	27/08/2014	John Tracey of Counsel
45.	John McClintock Crittall	CFMEU	05/08/2014	
46.	Mark Ronald Crofts	AWU	23/06/2014	
47.	Ronald Cummins	CFMEU	22/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
48.	Paul Dalton	CFMEU	09/07/2014	
49.	Paul Darrouzet	AWU	09/09/2014	Andrew Mewing, Solicitor, of McInnesWilson Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
50.	Kaye Darveniza	AWU	10/09/2014	
51.	Jo-Ann Davidson	TWU	20/08/2014	Nick Read of Counsel, instructed by Ryan Carlisle Thomas Lawyers
52.	Joris De Meulenaere	MUA	29/09/2014	Ian Neil SC & Stephen Gardiner of Counsel, instructed by Herbert Smith Freehills
53.	George William Thomas Dean	AWU	24/06/2014	
54.	Fabio Di Giorgi	MUA	29/09/2014	Mark Cox, Solicitor, of MDC Legal
55.	Iaan Graeme Forbes Dick	HSU	19/06/2014 27/08/2014	
56.	Reuben Dixon	HSU	27/08/2014	
57.	Charles Donnelly	NUW	11/09/2014	Richard Attiwill QC, Aphrodite Kouloubaritsis of Counsel instructed by Holding Redlich
58.	Stephen Paul Donnelly	HSU	19/06/2014	
59.	Mark Donohue	HSU	19/09/2014	
60.	Brent Dowton	CFMEU	03/09/2014	
61.	David Eden	HSU	19/09/2014	

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
62.	Ralph Edwards	CFMEU	16/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
63.	Robert Elliott	AWU	10/09/2014	
64.	Andrew Ermer	ETU	05/09/2014	
65.	Andrew Ferguson	CFMEU	23/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
66.	Brian Fitzpatrick	CFMEU	15/07/2014 24/09/2014	Adam Morison of Counsel, instructed by Phillip Ryan Solicitors
67.	Leonie Flynn	HSU	25/08/2014 19/09/2014	Cathy Dowsett of Counsel
68.	Seamus Flynn	CFMEU	02/09/2014	John Fernon SC, instructed by Gadens Lawyers
69.	Nicholas Fodor	CFMEU	24/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
70.	Stephen Fontana	CFMEU	18/09/2014	

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
71.	Wayne Forno	TWU	03/07/2014 04/07/2014	J L Glissan ESM QC of Counsel, instructed by Maurice Blackburn Lawyers
72.	Kerry Georgiev	HSU	16/09/2014	
73.	Barry Gibson	HSU	26/08/2014	
74.	Colin David Gibson	AWU	23/06/2014	
75.	Julia Gillard	AWU	10/09/2014	Neil Clelland QC & Anthony Lewis of Counsel, instructed by Galbally & O'Bryan Lawyers
76.	Troy Gray	ETU	05/09/2014	Herman Borenstein QC, instructed by ETU Victoria Branch
77.	Philip Green	ETU	05/09/2014	Damian Sheales of Counsel, instructed by Lander & Rogers Lawyers
78.	Darren Greenfield	CFMEU	03/10/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
79.	Jayne Govan	HSU	25/08/2014 16/09/2014	Maurice Addison, Solicitor, of Maddison & Associates

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
80.	Barbara (Denise) Gregor	HSU	25/08/2014 19/09/2014	Mark McKenney of Counsel, instructed by Faram Ritchie Davies Lawyers
81.	Anthony James Hackett	CFMEU	05/08/2014	
82.	Mark Musgrave Hardacre	HSU	16/06/2014	
83.	John Halloran	TWU Vic/Tas Branch	19/08/2014	J L Glissan ESM QC of Counsel, instructed by Maurice Blackburn Lawyers
84.	John Hanna	CFMEU	03/09/2014	
85.	Patricia Harper	CFMEU	07/07/2014	
86.	Katrina-Anne Patricia Hart	HSU	16/06/2014	
87.	Médy Hassan	CFMEU	05/08/2014	
88.	Gerard Hayes	HSU	26/08/2014	
89.	Peter Head	CFMEU	09/07/2014	
90.	Wayne John Hem	AWU	11/06/2014	
91.	Maurice Hill	CFMEU	17/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
92.	David Holmes	CFMEU	02/10/2014	Peter Skinner of Counsel, instructed by Greg Meakin Solicitor
93.	Jane Holt	HSU	17/06/2014 27/08/2014	
94.	Michael Huddy	CFMEU	22/09/2014	
95.	Robert (Bob) Hull	HSU	27/08/2014	Peggy Dwyer of Counsel, instructed by M T Partners Lawyers
96.	Daryll Hull	TWU	04/07/2014	William McNally, Solicitor, of McNally Jones Lawyers
97.	Romana Hutchinson	TWU	04/07/2014	William McNally, Solicitor, of McNally Jones Lawyers
98.	Jeff Jackson	HSU	27/08/2014	
99.	Kathy Jackson	HSU	18/06/2014 19/06/2014 30/07/2014 28/08/2014 29/08/2014	David Pritchard SC, instructed by Beazley Singleton Lawyers
100.	Athol James	AWU	11/06/2014	
101.	Nicholas Jukes	AWU	09/09/2014 10/06/2014	Andrew Mewing, Solicitor, of McInnes Wilson Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
102.	Michael Kaine	TWU	03/07/2014	J L Glissan ESM QC of Counsel, instructed by Maurice Blackburn Lawyers
103.	Mike Kane	CFMEU	09/07/2014	
104.	Nick Katsis	HSU	19/09/2014	
105.	Jimmy Kendrovski	CFMEU	01/09/2014	
106.	Patrick Kenniff	CFMEU	24/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
107.	Robert Kernohan	AWU	11/06/2014	
108.	Christopher Ketter	SDA	18/08/2014	Jim Murdoch QC, instructed by A J Macken & Co Lawyers
109.	Baden Kirgan	TWU/	21/08/2014	Anthony Howell of Counsel, instructed by Turner Freeman Lawyers
110.	Kimberley Kitching	HSU	26/08/2014 19/09/2014	Remy Van de Wiel QC & Mark Champion of Counsel, instructed by Slater & Gordon Lawyers
111.	Richard Lane	CFMEU	09/07/2014	

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
112.	Pik Ki (Peggy) Lee	HSU	25/08/2014 16/09/2014	Nina Moncrief of Counsel, instructed by Holdstock Law
113.	Frank Leo	AWU	15/09/2014	Dean Guidolin of Counsel, instructed by Matthew White & Associates Lawyers
114.	Alexander Leszczynski	HSU	19/09/2014	Josh Bornstein, Solicitor, of Maurice Blackburn Lawyers
115.	John Little	CFMEU	17/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
116.	Stephen Little	AWU	15/09/2014	
117.	Ben Loakes	CFMEU	22/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
118.	Tony Alexander Lovett	AWU	23/06/2014	
119.	Wayne Mader	TWU Vic/Tas	19/08/2014	J L Glissan ESM QC & Mark Gibian of Counsel, instructed by Maurice Blackburn Lawyers
120.	Andrew Maher	NUW	11/09/2014	

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
121.	Rita Mallia	CFMEU	25/09/2014 02/10/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
122.	Linda Maney	CFMEU	09/07/2014	
123.	Albert Mastramico	CFMEU	08/07/2014	
124.	Paul McCormack	CFMEU	03/09/2014	
125.	Robert McCubbin	HSU	25/08/2014 19/09/2014	Maurice Addison, Solicitor, of Maddison & Associates Lawyers
126.	Donald McDonald	CFMEU	24/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
127.	Craig McGregor	HSU	17/06/2014	Craig Dowling of Counsel, instructed by Maurice Blackburn Lawyers
128.	Julie McKee	CFMEU	03/09/2014	
129.	Gregory McLaren	CFMEU	22/09/2014	
130.	Leanne McLean	CFMEU	03/09/2014	
131.	Robyn McLeod	AWU	09/09/2014	Melinda Richards SC, instructed by Holding Redlich Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
132.	William McMillin	TWU	02/07/2014	Christian Juebner of Counsel instructed by Hall & Wilcox Lawyers
133.	Keryn McWhinney	CFMEU	02/10/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
134.	Marinus Meijers	MUA	29/09/2014	Andrew Kostopoulos of Counsel, instructed by David Glinatsis of Kreisson Legal
135.	Cesar Melhem	AWU	15/09/2014	Neil Clelland QC, instructed by Doogue O'Brien George Lawyers
136.	Dean Mighell	ETU	05/09/2014	Nick Harrington of Counsel, instructed by Mills Oakley Lawyers
137.	Michael Mijatov	TWU/McLean Forum	20/08/2014	Jim Nolan of Counsel
138.	Steven Miller	HSU	19/09/2014	
139.	Godfrey Moase	NUW	11/09/2014	Richard Attiwill QC, Aphrodite Kouloubaritsis of Counsel instructed by Holding Redlich

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
140.	Nitin Daniel Mookhey	TWU/McLean Forum	20/08/2014	J L Glissan ESM QC & Mark Gibian of Counsel, instructed by Maurice Blackburn Lawyers
141.	Robert Morrey	HSU	25/08/2014 16/09/2014	
142.	Bernard Murphy	AWU	09/09/14	Noel Hutley SC & Thomas Prince of Counsel, instructed by Colin Biggers Paisley Lawyers
143.	Peter Mylan	HSU	27/08/2014 24/09/2014 25/09/2014 31/10/2014	Christopher Birch SC (from 7 Nov) & Patricia Lowson of Counsel, instructed by Konstan Lawyers
144.	Nicolas Navarrete	CFMEU	03/09/2014	
145.	Michael Nealer	TWU SUPER	02/07/2014	Sam Hay of Counsel, instructed by Maurice Blackburn Lawyers
146.	Karen Nettleton	CFMEU	01/09/2014	
147.	Mark O'Brien	CFMEU	04/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
148.	Patrick O'Brien	HSU	25/08/2014 19/09/2014	Mark McKenney of Counsel, instructed by Faram Ritchie Davies Lawyers
149.	Jared O'Connor	CFMEU	02/09/2014	John Fernon SC, instructed by Gadens Lawyers
150.	Eoin O'Neill	CFMEU	15/07/2014 22/09/2014	Valerie Heath of Counsel, instructed by Etheringtons Solicitors
151.	William Oliver	CFMEU	16/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
152.	Thomas Pacey	TWU	20/08/2014	Maria Gerace of Counsel, instructed by Ersel Akpinar, Solicitor, of Slater & Gordon Lawyers
153.	Olivia Palmer	AWU	10/06/2014	
154.	Brian Parker	CFMEU	03/10/2014 24/10/2014 28/10/2014	Initial representatives: John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
155.	Brian Parker Geoff Parker	CFMEU CFMEU	03/10/2014 24/10/2014 28/10/2014 16/09/2014	New representatives (from 6 Nov 14): Tim Game SC & Bernard Lim of Counsel, instructed by McLachlan Thorpe Partners Lawyers
156.	Brian Parker Geoff Parker Adam Pascoe	CFMEU CFMEU CFMEU	03/10/2014 24/10/2014 28/10/2014 16/09/2014 02/09/2014	
157. 158.	Brian Parker Geoff Parker Adam Pascoe Rosa Perry	CFMEU CFMEU CFMEU SDA	03/10/2014 24/10/2014 28/10/2014 16/09/2014 02/09/2014 18/08/2014	John Fernon SC, instructed by Gadens Lawyers
159.	Richard Phillips	CFMEU	09/07/2014	
160.	Sandra Porter	HSU	16/09/2014	Maurice Addison, Solicitor, of Maddison & Associates Lawyers
161.	William Potter	TWU	03/07/2014	
162.	Charles Power	NUW	11/09/2014	Richard Attiwill QC, Aphrodite Kouloubaritsis of Counsel instructed by Holding Redlich
163.	Brian Douglas Pulham	AWU	23/06/2014	

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
164.	Radhika Raju	CFMEU	15/07/2014	Steven Crawshaw SC, instructed by Taylor & Scott Lawyers
165.	Michael Ravbar	CFMEU	06/08/2014 07/08/2014 23/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
166.	Bernard Riordan	TWU Vic/Tas Branch	21/08/2014	Robert Whyburn, Solicitor, of New Law
167.	Thomas Roberts	CFMEU	23/09/2014 24/10/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
168.	Michael Robinson	CFMEU	04/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
169.	Darryn Rowe	HSU	19/09/2014	
170.	Colin Geoffrey Saunders	AWU	23/06/2014	
171.	Steven Schalit	AWU	23/06/2014	
172.	Earl Setches	AWU	15/09/2014	Rachel Doyle SC & Malcolm Harding of Counsel, instructed by Maurice Blackburn Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
173.	Anthony Sheldon	TWU	21/08/2014	James Glissan ESM QC & Mark Gibian of Counsel, instructed by Maurice Blackburn Lawyers
174.	John Taylor Shenfield	CFMEU	04/08/2014	
175.	Albert Smith	CFMEU	04/08/2014	
176.	Robert Smith	AWU	09/09/2014	Dean Guidolin of Counsel, instructed by White & Associates Lawyers
177.	Damian Sloan	TWU	02/07/2014 03/07/2014	Brian Belling, Solicitor, of K&L Gates Lawyers
178.	Douglas Spinks	CFMEU	04/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
179.	Konstantinos Spyridis	AWU	11/06/2014	
180.	Christopher Robert Stanley	CFMEU	05/08/2014	
181.	Jason Peter Douglas Stein	CFMEU	05/08/2014	Craig Dowling of Counsel

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
182.	Anton Sucic	CFMEU	18/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
183.	Andrew Sutherland	CFMEU	04/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
184.	Alan Swetman	SDA	18/08/2014	
185.	Robert Swift	CFMEU	03/09/2014	
186.	Veronica Tadros	CFMEU	02/09/2014	John Fernon SC, instructed by Gadens Lawyers
187.	Peter Thomas	CFMEU	15/07/2014	Steven Crawshaw SC, instructed by Taylor & Scott Lawyers
188.	Saso Trajcevski-Uzunov	HSU	19/09/2014	
189.	Joseph Trio	AWU	09/09/2014	
190.	Andrew Wayne Toms	CFMEU	06/08/2014	
191.	Scott Vink	CFMEU	04/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
192.	William Wallace	CFMEU	22/09/2014	Ralph Warren of Counsel, instructed by Stevens & Associates Lawyers
193.	Anthony Walls	CFMEU	07/07/2014	
194.	Iain Weinzierl	CFMEU	09/07/2014	
195.	Heather Wellington	HSU	28/08/2014	Adrian Maroya of DLA Piper Lawyers
196.	Douglas Westerway	CFMEU	01/09/2014 25/09/2014	
197.	Katharine Wilkinson	HSU	17/06/2014 27/08/2014	
198.	Bruce Morton Wilson	AWU	12/06/2014	Kristine Hanscombe QC, instructed by Lewenberg & Lewenberg Lawyers
199.	Kylie Wray	CFMEU	02/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
200.	Michael Thye Seng Wong	TWU	20/08/2014	
201.	Arthur Wood	TWU	19/08/2014	
202.	Andrew Zaf	CFMEU	08/07/2014 17/09/2014	Scott Johns of Counsel, instructed by Tony Hargreaves Partners Lawyers on 17/09/2014

No.	Witness	Union	Public Appearance dates	Legal representatives (if any)
203.	Lisa Zanatta	CFMEU	07/07/2014 03/10/2014	Initial counsel: Chris Caleo QC & Georgie Coleman of Counsel, instructed by Holding Redlich Lawyers New counsel: Philip Crutchfield QC & Georgie Coleman of Counsel, instructed by Holding Redlich Lawyers

**ALPHABETICAL LIST OF WITNESSES FOR WHOM
STATEMENTS OR AFFIDAVITS WERE TENDERED WITH NO
ORAL EVIDENCE OR CROSS EXAMINATION**

No.	Witness	Union	Statement tendered	Legal representatives (if any)
1.	Justine Barrack	CFMEU	03/10/2014	
2.	Sam Beachey	AWU	21/11/2014	
3.	Joseph Boddington	CFMEU	02/09/2014	
4.	Roslyn Dawn Brady	NUW	11/09/2014	Andrew Maher, Solicitor HR Legal
5.	Ryden Braggins	CFMEU	8/07/2014	
6.	Desmond Caple	CFMEU	8/07/2014	

No.	Witness	Union	Statement tendered	Legal representatives (if any)
7.	Ben Cifali	CFMEU	18/09/2014	
8.	Danilo Codazzi	MUA	29/09/2014	Ashursts
9.	Timothy Constable	CFMEU	18/09/2014	John Agius SC, Anthony Slevin & David Sulan of Counsel, instructed by Slater & Gordon Lawyers
10.	Padraig (Paddy) Crumlin	MUA	29/09/2014	Steven Crawshaw SC, instructed by Slater & Gordon Lawyers
11.	Darren Dudley	CFMEU	19/09/2014	
12.	Shane Dyson	TWU Vic/Tas Branch	19/08/2014	
13.	Laurie D'Apice	TWU	04/07/2014	
14.	Simon Earle	MUA	29/09/2014	William McNally, Solicitor, of McNally Jones Lawyers
15.	Christopher Enright	SDA	18/08/2014	
16.	Jennifer Glass	CFMEU	23/09/2014	Steven Crawshaw SC, instructed by Taylor & Scott Lawyers
17.	Carol Glen	HSU	29/08/2014	
18.	David Hillis	HSU	27/08/2014	
19.	Glen Ivory (d.)	AWU	12/06/2014	
20.	Marlene	HSU	27/08/2014	

No.	Witness	Union	Statement tendered	Legal representatives (if any)
	Kairouz			
21.	Rosemary Kelly	HSU	29/08/2014	Simone Bingham of Counsel, instructed by Davies Lawyers
22.	David Lansbury	MUA	29/09/2014	
23.	Santi Mangano	CFMEU	18/09/2014	
24.	Sammy Marfatia	TWU/McLean Forum	31/10/2014	
25.	Peter McClelland	CFMEU	23/09/2014	Steven Crawshaw SC, instructed by Taylor & Scott Lawyers
26.	James McFadyen	TWU Vic/Tas Branch	31/10/2014	
27.	Mark Milano	CFMEU	18/09/2014	
28.	Jaromir Misztak	CFMEU	18/09/2014	
29.	Michael Newitt	CFMEU	18/09/2014	
30.	Geoffrey Prime	TWU	31/10/2014	
31.	Steven Richardson	CFMEU	18/09/2014	
32.	Hon. William Shorten	AWU	10/12/2014	
33.	Paul Sinclair	TWU Vic/Tas Branch	31/10/2014	
34.	Anthony Simpson	CFMEU	18/09/2014	

No.	Witness	Union	Statement tendered	Legal representatives (if any)
35.	Fabrizio Ubaldi	CFMEU	18/09/2014	
36.	Christopher Worthy	TWU	20/08/2014	
37.	Brett Young	CFMEU	18/09/2014	
38.	Jason Zoller	CFMEU	03/09/2014	

APPENDIX 13 - STAKEHOLDER ENGAGEMENT

During the short life of the Royal Commission, its officers have met with a wide range of parties interested in or connected with the work of the Royal Commission. This includes:

- Law enforcement and regulatory agencies at the Commonwealth and State and Territory level including the Australian Federal Police, all State and Territory Police, the Australian Crime Commission, the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority, the Australian Taxation Office, the Australian Electoral Commission, the Australian Transaction Reports and Analysis Centre, the NSW Crime Commission, the Independent Commission Against Corruption (NSW), the Independent Broad-Based Anti-Corruption Commission (VIC), the Crime and Corruption Commission (QLD) and the Corruption and Crime Commission (WA).
- Employment and workplace relations departments, agencies and tribunals including relevant Commonwealth Departments, State and Territory Departments and tribunals responsible for workplace relations, the Fair Work Commission, Fair Work Building and Construction and the Queensland Building and Construction Commission.
- Representatives of the union movement including the Australian Council of Trade Unions, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), the Transport Workers' Union (TWU), the Health Services Union (HSU) and the Australian Workers Union (AWU).
- Industry and employer representatives including the Property Council of Australia, Master Builders Australia, Australian Constructors Association, Australian Industry Group and State and Territory Chambers of Commerce.

- Individual employers.
- Industrial relations experts, consultants and academics.
- Corporate governance and anti-corruption experts and academics.

APPENDIX 14 - EXTRACTS FROM THE ROYAL COMMISSIONS ACT 1902 (CTH)

1A Power to issue Royal Commission

Without in any way prejudicing, limiting, or derogating from the power of the King, or of the Governor General, to make or authorise any inquiry, or to issue any commission to make any inquiry, it is hereby enacted and declared that the Governor General may, by Letters Patent in the name of the King, issue such commissions, directed to such person or persons, as he or she thinks fit, requiring or authorising him or her or them or any of them to make inquiry into and report upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.

1B Definitions

- (1) In this Act, unless the contrary intention appears:

authorised member hearing means a hearing of a Commission that is held as referred to in subsection 2(1A).

Commission and ***Royal Commission*** means any Commission of inquiry issued by the Governor General by Letters Patent under this Act or any other power, and includes the following persons sitting for the purposes of the inquiry:

- (a) in relation to an authorised member hearing—the member or members of the Commission holding the hearing;
- (b) in relation to a Commission that is constituted by 2 or more members (except if paragraph (a) applies)—the members of the Commission, or a quorum of those members;
- (c) in relation to a sole Commissioner—the Commissioner.

document includes any book, register or other record of information, however compiled, recorded or stored.

Finance Minister means the Minister administering the *Public Governance, Performance and Accountability Act 2013*.

Foreign Affairs Minister means the Minister administering the *Diplomatic Privileges and Immunities Act 1967*.

legal practitioner means a barrister, a solicitor, a barrister and solicitor, or a legal practitioner, of the High Court or of the Supreme Court of a State or Territory.

member, in relation to a Commission, means:

- (a) in the case of a Commission constituted by one person—that person; or
- (b) in the case of a Commission constituted by 2 or more persons—each of those persons.

reasonable excuse means:

- (a) in relation to any act or omission by a witness before a Commission—an excuse which would excuse an act or omission of a similar nature by a witness before a court of law; or
- (b) in relation to any act or omission by a person summoned as a witness before a Commission—an excuse which would excuse an act or omission of a similar nature by a person summoned as a witness before a court of law; or
- (c) in relation to any act or omission by a person served with a notice under subsection 2(3A) or 6AA(3)—an excuse which would excuse an act or omission of a similar nature by a person served with a subpoena in connection with a proceeding before a court of law.

relevant Commission means a Commission established by Letters Patent that declare that the Commission is a relevant Commission for the purposes of the provision in which the expression appears.

- (2) In this Act, unless the contrary intention appears:
- (a) a reference to a requirement to produce a document includes a reference to a requirement to produce a part of the document; and
 - (b) a reference to refusal or failure to produce a document includes:
 - (i) if production of the whole of the document is required—a reference to refusal or failure to produce a part of the document; and
 - (ii) if production of a part of the document is required—a reference to refusal or failure to produce a part of that part of the document.
- (3) A reference in any other Act to a Royal Commission (being a Royal Commission established by the Governor General by Letters Patent under this Act or any other power) includes a reference to one or more members of a Commission holding an authorised member hearing.

6DD Statements made by witness not admissible in evidence against the witness

- (1) The following are not admissible in evidence against a natural person in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory:
- (a) a statement or disclosure made by the person in the course of giving evidence before a Commission;
 - (b) the production of a document or other thing by the person pursuant to a summons, requirement or notice under section 2 or subsection 6AA(3).
- (2) Subsection (1) does not apply to the admissibility of evidence in proceedings for an offence against this Act.

6H False or misleading evidence

- (1) A person shall not, at a hearing before a Commission, intentionally give evidence that the person knows to be false or misleading with respect to any matter, being a matter that is material to the inquiry being made by the Commission.
- (2) An offence against subsection (1) is an indictable offence and, subject to this section, is punishable on conviction by imprisonment for a period not exceeding 5 years or by a fine not exceeding \$20,000.
- (3) Notwithstanding that an offence against subsection (1) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.
- (4) Where, in accordance with subsection (3), a court of summary jurisdiction convicts a person of an offence against subsection (1), the penalty that the court may impose is a fine not exceeding \$2,000 or imprisonment for a period not exceeding 12 months.
- (5) The reference in subsection (1) to the inquiry being made by the Commission is, for a Commission that holds an authorised member hearing, a reference to the inquiry being made by the Commission as a whole.

Note: However, the reference in subsection (1) to a hearing before a Commission may be an authorised member hearing.

APPENDIX 15 - EXTRACTS FROM THE CORPORATIONS ACT 2001 (CTH)

180 Care and diligence—civil obligation only

Care and diligence—directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (a) were a director or officer of a corporation in the corporation's circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

- (2) A director or other officer of a corporation who makes a business judgment 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 they:
 - (a) make the judgment in good faith for a proper purpose; and
 - (b) do not have a material personal interest in the subject matter of the judgment; and
 - (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

- (d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.

- (3) In this section:

business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

181 Good faith—civil obligations

Good faith—directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
 - (a) in good faith in the best interests of the corporation; and
 - (b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: This subsection is a civil penalty provision (see section 1317E).

182 Use of position—civil obligations

Use of position—directors, other officers and employees

- (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:
 - (a) gain an advantage for themselves or someone else; or
 - (b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines involved.

Note 2: This subsection is a civil penalty provision (see section 1317E).

183 Use of information—civil obligations

Use of information—directors, other officers and employees

- (1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:
 - (a) gain an advantage for themselves or someone else; or
 - (b) cause detriment to the corporation.

Note 1: This duty continues after the person stops being an officer or employee of the corporation.

Note 2: This subsection is a civil penalty provision (see section 1317E).

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines involved.

Note 2: This subsection is a civil penalty provision (see section 1317E).

184 Good faith, use of position and use of information—criminal offences

Good faith—directors and other officers

- (1) A director or other officer of a corporation commits an offence if they:
- (a) are reckless; or
 - (b) are intentionally dishonest;
- and fail to exercise their powers and discharge their duties:
- (c) in good faith in the best interests of the corporation; or
 - (d) for a proper purpose.

Note: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

Use of position—directors, other officers and employees

- (2) A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:
- (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
 - (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

Use of information—directors, other officers and employees

- (3) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly:

- (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
- (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

APPENDIX 16 - EXTRACTS FROM THE FAIR WORK ACT 2009 (CTH)

340 Protection

- (1) A person must not take adverse action against another person:
- (a) because the other person:
 - (i) has a workplace right; or
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
 - (b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4 1).

- (2) A person must not take adverse action against another person (the *second person*) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4 1).

343 Coercion

- (1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:
- (a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or

- (b) exercise, or propose to exercise, a workplace right in a particular way.

Note: This subsection is a civil remedy provision (see Part 4 1).

- (2) Subsection (1) does not apply to protected industrial action.

355 Coercion—allocation of duties etc. to particular person

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

- (a) employ, or not employ, a particular person; or
- (b) engage, or not engage, a particular independent contractor; or
- (c) allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor; or
- (d) designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

Note: This section is a civil remedy provision (see Part 4 1).

APPENDIX 17 - EXTRACTS FROM THE FAIR WORK (REGISTERED ORGANISATIONS) ACT 2009 (CTH)

190 Organisation or branch must not assist one candidate over another

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

Maximum penalty: 100 penalty units.

283 Part only applies in relation to financial management

This Part only applies in relation to officers and employees of an organisation or a branch of an organisation to the extent that it relates to the exercise of powers or duties of those officers and employees related to the financial management of the organisation or branch.

284 Meaning of *involved*

For the purposes of this Part, a person is *involved* in a contravention if, and only if, the person has:

- (a) aided, abetted, counselled or procured the contravention;
or
- (b) induced, whether by threats or promises or otherwise, the contravention; or
- (c) been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- (d) conspired with others to effect the contravention.

Division 2—General duties in relation to the financial management of organisations

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.

Note: This subsection is a civil penalty provision (see section 305).

- (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
 - (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.

Note: This subsection only operates in relation to duties under this section and their equivalents at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.

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.

Note: This subsection is a civil penalty provision (see section 305).

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note: This subsection is a civil penalty provision (see section 305).

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.

Note: This subsection is a civil penalty provision (see section 305).

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note: This subsection is a civil penalty provision (see section 305).

288 Use of information—civil obligations

- (1) A person who obtains information because he or she is, or has been, an officer or employee of an organisation or a branch must not improperly use the information to:
- (a) gain an advantage for himself or herself or someone else;
or
 - (b) cause detriment to the organisation or to another person.

Note 1: This duty continues after the person stops being an officer or employee of the organisation or branch.

Note 2: This subsection is a civil penalty provision (see section 305).

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note: This subsection is a civil penalty provision (see section 305).