

# **The Peter Mac Settlement: A personal submission to the Trade Union Royal Commission**

*By Dr John Lourens, FCPA*

In Chapter 12.3 of the Counsel Assisting Submission of 31 October 2014, Counsel Assisting recommends that testimony given by Kathy Jackson in relation to the \$250,000 payment made by the Peter MacCallum Cancer Institute (PMCI) to the Health Services Union of Australia Number 3 Branch (HSUA#3) in November 2003 be rejected. At the time the payment was made, Kathy Jackson was the Branch Secretary of HSUA#3.

The reason Counsel Assisting gives for his recommendation is that Ms Jackson's testimony is inconsistent with the available documentary evidence, the testimony of PMCI's then Chief Executive Officer, Dr David Hillis, the testimony of PMCI's then Chair of the Board of Directors, Dr Heather Wellington and the testimony of Mr Brian Cook, Managing Director of Service Industry Advisory Group Pty Ltd (SIAG). At Paragraph 27 of Chapter 12.3, Counsel Assisting states:

*The upshot of Ms Jackson's evidence was that those representing Peter Mac in fact knew that the amount claimed was not a genuine reimbursement of costs that the union had incurred, and reasonably expected to incur. That evidence ought not to be accepted. It is inconsistent with the available documentary evidence (summarised above), Dr Hillis' evidence, Dr Wellington's evidence, and Mr Cook's evidence.*

This submission accepts that Counsel Assisting made his recommendation based on the "available evidence" before the Royal Commission, but it questions the adequacy of that evidence. The submission proposes that important evidence was possibly overlooked, and respectfully suggests the evidence of Dr David Hillis, Dr Heather Wellington and Mr Brian Cook should not be accepted without further critical examination. Conversely, this submission contends that notwithstanding significant deficiencies in other parts of her evidence, the evidence of Kathy Jackson regarding the circumstances surrounding the \$250,000 PMCI payment to HSUA#3 should not be rejected out of hand without further inquiry.

In essence, this submission proposes there are credible grounds for believing underpaid Hospital research workers were deliberately and knowingly betrayed by their Union leader, Kathy Jackson. It also proposes that underpaid Hospital research workers were deliberately and knowingly deceived by their employer. It is submitted here that Kathy Jackson, the Hospital Board of Directors and Hospital

senior management (including SIAG) failed manifestly in their duty of care to the underpaid Hospital research workers, and that they did so knowingly and in concert. In short, this submission argues that underpaid Hospital research workers were denied justice when PMCI paid a cash amount of \$250,000 to HSUA#3 in November 2003. The submission canvasses the possibility that the \$250,000 payment represented a conspiracy resulting in the payment of an illegal secret commission. The receipt or solicitation of secret commission by an agent is an indictable offence under Section 176 of the Victorian Crimes Act 1958, and can attract a substantial (level 5) fine, imprisonment up to a maximum of 10 years or both.

### ***Background to the \$250,000 payment***

In July 2003, the Board of Directors of Melbourne's Peter MacCallum Cancer Institute (PMCI) agreed to pay \$250,000 cash to the Health Services Union of Australia Number 3 Branch (HSUA#3). The cash payment was part of a settlement relating to a \$4.06 million underpayment of wages involving approximately 160 Hospital research workers. HSUA#3 had industrial coverage of the underpaid staff, and was thus entitled to become directly involved in matters associated with industrial award breaches.

The underpayment of award wages spanned a period of approximately three years, and had been discovered by not by HSUA#3 led by Ms Kathy Jackson, but rather by the Health Services Union Number 4 Branch (HSUA#4) led by Dr Rosemary Kelly. Because Dr Kelly, as Secretary of HSUA#4, did not have industrial standing with PMCI, she voiced her concerns to Kathy Jackson, Secretary of HSUA#3. As a result of what Dr Kelly had told her, Kathy Jackson then drew the matter to the attention of PMCI in early March 2003. Thus began a sequence of events that would ultimately culminate, among other things, in PMCI making a cash payment of \$250,000 to HSUA#3 five months later, in November 2003.

The cash settlement formed the central core of a "no back pay, no redundancies" agreement negotiated between the Hospital and the Union. Many questions could, and should, be asked about the \$250,000 payment, colloquially referred to as the "Peter Mac money". Many questions could, and should, also be asked about the overall negotiated agreement. But perhaps no question is more serious than this one: were the underpaid Hospital research workers knowingly and criminally deceived as a result of implementing the negotiated agreement between HSUA#3 and the Hospital? Put differently, was the \$250,000 payment to HSUA#3 a secret commission?

### ***The negotiated agreement in outline***

The PMCI negotiated agreement, and the Peter Mac money, had their genesis in events occurring in early 2003. At the start of that year, a matter of great significance was fortuitously brought to the attention of Dr Rosemary Kelly, then Secretary of HSUA#4. One of Dr Kelly's members, a researcher, found himself about to become a member of HSUA#3, and queried an apparent anomaly in the remuneration of PMCI research staff. Dr Kelly investigated the matter, and discovered that since the year 2000, PMCI had underpaid its research staff by \$3.16 million. When salary on-costs of \$0.9 million were added to this amount, the overall underpayment totalled \$4.06 million. Dr Kelly informed Kathy Jackson of the situation. Ms Jackson then informed PMCI of the apparent award breaches by the Hospital.

Following months of discussion and negotiation, a settlement was eventually reached between HSUA#3 and PMCI. The essence of the agreement was that PMCI would not reimburse the \$4.06 million back pay owing to the underpaid research workers. But, and instead, PMCI would agree to a new and enhanced industrial award covering the Hospital's research workers. Plus, PMCI would agree to two further conditions:

- (a) There would be no research staff redundancies; and
- (b) PMCI would pay HSUA#3 a cash amount not exceeding \$250,000 to cover the Union's legal and other expenses.

### ***The rationale for not reimbursing back pay***

At a Board meeting on 11 March 2003, it had been accepted by the PMCI Board of Directors that being compelled to pay \$4.06 million in back pay would pose a "financial threat" to the Hospital's long term research capability. A later Board meeting held on 12 August 2003 quantified the financial threat. At that meeting, the directors of PMCI were advised that if the Hospital was to pay \$3.16 million in underpaid wages plus a further \$0.9 million for salary on-costs, this would necessitate redundancies of up to 38 equivalent fulltime staff. This, it was alleged, would have a serious impact on the viability of research at PMCI. The Board subsequently resolved that PMCI management continue to negotiate with HSUA#3 in order to "settle the matter".

### ***The rationale for paying \$250,000 cash to the Union***

The basis for PMCI making a single \$250,000 cash payment to HSUA#3 was outwardly convincing. It was alleged that under industrial relations legislation

existing at the time, HSUA#3 had the right to petition the Federal Court to impose fines or penalties on PMCI for breach of award conditions. If the petition was successful, then HSUA#3 would be the beneficiary of any fines or penalties imposed. Although the quantum of possible fines or penalties appears not to have been discussed by or between the parties involved, it seems that PMCI took it for granted that (a) fines and penalties would most likely be imposed on the Hospital by the Federal Court; (b) any fines and penalties imposed would be substantial; and (c) any fines and penalties imposed by the Federal Court would significantly increase the financial threat to the Hospital's long term research capability. PMCI clearly took the position that making a one-off \$250,000 cash payment to HSUA#3 was preferable to paying any fines and penalties imposed by the Federal Court. The cash payment was officially described and represented as a reimbursement of the legal and other costs the Union had incurred, and would incur in the future, as a result of dealing with, and settling, the dispute over PMCI's breaches of the old industrial award.

### ***Formalising the negotiated agreement***

The agreement negotiated between PMCI and HSUA#3 resulted in three outcomes:

- (1) A new and dedicated industrial award covering Hospital research staff;
- (2) A Deed of Release between the Hospital and its underpaid research workers;
- (3) A Deed of Release between the Hospital and HSUA#3.

As might be expected, the new award embodied substantially improved pay and conditions for Hospital research staff. In Board minutes dated 14 April 2003, the new enterprise agreement was reported as representing a 6.6 percent salary increase estimated to cost \$688,000 in a full year. The new award took the form of a Single Enterprise Certified Agreement.

The Deed of Release between the Hospital and its 160 underpaid research workers provided that there would be no reimbursement of back pay, but in return PMCI guaranteed there would be no research staff redundancies. For their part, the Hospital's underpaid research staff would release and discharge PMCI from all claims and liability arising from alleged breaches of the old award. The Deed was subject to a minimum acceptance of 95 percent of the eligible 160 research workers. It is not clear when the Deed was finalized, if indeed it was finalized at all. However, and at the earliest, the Deed could only have been sealed sometime after the 4 September 2003 research staff meeting referred to in PMCI Board minutes dated 9 September 2003. It was at that staff meeting that a presentation on the underpayment problem was made to Hospital research workers by then Board Chair, Dr Heather Wellington and then HSUA#3 Branch Secretary, Kathy Jackson.

The Deed of Release between the Hospital and Union provided that PMCI would make a payment to HSUA#3 within fourteen days of receiving an itemized statement of the Union's legal and other (including future) expenses. The proviso was that the amount paid would not exceed \$250,000. In return, the Union would refrain from commencing legal proceedings for breach of previous award conditions. The Deed was signed on 9 September 2003. HSUA#3 submitted its itemized statement of expenses totaling \$252,679 six weeks later on 22 October 2003. Three weeks after that, on 11 November 2003, PMCI paid HSUA#3 the sum of \$250,000. Interestingly and significantly, the document stipulated that the terms of the Deed would remain "confidential between the parties and their respective legal and other advisors". Also stipulated was the somewhat obscure provision that "HSUA shall make such disclosures to its members as are necessary to ensure the enforceability of the terms contained herein and for full compliance with any other legal obligations which arise from this Deed." Taken at face value, this provision indicates there was no definite obligation to inform the underpaid research workers about the Deed itself, and no explicit requirement for disclosure to research staff of the precise payment amount.

In light of the foregoing synopsis of events, at least eight significant issues arise – issues that were not canvassed either at all, or in sufficient depth, by the Royal Commission. The eight issues are presented below.

***Issue No.1: the financial threat to PMCI – real or imagined?***

One fundamental assumption lay at the very heart of the negotiated settlement between PMCI and HSUA#3, and formed the rationale for the \$250,000 payment by the Hospital to the Union. And that fundamental assumption was PMCI faced a serious financial threat at the prospect of reimbursing \$4.06 million in back pay to Hospital research workers and possibly paying Court imposed fines for breaches of an industrial award. The financial threat was, allegedly, so severe that it compromised the Hospital's long term research capability, and would bring about the forced redundancies of up to 38 equivalent fulltime staff. But the critical question that has to be asked is this: how real was the financial threat? Evaluating the seriousness of the threat requires an assessment be made of PMCI's financial health between the years 2000 and 2004.

PMCI used to be part of the Inner and Eastern Health Care Network. The Service Industry Advisory Group Pty Ltd (SIAG) was the outsourced human resources management consultancy group for Inner and Eastern Health Care Network. In July 2000, PMCI was reconstituted as a stand-alone health service with its own Board of Directors. Dr David Hillis was appointed Chief Executive Officer, Dr Heather Wellington was appointed Chair, and the consultancy arrangement with SIAG continued. The entire underpayment matter was identified, negotiated and settled

over an eight-month period spanning two financial years – the 2003 financial year (ended 30 June 2003) and the 2004 financial year (ended 30 June 2004). Figure 1 below presents a summary of selected data extracted from the audited financial reports of PMCI during its first four years of operation as a stand-alone health service. Specified columns are for the financial year ended 30 June.

**Figure 1 – PMCI selected financial data for years 2000 to 2004**

<b>Financial Report</b>	<b>2001</b> (\$ millions)	<b>2002</b> (\$ millions)	<b>2003</b> (\$ millions)	<b>2004</b> (\$ millions)
<b>INCOME STATEMENT</b>				
<b>Revenue</b>	104.6	125.9	132.9	143.6
<b>Expenses</b>	105.7	123.4	140.5	152.5
<b>Surplus / (Deficit)</b>	(1.1)	2.5	(7.6)	(8.9)
<b>BALANCE SHEET</b>				
<b>Total assets</b>	172.5	176.7	190.6	179.3
<b>Total liabilities</b>	23.5	25.2	33.0	30.7
<b>Net assets</b>	149.0	151.5	157.6	148.6
<b>CASH FLOW STATEMENT</b>				
<b>Operating Inflows</b>	109.5	132.2	141.5	150.0
<b>Operating Outflows</b>	(101.0)	(122.4)	(135.6)	(151.7)
<b>Net Inflow / (Outflow)</b>	8.5	9.8	5.9	(1.7)

The data show PMCI was in sound financial health during its early and formative years. The Hospital reported an operating deficit for three of its first four years (2001, 2003 and 2004), but this should not be considered an indicator of poor financial health. It is commonplace for newly formed business entities to experience deficits as they attempt to establish themselves during their formative years. Besides, and in relative terms, the financial performance deficits were small compared to the overall revenue and expenses involved.

Furthermore, and throughout the four-year period, PMCI reported a constant and uniformly high level of total assets (that is, resources controlled) as well as a constant and uniformly low level of total liabilities (that is, amounts owed to outside parties). The Hospital's net assets (total assets minus total liabilities) indicated an organisation in a very sound financial position.

Even in terms of its operating cash flows, large amounts of cash were flowing into, and out of, the Hospital during each of the four years in question. Indeed, other

than the 2004 financial year, each year PMCI was able to report a healthy net cash inflow. And the net cash outflow reported in 2004 was very small compared to the large amounts of cash being handled. This indicates a very healthy cash position. And since cash flow is the lifeblood of any business, a healthy cash position is the strongest indicator of survival and viability into the future.

Perhaps the most significant conclusion to be drawn from the financial summary presented in Figure 1 is that the \$4.06 million underpayment to Research staff, although certainly a substantial amount, would not have been life-threatening to the Hospital. The amount was relatively small and would have been well within PMCI's financial capacity to pay. Even with possible Federal Court imposed penalties for Award breaches included (\$10,000 per breach according to Slater & Gordon advice received by HSUA#3 in May 2003 and tendered in evidence to the Royal Commission), PMCI should have been able to afford the monetary amount owing and still maintain its long term viability as a research institution.

And in relation to possible penalties for award breaches, it is not clear that PMCI was justified in assuming these would inevitably add significantly to the financial threat the Hospital allegedly faced. If 160 research workers had been underpaid, would the Federal Court regard this as 160 breaches, or would (as is more likely) the Court rule there was only a single breach involving 160 persons? Even under the worst case scenario, 160 breaches at \$10,000 per breach would result in a total penalty imposed of \$1.6 million. This, when added to the \$4.06 million back pay owed to research staff, results in a total financial outlay by the Hospital of \$5.66 million – an amount that would still have been well within PMCI's financial capacity to pay.

In short, and based on the available financial data, it is difficult to support the proposition that in 2003 PMCI faced a financial threat of such magnitude that it compromised the Hospital's long term viability as a research institution and necessitated forced staff redundancies in the event that back pay amounts were made good. This is an important observation to make because it goes to the very heart of what the parties intended, and how they conducted themselves, in relation to the agreement they negotiated and implemented in 2003. If the "financial threat" and the need for staff redundancies were simply floated for public relations purposes, and as a means of securing research staff agreement for a "no back pay" resolution, interesting questions arise. What was the real motivation behind the agreement negotiated between PMCI and HSUA#3? What was the real motivation for the \$250,000 payment to the Union?

This submission proposes each of the main parties involved in the negotiated settlement might have had something to gain from, and therefore an incentive to promote, the arrangements that were ultimately put in place.

## **Issue No.2: the likely preference of PMCI**

The preference of PMCI concerning how best to deal with the \$4.06 million underpayment problem would have been reflected in the preference of the Hospital's Board of Directors. And the Board was likely to have preferred a negotiated settlement with HSUA#3 rather than having to make good the underpayments to the Hospital's 160 research staff and pay any fines imposed by the Federal Court. The reason for such preference would have been to preserve the reputation of both the Hospital and the Board itself.

The Hospital would not have relished the inevitable negative publicity associated with admitting it had underpaid its research workers and the ignominy of being subsequently fined by the Federal Court. The Board, chaired by Dr Heather Wellington, would have had additional concerns about the Hospital's reputation, in particular, the reputations of the Board Chair, individual Board members and the Hospital CEO, Dr David Hillis.

Although it was still a young organisation in sound financial health, PMCI had reported an income statement surplus of \$2.5 million in 2002 after reporting a deficit of \$1.1 million in 2001. This turnaround would have been interpreted as evidence of good performance by both the Board and the CEO of the Hospital. However, when the underpayment of Research staff first came to light in March 2003 (a mere four months before the end of the 2003 financial year), both PMCI and the Board would have been acutely aware that the Hospital was well on track to report an operating deficit for that year. The 2003 deficit subsequently reported was \$7.6 million, and represented an undesirable performance turnaround of \$10.1 million compared to the 2002 financial year. Had the underpayment to Research staff been made, the undesirable performance turnaround would have been \$14.16 million. And fines imposed by the Federal Court would simply have made the turnaround worse.

Nonetheless, and as explained earlier, it was well within the Hospital's financial capacity to absorb paying its Research staff the \$4.06 million owed plus any fines imposed by the Federal Court. But in terms of professional reputation and public relations fallout, there seems little doubt that both PMCI and its Board of Directors would have had a considerable incentive to support the "no back pay, no redundancies" solution. Preservation of the professional standing and reputation of individual Board members, the Hospital's CEO and the Hospital itself would have been prominent in the thinking of PMCI. Faced with a choice between entering into a negotiated "no back pay, no redundancies" solution incorporating a new award for Research staff plus a \$250,000 cash payment to HSUA#3 on the one hand, and disbursing the back pay owed to its Research staff (plus possible Federal Court



imposed penalties) on the other hand, PMCI might very well have preferred the “no back pay, no redundancies” solution.

**Issue No.3: Did the Board Chair declare a potential conflict of interest?**

One serious question that should be addressed is whether the then Chair of PMCI, Dr Heather Wellington, declared a potential conflict of interest to her fellow Board members regarding her prominence in the Australian Labor Party and her likely association with Jeff Jackson, then Secretary of Victoria’s HSUA#1 Branch and also then husband of HSUA#3 Secretary, Kathy Jackson.

In January 2004, Dr Wellington was one of the Victorian delegates attending the 43<sup>rd</sup> ALP National Conference in her capacity as a Geelong ALP Councillor. Another Victorian delegate was Jeff Jackson, then Secretary of the HSU No.1 Branch, and also then husband of Kathy Jackson. Being a delegate to National Conference is a prestigious and sought after position, as the Conference is the supreme policy making body of the ALP. Persons chosen as delegates would have to be well known, and well regarded, particularly if they did not attend as a representative of an affiliated union. As Chair of the PMCI Board, it would certainly be of interest that Dr Wellington might have had political interactions and/or associations with the husband of a Union leader who was engaged in a major industrial dispute with the institution she represented.

Aside from Dr Wellington’s role as a Victorian delegate to the 43<sup>rd</sup> ALP National Conference in 2004, there is also the matter of her attempt to run as an ALP candidate in the Victorian State election of November 2002. Dr Wellington lost her pre-selection battle in 2001. Despite the loss, it is quite possible that Dr Wellington held continuing aspirations of being an ALP candidate at future elections.

It seems reasonable to suppose that having joined the Labor Party in the late 1990s as a member of the Right faction, Dr Wellington would have been mixing in the same circles as fellow Right faction members Kathy Jackson, then Branch Secretary of HSUA#3 and her then husband Jeff Jackson who was then Branch Secretary of HSUA#1. In light of the foregoing history, it seems sensible to ask whether Dr Wellington ever declared a potential conflict of interest to both her fellow Board members and PMCI.

**Issue No.4: What was the true nature of the \$250,000 payment?**

Although Counsel Assisting the Royal Commission has recommended Kathy Jackson’s evidence regarding the \$250,000 payment made by PMCI to HSUA#3 in November

2003 be rejected, it is worth revisiting Ms Jackson's testimony if for no other reason than to place her testimony in proper context.

During her first and initial appearance before the Royal Commission, Kathy Jackson testified (under oath) that the \$250,000 received from the Peter MacCallum Cancer Institute (PMCI) was a fine or penalty imposed on the hospital in light of the \$3.16 million underpaid wages (plus \$900,000 salary on costs) to PMCI research staff.

In her second appearance before the Royal Commission, Kathy Jackson agreed (under oath) that the \$250,000 payment was not a fine or penalty, but was instead the reimbursement of HSUA#3 Branch legal and other costs – both past and future – pertaining to negotiation of the Deed of Release document pursuant to which the \$250,000 amount had been paid.

And during her third appearance before the Royal Commission, Kathy Jackson admitted (under oath) that the cost reimbursements she had claimed from PMCI had been grossly and knowingly over-inflated. For instance, Jackson had claimed reimbursement of \$67,470 for work done by Slater & Gordon but agreed with Counsel Assisting that the actual amount charged by Slater & Gordon had been only \$1,122. She also agreed (under oath) that the expected future costs of \$89,460 claimed from the PMCI did not reflect a true claim for expected future costs. Kathy Jackson further agreed with Counsel Assisting that she had knowingly and falsely over-inflated claimed reimbursements "to bring the total of the amount claimed to an amount in excess of, if only a small amount in excess of, \$250,000". In short, it was Kathy Jackson's testimony that the \$250,000 was not a reimbursement for legal and other costs incurred by HSUA#3.

What Kathy Jackson's conflicting (and arguably false and misleading) evidence under oath before the Royal Commission points to is a huge question mark over the true nature of the \$250,000 Peter Mac money. If the money was not a fine or penalty imposed on PMCI, and if it was not reimbursement of HSUA#3 legal and other costs, then what was it? One possibility is the money represented payment of an illegal secret commission. This possibility competes with the view put forward by Counsel Assisting in his submission - that the payment represented money or property obtained dishonestly and by deception on the part of Kathy Jackson.

#### **Issue No.5: the outcome most likely preferred by SIAG**

As mentioned previously, in July 2000 PMCI was reconstituted as a stand-alone health service with its own Board of Directors. Previously, the Hospital had been part of the Inner and Eastern Health Care Network. The Network had outsourced its entire human resource function to an external provider, the human resources

management consultancy group Service Industry Advisory Group Pty Ltd (SIAG) managed by Mr Brian Cook.

When PMCI gained its autonomy, the consultancy arrangement continued for the new entity, and SIAG assumed responsibility for the Hospital's human resource needs. The consultancy arrangement between PMCI and SIAG was such that several SIAG employees were seconded to PMCI. One SIAG employee was Ms Christina Wilson who took on a very senior management role within PMCI. Indeed, the PMCI Annual Reports for 2002, 2003 and 2004 list Ms. Wilson as being the PMCI Human Resources Director. Nonetheless, it has to be remembered that Christina Wilson always was an employee of SIAG while discharging her PMCI duties. When the \$4.06 million underpayment to PMCI's Research staff was discovered in early 2003, it became abundantly clear that SIAG had failed in its professional duty to the Hospital and PMCI employees. Yet, and despite this apparent professional failure, SIAG assumed the role of "chief negotiator" in the settlement agreed to by PMCI and HSUA#3.

The essential point here is that from 2000 onwards, PMCI was entitled to rely, and act, on the advice of its Director of Human Resources in matters pertaining to staff remuneration. That the Director of Human Resources was an employee of the external consulting company, SIAG, does not invalidate this proposition. The fact is, SIAG failed in its professional duty from the very beginning to advise PMCI that Research staff were not being paid at the correct rates. If human resource professionals cannot be held responsible for such lapses, then who can be held responsible?

It was SIAG Managing Director Brian Cook's testimony to the Royal Commission that in or around early March 2003 he was engaged by PMCI to "establish the framework for, and then negotiate a certified enterprise agreement with HSUA#3 an agreement that became known as the 'Health Services Union of Australia – Health Professionals – Peter Mac Certified Agreement 2000-2004'." Mr. Cook deposed that his role was to help create the framework to move forward with the Certified Agreement that would deal with the compliance issue, namely the \$4.06 million underpayment of the 160 Hospital research workers. Part of the framework negotiated and facilitated by Mr. Cook was the "no back pay no redundancies" arrangement that included the \$250,000 payment by PMCI to HSUA#3.

To many people it would appear bizarre that the party who was primarily responsible for the \$4.06 million underpayment to research staff, SIAG, would then be asked to deal with the "compliance issue". As a matter of logic, there would exist a significant conflict of interest where a party who caused a problem is the very same party asked to negotiate a satisfactory solution.

In the case of the \$4.06 million underpayment to Hospital research workers, what safeguards were implemented to ensure that the chief negotiator (SIAG) negotiated an agreement that best served the interests of its clients (PMCI and Hospital research staff) rather than its own best interests? If SIAG acted incompetently in the discharge of its professional duties, it would (arguably) have good reason to make the problem "go away" so as to minimize, or even avoid, damage to both its own professional reputation and standing, and those of SIAG employees. It is interesting to note that the PMCI 2004 Annual Report contained a statement that the Hospital was "reverting back" to an in-house human resource function. Clearly, and following the events of the previous two years, PMCI wished to end its professional association with SIAG.

In short, there are strong reasons for believing that SIAG would have greatly preferred a "no back-pay, no redundancies" solution to the PMCI underpayment problem especially since SIAG would be the "chief negotiator" in arriving at a settlement. Being able to control the situation to such an extent would certainly minimize professional fallout and damage to SIAG and its employees.

***Issue No.6: the outcome most likely preferred by HSUA#3***

The basic choice facing HSUA#3 in early 2003 when the \$4.06 million underpayment to Hospital Research staff was first discovered can be usefully summarised as comprising two alternative courses of action.

First, and on behalf of HSUA#3 members, the Union could pursue legal action against PMCI for the underpaid wages and at the same time ask the Federal Court to impose financial breach of award penalties on the Hospital.

Or second, the Union could press for a negotiated settlement with the Hospital that provided some benefits for HSUA#3 members and a single "windfall" pecuniary benefit for the Union. Research staff would not receive their \$4.06 million in underpaid wages, but they would receive better award terms and conditions plus a guarantee of no redundancies. And the Union would receive a \$250,000 cash windfall payment.

From the Union's perspective, the foregoing situation could be further summarised as two stark choices: (1) choose the legal litigation route with all the time, effort and uncertainty of outcome this would entail; or (2) settle for a more modest, less costly but virtually guaranteed outcome. (Under then prevailing legislation, trade unions were entitled to retain Federal Court imposed penalties for breach of award offences.)

The problem for the Union was, and as is the case for all legal litigation, future outcomes can never be predicted with certainty. Even the Union's own legal advisor appeared sceptical about the chances of success in a written Memorandum of Advice dated 10 September 2003 and tendered in evidence to the Royal Commission. Faced with such a scenario, HSUA#3 might very well have preferred the "no back pay, no redundancies" solution. After all a bird in the hand (\$250,000 cash received from the Hospital) is worth more than two in the bush (unspecified Federal Court imposed penalties accruing to the Union).

Thus, there are reasons for believing HSUA#3 might well have preferred the "no back-pay, no redundancies" solution to the PMCI underpayment problem especially since the Union stood to gain a \$250,000 cash windfall.

**Issue No.7: what were the underpaid research workers told?**

What the 160 underpaid research workers were specifically told about the Deed of Release between PMCI and HSUA#3 is a matter of considerable import. Were the research workers told about the terms of the Deed? Were they ever told that the specific payment amount direct to their Union was to be \$250,000? What form did the disclosure take? If the 160 underpaid research workers were not told about these matters, they might well have rejected the entire settlement negotiated between PMCI and HSUA#3. After all, a \$4.06 million reimbursement shared between 160 underpaid research workers represented an individual payout of \$25,375 person – a substantial sum of money in 2003.

There is considerable doubt about the degree to which PMCI research staff was actually informed about the Deed of Release negotiated between the Hospital and HSUA#3. PMCI Board minutes from the period contain only one inconclusive statement about the matter. Board minutes dated 9 September 2003 referred to research staff meeting that allegedly took place five days earlier on 4 September 2003 – a meeting that was attended by PMCI CEO Dr David Hillis, Board Chair Dr Heather Wellington and HSUA#3 Secretary Kathy Jackson.

In evidence before the Royal Commission on 14 August 2014, Dr Hillis deposed that he could not recall whether drafts of the deed of release had been circulated at the meeting. He also deposed that the meeting was not transcribed, and that he could not recall whether a written or Powerpoint presentation had taken place. Dr Hillis did not recall that any specific dollar amount (for example, \$250,000) was mentioned at the meeting.

Dr Wellington's evidence tendered to the Royal Commission was similarly inconclusive. In her 26 August 2014 statement tendered to the Royal Commission, Dr Wellington said that she recalled attending a research staff meeting, but was unable to recall the content of discussion at the meeting. Appended to her statement was a copy of the speech Dr Wellington delivered at the meeting. However the speech copy contained no mention of the \$250,000, or indeed any, cash payment by PMCI to HSUA#3.

It was Kathy Jackson's evidence to the Royal Commission on 30 July 2014 that the Peter Mac money was discussed at the research staff meeting, but she was not sure whether the quantum of what was contemplated (\$250,000) was also discussed.

In short, there is no conclusive evidence that the Hospital's underpaid research workers were ever informed of the terms of the Deed of Release between PMCI and HSUA#3. And it seems unlikely that specific payment amount of \$250,000 was even mentioned to research staff. This conclusion is supported by the recent claims of three former directors of PMCI (*The Sunday Age*, August 31, 2014). The three directors claimed that they were either not aware of the payment to the Union, or they did not recall such a payment taking place. The non-disclosure of information is also supported by several research scientists who were present at the staff meeting, and who recently claimed that the intent or quantum of the payment were not disclosed to research staff (*The Age*, August 10, 2014).

To the extent the foregoing non-disclosure claims are accurate, it seems the Hospital's underpaid research workers were grievously misled. Specific details of the Deed of Release between PMCI and HSUA#3 were withheld from them, as was the quantum of the \$250,000 cash payment to the Union.

### **Issue No.8: what did the CEO tell the PMCI Board?**

A further question of interest is whether the Hospital CEO, Dr David Hillis, fully informed the Board of all relevant events pertaining to the Deed of Release negotiated by PMCI and HSUA#3. The issue here is whether Dr Hillis was somewhat selective in what he chose to disclose to the Board and the manner in which he disclosed information.

As cited earlier, three former PMCI directors were either unaware of, or could not recall, a \$250,000 cash payment made to the Union. One 2003 Board member, John Patterson, was reported as saying the Board was not aware of the proposal to pay money to the HSU and that any such payment "wasn't right". Another 2003 Board member, Noala Flynn, was reported as saying she had no recollection of a payment to the union. Still a third 2003 Board member, Sue Carter, was reported as

saying she recalled nothing about such a payment and was “completely in the dark” about a written warning from the Victoria Department of Health Services that the proposed payment would not be supported by the Department. Ms Carter’s recollection relates to written correspondence that had taken place between PMCI and the Victorian Department of Human Services (DHS).

On 15 May 2003, Dr Hillis had written to DHS informing the Department of the underpayment situation and the circumstances leading up to it. The letter contained details of a proposed new enterprise award for research staff, but made no mention of a proposed cash payment to HSUA#3. At the scheduled Board meeting held on 8 July 2003, Dr Hillis delivered a confidential briefing to the Board recommending acceptance of a Deed of Release “in full and final settlement with the HSUA#3 in relation to the underpayment of Research staff”. Dr Hillis also recommended that the Board approve the expenditure of up to \$250,000 to reflect “the true union costs associated in achieving approval of the Certified Agreement at the Australian Industrial Relations Commission”. Dr Hillis’s briefing paper stated:

*The outstanding issue is the Deed of Release (final version attached 5) and the payment to HSUA#3, in respect to their legal costs and time impost on senior officials. That this payment be made as a 'one-off' payment with no ongoing arrangements.*

On 23 July 2003, Dr Hillis wrote a second letter to DHS in which he notified the Department of the \$250,000 payment proposal. The letter, which referred to earlier “recent discussions” with DHS, informed the Department:

*There is significant momentum behind these initiatives and HSUA#3 have indicated we need to progress on the Deed of Release by 24 July 2003. The Board of Peter Mac met in an extraordinary meeting on Tuesday 22 July to clarify outstanding concerns. It resolved that we will continue with this approach unless we hear from the Department of Human Services to the contrary.*

In a written response dated 1 August 2003, DHS provided a reply to the second Hillis letter. The Departmental letter contained the following:

*The Department believes that it is in PMCI’s best interest to achieve an outcome that secures its financial and legal exposure to pay back payment recovery action and cannot support the original proposal presented.*

To many observers, the DHS response implies that the Department did not support PMCI making a \$250,000 payment to the Union. However, in her 26 August 2014

statement to the Royal Commission, and despite having no independent memory of the letter, Board Chair, Dr Heather Wellington, offered a somewhat convoluted and unconvincing interpretation of what the DHS letter most likely meant. In any event, Dr Wellington was convinced of the efficacy of the actions taken both by the Board and by Dr Hillis, as evidenced by paragraphs 37 to 39 of her Witness Statement:

*Had the Board received a copy of the letter, and appreciated that the Department did not support the proposal to settle the No. 3 Branch's claim (if that was the Department's position), I am very confident the Board would not have proceeded as it did.*

*If the Department did not in fact support the proposal, and if Dr Hillis had appreciated this fact, I would certainly have expected him to clearly draw the Board's attention to the Department's position and I certainly would not have expected that he would have gone ahead and recommended to the Board that it resolve to implement the settlement anyway. I believe that Dr Hillis would not have done that.*

*As indicated, I have no recollection that in settling the claims made by the research scientists and the No. 3 Branch's claim the Board was acting without the support of the Department. To the contrary, my understanding was that the Department had been advised of the proposal to settle both these issues and I was unaware that it had expressed any lack of support, however I was not the person who communicated with the Department about these matters.*

One possible construction that could be placed on the Wellington quote above is that Dr Wellington might be hedging her options. On the one hand, she believes that no untoward actions by either the Board or Dr Hillis took place. But on the other hand Dr Wellington appears to leave the door ajar by observing that she was not the person who communicated with DHS about the matter in question.

Not only did Dr Wellington tender evidence that she did not remember receiving advice that DHS advice in 2003, but it was also reported in *The Sunday Age* of 31 August 2014 that none of the other former directors spoken to by journalists had recalled the DHS advice either.

For the sake of furnishing a complete narrative, it is noted here that in October 2003 Dr Hillis tendered his resignation to the PMCI Board, stating his intention to depart the Hospital in November 2003 in order to take up the position of Executive General Manager at the Royal Australasian College of Surgeons. Before his departure, however, Dr Hillis did oversee events arising from the Deed of Release to their conclusion.



On 22 October 2003, Secretary of HSUA#3, Kathy Jackson, submitted a written itemised statement to Dr Hillis listing the Union's legal expenses and other expenses (including expected future expenses) incurred "in relation to the matters". The itemized statement totalled \$252,679. Three weeks later, on 11 November 2003, Dr Hillis sent Kathy Jackson a cheque for \$250,000 "in accordance with paragraph 1 (b) of the Deed of Release". Shortly thereafter, Dr Hillis left PMCI to take up his new position at the Royal Australasian College of Surgeons.

The issue of precisely what the Hospital CEO disclosed to the PMCI Board, and how the information was disclosed, are matters of considerable import. The matters are significant because they illuminate the manner in which the PMCI Board and Hospital senior management made important decisions and discharged their legal and other obligations.

### ***Concluding comments***

The events referred to in this submission can be interpreted as evidence of a serious and troubling failure in moral, ethical and legal process on the part of those directly associated with negotiating the Peter Mac settlement. A total of 160 Hospital research workers were underpaid \$4.06 million in award wages over a period spanning approximately three years. But instead of making good the underpayment, and accepting the adverse consequences from the award breaches, PMCI represented to research workers that repaying the \$4.06 million would constitute a grave financial threat to the Hospital's long term research capability, and would bring about the forced redundancies of up to 38 equivalent fulltime staff. Holding fears about their job security, it is perhaps inevitable the underpaid research workers would accept the PMCI argument, and would agree to a "no back pay, no redundancies" settlement accompanied by a new and better enterprise agreement.

However, the basic premise on which the PMCI argument to research workers rested cannot be sustained by the available financial data. Far from having its long term viability as a research entity threatened, PMCI appeared to be in sound financial health at the time the \$4.06 million underpayment to research staff was discovered. So much so, that the Hospital could well have afforded to make good the back pay amount owing and any associated financial penalties for breach of award imposed by the Federal Court. In short, the 160 underpaid research workers were possibly deceived into accepting an outcome they might have rejected had they known the full picture. Had the underpaid research workers been told about the Hospital's true financial position and had they been told about the \$250,000 windfall payment made to their union, HSUA#3, the settlement outcome accepted by the Hospital research staff might have been quite different.

Had the underpaid research workers also known that PMCI, the Board of Directors and Hospital senior management might each have had considerable incentive and self-interest to promote the "no back pay, no redundancies" settlement, the research workers would possibly have been very concerned about the proposed settlement. Such concerns would most likely have increased had underpaid research workers been told about the potential conflict of interest pertaining to the PMCI Board Chair, the possible withholding of information by the Hospital CEO and the demonstrably false nature of the \$250,000 payment made to HSUA#3. The fact that the bogus \$250,000 payment to their Union could have been better applied to further cancer research would probably not have escaped the underpaid research workers' attention either.

In essence, this submission proposes there are credible grounds for believing the 160 underpaid Hospital research workers were deliberately and knowingly betrayed by their Union leader, Kathy Jackson. The submission also proposes that underpaid Hospital research workers were deliberately and knowingly deceived by their employer. It is submitted here that Kathy Jackson, the Hospital Board of Directors and Hospital senior management (including the Hospital CEO and SIAG) manifestly failed in their duty of care to the underpaid Hospital research workers, and that they did so knowingly and in concert. In short, this submission argues that underpaid Hospital research workers were denied justice when PMCI paid a cash amount of \$250,000 to HSUA#3 in November 2003. The submission canvasses the possibility that the \$250,000 payment represented a conspiracy resulting in the payment of an illegal secret commission.

Many important questions have been raised in this submission. The questions are sufficiently serious to warrant further investigation and they deserve definitive answers. And as a final observation, here are some supplementary questions that could be added to the list:

- (a) Why did the Hospital Board disregard DHS advice, and side with the Union in giving effect to the "no back pay, no redundancies" settlement?
- (b) Why are there no minutes of a Board meeting that discuss the DHS letter?
- (c) Why did the Board Chair and the Hospital CEO only seek the advice of DHS well after negotiations with HSUA#3 began? Why was DHS advice not sought before negotiations started?
- (d) At the research staff meeting conducted by Board Chair and attended by the Hospital CEO and HSUA#3, were all the elements of the Peter Mac settlement discussed? If all elements were discussed, why does the Deed of Release

document signed by research staff make no mention of the \$250,000 payment to the Union?

- (e) Why did the Hospital CEO, or the PMCI Board, not ask the HSUA#3 Secretary, Kathy Jackson to provide documentation to substantiate the Union reimbursement claims she lodged in October 2003? Why were the expenses claimed by Ms Jackson simply accepted without question and at face value?
- (f) Is it plausible or likely the Hospital CEO and the PMCI Board would unwittingly participate in such a gross lack of due diligence?

In light of argument presented in this submission, it is instructive to note that the former Board Chair of PMCI, Dr Heather Wellington, the person who was ultimately responsible for overseeing the Peter Mac settlement, included the following emphatic expression of belief at paragraphs 73 and 74 of her Witness Statement of 26 August 2014:

*I do not remember any discussion about an amount of money being "packaged up" or "dressed up" as legal expenses.*

*I would not personally have approved an attempt to present this arrangement as something that it was not, and I am very confident the Board would not have contemplated this either. The Board was committed to transparency. My understanding, then and now, is that an amount was to be paid to the No 3 Branch which reflected the costs it had incurred, or was likely to incur, in connection with this matter.*

Dr Wellington's belief in this matter is very much at odds with the essential thesis of this submission.

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*Note: the author draws no conclusions in this submission, but simply asks questions which he considers arise from the evidence.*

*John Lourens*

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14 November 2014