

IN THE ROYAL COMMISSION
 INTO TRADE UNION GOVERNANCE
 AND CORRUPTION

RE: HEALTH SERVICES UNION

WRITTEN SUBMISSIONS ON BEHALF OF
 KATHERINE JACKSON
 14 NOVEMBER 2014

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A - INTRODUCTION

1. These submissions are made on behalf of Katherine Jackson in response to the submissions of Counsel Assisting dated 31 October 2014 (“CAS”).
2. Ms Jackson is not well enough to give specific instructions in relation to CAS or peruse these submissions in detail and approve them. This submissions are drafted from prior (existing) instructions from her, her evidence given to the Royal Commission, and other evidence gathered by the Royal Commission. The medical constraints on Ms Jackson, that prevent her from giving necessary instructions at this time, were accepted by Justice Tracey in a contested hearing on 5 November 2014 and the subject of findings on expert evidence, eventually accepted by the Union (see HSU v Jackson [2014] FCA 1215¹).
3. Notwithstanding that this creates some difficulties, we believe it is important for Ms Jackson’s wellbeing that this portion of the Royal Commission concerning her conclude within the current timeframe and these submissions are made on that basis.
4. Ms Jackson freely admitted in her evidence to the Royal Commission that she “is not a saint” (see Exhibit KJ1 to the witness statement of Ms Jackson of 14 August 2014 28.8.2014, at p 089).
5. As a high-ranking “insider” within the factional system which links the union movement and the ALP, Ms Jackson was perhaps necessarily flawed to some degree. She has never tried to hide this and made candid admissions in a feature article published in the Australian on 18 February 2012 – two years before this Royal Commission was established.
6. Ms Jackson has freely admitted that she had control of a “slush fund” – a discretionary fund to advance the union’s political and industrial interests. At her very first interview with Royal Commission staff on 11 April 2014 Ms Jackson submitted a document (28.8.2014 Exhibit KJ1 p 81 to the witness statement of Ms Jackson of 14 August 2014) which particularised “slush funds” and “her involvement” as a topic on which she wished to give evidence to the Royal Commission.
7. This supports a finding that Ms Jackson was determined, as a whistleblower, to tell the whole truth, including in relation to matters which may have affected her adversely.
8. CAS make a number of specific criticisms of Ms Jackson (mainly in CAS 12.3 and 12.4) and, in respect of some of these matters, admissions will be made that Ms Jackson’s conduct fell short of proper governance practices.
9. Ms Jackson is a whistleblower. That is, she is “an organization member who discloses illegal, immoral or illegitimate practices to persons or organizations that may be able to effect action” (CAS 19.2, para 2).
10. Somewhat unusually for a whistleblower, Ms Jackson held high office within the Health Services Union (“HSU”) – Branch Secretary of Victorian No 3 Branch from

¹ <http://www.austlii.edu.au/au/cases/cth/FCA/2014/1215.html>



1997 and National Secretary of the merged entity from May 2008. It was this status which allowed her to become an effective whistleblower.

11. Counsel Assisting correctly accepts (CAS 19.2, para 6 and CAS 13.1, para 36) that it was Ms Jackson's actions in exposing the corrupt conduct of Michael Williamson and Craig Thomson which led to the conviction of these individuals and the revealing of more general misconduct within the HSU.
12. Ms Jackson's actions also, more indirectly, played a part in the establishment of this Royal Commission.
13. Counsel Assisting correctly accepts (CAS 19.2, para 6) that Ms Jackson has paid "a heavy price" for exposing trade union corruption. That is, with respect, an understatement.
14. As Counsel Assisting broadly accepts, since late 2011 Ms Jackson has been subjected to a campaign of persecution and vilification by certain HSU officials and supporters of the now disgraced Mr Williamson (CAS 10.2, para 45 and CAS 19.2, para 6-11).
15. At the same time, Ms Jackson has been subjected to a campaign of denigration in the mass media and online – correctly described by Counsel Assisting as standard operating practice for Mr Williamson and his supporters (CAS 10.2, para 43(e), and CAS 13.1, para 36).
16. These continuing campaigns are closely related.
17. The Royal Commission has shown (and not only in respect of the HSU under Mr Williamson's reign) that trade union officials holding high office exercise extraordinary power and influence at both an industrial and at a political level. This is a key aspect of contemporary trade union culture and it assists corruption on a mass scale to go undetected and unpunished.
18. The power and influence of high-ranking union officials is reinforced and strengthened by the complex inter- relationship between the trade union movement and the ALP.
19. Ms Jackson is more than just a whistleblower in respect of the HSU. Her disclosures also affected the power structures within the ALP and which in context explains the scope, vehemence and intensity of the campaigns conducted against her.
20. Trade union power and influence has a unique political dimension which can make it virtually impregnable. Counsel Assisting correctly describes Mr Williamson's power base as being akin to "a cult of personality" (CAS 10.2, paras 42 and 48-50).
21. To be blunt, corruption in the upper ranks of all trade unions will remain whilst those positions have direct voting power to preselect candidates for elections to stand for the Labor Party in elections, to preselect candidates for the upper houses of parliament, to elect members of caucus and to elect the parliamentary leader of the Labor Party, at state and federal levels. Contemporary trade union corruption can only be effectively exposed by whistleblowers with the status of Ms Jackson.
22. These submissions describe in detail the HSU and media campaigns conducted against Ms Jackson for the past three years. They then deal with some issues relating



to the conduct of the Royal Commission and arising out of CAS. They then respond to specific criticisms of Ms Jackson made in CAS, deal briefly with policy issues and offer a conclusion.

23. Counsel Assisting correctly submits that *“it is important in investigating corrupt conduct that whistleblowers be willing and able to come forward, and that they not face hardship if they do”* (CAS 1.1, para 22). Indeed, this is a key issue for consideration by the Commission.
24. What has happened to Ms Jackson during the past three years provides an object lesson in just how much more needs to be done in order to ensure that whistleblowers feel willing and able to come forward and expose systemic corruption.
25. It is submitted that this is a matter which should weigh very heavily with the Commission in finalising its recommendations in respect of Ms Jackson.

B - HSU CAMPAIGN

B.1 Introduction

26. Ms Jackson has, since late 2011, been subjected to an unrelenting campaign of persecution and vilification by certain HSU officials and their supporters.
27. Counsel Assisting has broadly accepted that Ms Jackson has been subjected to such a campaign, and has made the following submissions in support of findings to that effect:
 28. At CAS 10.2, para 36, Counsel Assisting submitted:

However evidence given to the Commission and explored in detail in the following chapters, showed that Mr Williamson took leave from his role in name only, and continued to control the Union through officers loyal to him including Mr Mylan, Mr Gerard Hayes and to some extent, Mr Chris Brown.
 29. At CAS 10.2, para 45, Counsel Assisting submitted:

Mr Williamson’s power emanated from the loyalty that he demanded of his supporters. The Commission received a great deal of evidence showing that Mr Williamson’s supporters were very loyal to him and willing to engage in improper and criminal possibly also conduct to protect Mr Williamson when he was being investigated by the NSW Police.
 30. At CAS 10.2, para 43, Counsel Assisting submitted:

As detailed by Mr Hardacre, Mr Williamson employed a range of intimidatory tactics to ward off opponents and their supporters. Mr Williamson’s tactics included, but were not limited to:

 - (a) legal actions against opponents and their supporters to financially damage them before elections and scare potential opponents from opposing him;
 - (b) isolating potential opponents who were employed in the union in an attempt to force them to resign;

(c) offering large financial settlements to officers who opposed him to remove any dissent or potential for opponents to organise and have access to information within the union;

(d) arranging for loyal organisers to harass opponents when visiting worksites and to attempt to prevent them accessing the site to campaign against Mr Williamson; and

(e) using contacts within politics and the media to smear opponents.

31. At CAS 12.2, paras 28-29, Counsel Assisting submitted:

...Mr Gibson understood that the review of the documents was an attempt by Mr Williamson and Mr Mylan to 'get dirt' on Ms Jackson.

Mr Williamson's role in at least partially orchestrating this plan was made evident in an intercepted telephone call tendered to the Commission, during which Mr Williamson talks to Mr Brown about appointing an independent forensic auditor to go through the documents with a view to suspending Ms Jackson for six months

32. At CAS 12.2, para 50, Counsel Assisting submitted:

The more obvious and complete explanation, supported by the documentary evidence, and the content of phone calls between Mr Brown and Mr Williamson, is that Mr Mylan and Mr Williamson engineered the removal of all No 3 Branch records to Sydney in order for Mr Mylan and through him, Mr Williamson, to be able to search for material with a view to finding 'dirt' on Ms Jackson and finding some basis to report her to the police.

33. At CAS 13.1, para 36, Counsel Assisting submitted:

... Ms Jackson did play a large role in exposing Ms Thomson's corrupt conduct and was subjected to intense media scrutiny and criticism for doing so.

34. At CAS 19.2, paras 6-11, Counsel Assisting submitted:

Perhaps the most controversial and well-known whistleblower on misconduct by union officials is Ms Kathy Jackson. Whatever else may be said about Ms Jackson (as to which see Chapters 12.3 and 12.4), she came forward to reveal misconduct in the HSU and, for that, she paid a heavy price.

After commenting publicly on allegations against Mr Craig Thomson for misuse of his union credit card, Ms Jackson awoke two days later to a shovel on her doorstep.

She was the subject of all sorts of verbal abuse and a deluge of media articles making allegations against her. One example of the victimisation she faced will suffice as an illustration.

Despite Mr Brown's written assertions that Mr Williamson was a 'dead man walking' from September 2011 when he stood aside as General Secretary of HSU East, and that Mr Brown had to steer a course between Mr Williamson and Ms Jackson, an objective assessment of Mr Brown's conduct reveals he sided with Mr Williamson and was in frequent contact. Mr Brown made plans with Mr Williamson in early 2012 to appoint a union ombudsman with the specific intention of laying charges against Ms Jackson and removing her from office.

In oral evidence, Mr Brown initially stated that the discussions with Mr Williamson to appoint an ombudsman for the purpose of laying charges against Ms Jackson and removing her from office 'wasn't the primary motive' for the appointment. However, in an intercepted telephone call between Mr Williamson and Mr Brown, Mr Williamson can be heard saying to Mr Brown: 'If we get the Ombudsman, we charge her, we sack her; right?' Mr Brown replied, 'Yep'. The Ombudsman would be there for 'five minutes'. Mr Brown is heard saying: 'to deal with this one issue and then that's it'.

When asked again about whether the Ombudsman was being appointed for the sole purpose of charging and removing Ms Jackson from office, Mr Brown attempted to justify his conduct on the basis that other members had indicated an intention to make complaints against officers of HSU East. However, Mr Brown then conceded, three questions later, 'we never had any issues before us at that point in time'. The strategising by Mr Brown with one of the very people Ms Jackson's whistleblowing had exposed, evinces its true character; it was a powerful demonstration of the extent to which whistleblowers who expose serious corruption may be the subject of reprisals of many sorts from their opponents in the organisation, and supporters of those whose conduct the whistleblowing exposed.

35. It is submitted that the Commission should accept these submissions and make findings to similar, if not stronger, effect.

B.2 The HSU campaign

36. The following are the key events in the HSU campaign against Ms Jackson.
37. On 24 August 2011 Ms Jackson played a pivotal role in procuring a referral of the allegations against Craig Thomson to the New South Wales Police by the National Executive of the HSU.
38. In the early hours of 26 August 2011 Ms Jackson was awakened by a banging on her house. She received a death threat in the form of a shovel left at her front door.
39. On 26 August 2011 Ms Jackson attended a meeting of the administrative committee of the Victorian Branch of the ALP. Ms Kitching and Mr Landeryou were present at the meeting. Ms Jackson was abused and called a "traitor" and a "rat".
40. Ms Jackson suffered a total mental breakdown in early September 2011 and was confined to the Acute Psychiatric Unit of the Austen hospital between 2 and 7 September 2011.
41. When she returned to the office, after being discharged from hospital, she discovered that it had been ransacked and that many documents, including private documents, had been stolen from her office. The most important of these documents were the exercise book in which he had kept a record of expenditure from the NHDA, and documents relating to her personal financial affairs and family law settlement.
42. Ms Jackson made a complaint of serious corruption against Mr Williamson to the New South Wales Police on 12 September 2011.
43. There was a meeting of the Counsel of HSU East branch and HSUEast on 16 September 2011. Resolutions moved by Ms Jackson for an independent investigation

were voted down by Mr Williamson's supporters (voting as a block, in accordance with the direction or indication of Mr Mylan).

44. Ms Jackson, who had never been subjected to allegations of corruption in the mainstream media in her union career, began receiving calls from journalists asking her about allegations of wrongdoing based upon nothing more than rumours and scuttlebutt.
45. Ms Jackson was the subject of "shit sheets", distributed amongst the HSU membership at major hospitals, making false and baseless allegations against her.
46. The Centenary Conference of the HSU East Branch/HSUeast was held on 14 and 15 November 2011. At that meeting resolutions condemning Ms Jackson and calling for a disamalgamation were passed by the Williamson majority. Ms Jackson and her supporters were harangued and abused throughout the Conference. Ms Jackson was spat at and called "Judas".
47. On 30 November 2011 there was a meeting of the National Executive, followed by the National Conference of the HSU. At the meeting, over the objection of Ms Jackson and her supporters, Mr Williamson, with the support of Mr Brown and the other Branch Secretaries, passed a resolution for the disamalgamation of HSU East and other resolutions prejudicial to the interests of Ms Jackson.
48. Counsel Assisting deals comprehensively with the issue of missing documents and the misuse of the old Vic 3 Branch records by Mr Williamson and Mr Mylan and others at some length (CAS 12.3). The destruction and misuse of documents is an integral part of the campaign.
49. In this context, it is sufficient to note the following:
 - (a) Mr Mylan's removal of all of those records to Sydney in late February 2012;
 - (b) Ms Tsirvoas' search of those documents to get "dirt" on Ms Jackson;
 - (c) the use of that material to form the basis of a complaint by Peter Mylan to the Victoria Police aimed at exciting police interest in Ms Jackson;
 - (d) Mr Williamson being permitted to peruse the documents (notwithstanding his having 'stood aside' as General Secretary and being under police investigation);
 - (e) the dissemination of those documents to Mr Wicks for the purpose of facilitating his smear campaign against Ms Jackson; and
 - (f) the destruction of at least 76 boxes of documents (on Counsel Assisting's count).
50. On 20 March 2012 Mr Mylan sent a letter to the Chief Commissioner of the Victoria police alleging a series of irregularities in the affairs of Ms Jackson's old Vic 3 Branch.
51. On 22 May 2012 Mr Mylan lodged a formal complaint against Ms Jackson with the Victoria police, repeating the matters alleged in his letter of 20 March and adding two

new matters. (After investigation, the Victoria Police concluded that there were no offences established in relation to those matters.)

52. On 29 March 2012 the National Executive refused to authorise payment of legal fees incurred by Ms Jackson in her capacity as National Secretary with the law firm Toomey Pegg, without considering the explanation she had provided and passing a pre-drafted resolution.
53. On 3 April 2012 Mr Williamson sent a letter to his organisers in which the malicious campaign being conducted against Ms Jackson is revealed on its face. The organisers were urged to use their networks to circulate information adverse to Ms Jackson. (Exhibit KJ1 to Jackson 28.8.2014 at p KJ1-113)
54. On 26 April 2012 there was a meeting of a majority of the National Executive, a group that came to be known as the "10 of 14" group, that called for Ms Jackson's resignation. Outside the meeting Mr Brown told reporters that Ms Jackson needed to resign for the good of the union.
55. On 27 August 2012 Mr Brown laid disciplinary charges against Ms Jackson. Once again, these charges were provided to journalists before they were provided to Ms Jackson, including an apparently advance copy to Mr Wicks who published a copy of Mr Brown's media release and the charges that same evening.
56. On 25 September 2013 Mr McGregor issued a "Special Report" from the Vic 3 Branch identifying Ms Jackson as someone who is being investigated for corruption.
57. During 2013 the HSU commenced separate legal proceedings against Ms Jackson: a cross claim in proceedings NSD 1501 of 2013, and an application in matter of VID 1042 of 2013 in relation to Ms Jackson's claim in relation to the Toomey Pegg fees.
58. In May 2014 the HSU sought an amendment to the Federal Court proceedings to include a claim in relation to the NHDA and cash withdrawals. In September 2014 the HSU applied to amend its claim, yet again, to include an array of claims relating to allegedly personal expenses paid for with union money and without approval.
59. The campaign has continued in the Royal Commission, most notably with the filing of Mr Brown's witness statement of 17 August 2014 and in the hostile cross-examination of Ms Jackson undertaken by Mr Irving on 28 August 2014.
60. On 12 November 2014 the HSU National Council, controlled in the manner explained by Mr Brown's analysis of the "numbers" in his witness statement, passed a resolution for the referral of allegations relating to Ms Jackson to the Victoria Police for criminal investigation. This is the third referral to the Victoria Police relating to Ms Jackson.
61. The media campaign described in the following section is a key component of the HSU campaign of denigration against Ms Jackson.

C - THE MEDIA CAMPAIGN

62. Since late 2011, Ms Jackson has been subjected to an ongoing campaign of denigration in the mass media and online.
63. The media campaign conducted against Ms Jackson was, and remains, an integral part of the HSU campaign.
64. Mr Williamson, Mr Brown and Mr McGregor regularly leaked material harmful to Ms Jackson's reputation to selected journalists who then wrote stories defamatory of Ms Jackson. These same three persons also issued a number of media releases adverse to Ms Jackson and regularly participated in interviews with newspaper journalists, television and radio reporters in which they denigrated Ms Jackson.
65. Counsel Assisting correctly accepts that this campaign existed, and it is clear that it is ongoing.
66. At CAS 10.2, para 43(e), Counsel Assisting correctly identifies one of the intimidatory tactics utilised by Mr Williamson and his supporters to ward off opponents as *"using contacts within politics and the media to smear opponents"*.
67. At CAS 19.2, para 8, Counsel Assisting correctly finds that Ms Jackson was the subject of *"a deluge of media articles making allegations against her"*.
68. At CAS 10.3, paras 43-45 Counsel Assisting correctly submits that Mr Williamson, Mr Brown and Mr Mylan *"orchestrated a media campaign against Ms Jackson"*. This extended to drafting press releases that were placed with compliant journalists and resulted in articles highly critical of Ms Jackson.
69. At CAS 12.2, para 34, Counsel Assisting correctly submits that the release to the media of the fact that Mr Mylan and others had lodged a complaint about Ms Jackson to the Victoria Police was *"motivated, to a large extent, to attack Ms Jackson."*
70. At CAS 10.3, paras 43-45, Counsel Assisting correct submits:

In February 2012 Mr Mylan was helping Mr Williamson and Mr Brown to orchestrate a media campaign against Ms Jackson. Mr Mylan would share draft media releases of the HSU national office with Mr Williamson in order to get his approval on the draft wording.

In an intercepted telephone call between Mr Mylan and Mr Williamson on 4 February 2012, the pair discuss a media article that was in the paper on the day and go on to discuss an article Mr Brown wants to release shortly. Mr Mylan tells Mr Williamson, '[w]hat Chris wants to also do, he's going to work it up today and send it around to us, with the exception of Kathy again, before lunch tomorrow another draft media release he wants to put out.' Mr Mylan goes on to ask Mr Williamson for his approval and can be heard to say:

So what I might do, mate, tomorrow, if you're around, I'll bring it to you if you want to have a quick cursory eye over it ... [b]efore it goes out ... and I'm not telling anyone, because it's national office ... so just you, and I'll flick it up to you to have a quick squiz.

In another intercepted phone call on 5 February 2012 between Mr Mylan and Mr Williamson, this trend continues, with Mr Mylan asking Mr Williamson for his opinion on the draft sent through by Mr Brown, and Mr Williamson responding with suggested changes.

71. It is submitted that the Commission should accept these submissions and make findings to similar, if not stronger, effect.
72. The media campaign against Ms Jackson commenced in late 2011 after she had taken a public stand on the corrupt activities of Craig Thomson.
73. Initially, the campaign took the form of rumours passed on to journalists, including circulating an "ALP dirt file" to media outlets and malicious attacks in the blogosphere, most notably by Mr Andrew Landeryou on the Vex news website (Kathy Jackson MFI 1, Tab 16) and Mr Peter Wicks, from late May 2012, on his "Wixxyleaks" and "Independent Australia" websites (Kathy Jackson MFI 1, Tab 17).
74. The Commission should infer that Mr Landeryou and Mr Wicks obtained most of the material that they advanced as "evidence" of wrongdoing by Ms Jackson from Mr Williamson, Mr Mylan and/or Mr Brown and that they used that material to make false allegations against Ms Jackson..
75. After candidates supported by Mr Brown and his supporters were successful in the elections in the dis-amalgamating HSU branches in December 2012, the mainstream media campaign became less intense.
76. During 2013 Mr Brown and his supporters pursued Ms Jackson through the Courts and continued to leak material to Mr Wicks who smeared Ms Jackson on his websites.
77. The media campaign intensified dramatically in late April 2014.
78. In one sense, the media campaign reached its culmination in the actions of Mr McGregor during the period leading up to the commencement of the HSU hearings in the Royal Commission.
79. Mr McGregor was cross-examined to revealing effect by Counsel Assisting on 17 June 2014. During the course of the cross-examination, he admitted to the existence of the media campaign against Ms Jackson and the involvement of Mr Brown in the campaign. He also admitted that he had provided material to journalists, the allegations arising from which he admitted amounted to "pure speculation". He also conceded that he leaked material to journalists before giving Ms Jackson any opportunity to respond to the allegations. (17.6.2014 Tr 720 to 727)
80. The following list sets out a selection of media reports, mostly print media, adverse to Ms Jackson (the key articles appear in bold):

25 September 2011	Telegraph (Silmalis) - <i>HSU president Kathy Jackson faces accusations she misused a union-funded credit card</i> ² (MFI 1, 18.6.2014, Tab 12)
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² <http://www.news.com.au/national/hsu-president-kathy-jackson-faces-accusations-she-misused-a-union-funded-credit-card/story-e6frfkp9-1226145396520>

- 5 June 2012 Australian (Rout) - *Craig Thomson fuels the HSU fire*³
- 26 June 2012 **ABC News (Cullen) - Jacksons at centre of 'disturbing' HSU allegations**⁴
- 21 August 2012 **Telegraph (Benson) - HSU's whistleblower at the centre of the Craig Thomson scandal named in complaint**⁵
- 23 August 2012 Telegraph (Benson) - *Call for Kathy Jackson to resign – Brown*⁶
- 29 April 2014 **Age (McKenzie Baker) - Kathy Jackson slush fund supported political allies**⁷
- 29 April 2014 **Age (McKenzie Baker) - Questions but few answers surround curious bank account**⁸
- 30 April 2014 **ABC AM (Uhlmann) - HSUs Jackson ran secret slush fund report**⁹ - *McGregor*
- 30 April 2014 ABC Lateline - *Slush funds linked to Kathy Jackson*¹⁰
- 9 May 2014 SMH (Dunckley) - *HSU demands Kathy Jackson repay \$250,000*¹¹
- 10 May 2014 Australian (Wallace) - *Ex-HSU secretary Kathy Jackson 'moved \$250K'*¹²
- 6 June 2014 **SMH (McKenzie Baker Schneiders) - Whistleblower used \$1m in union funds**¹³
- 6 June 2014 SMH (McKenzie Baker Schneiders) - *Statement says Jackson knew about graft claims for a decade*¹⁴

³ <http://www.theaustralian.com.au/national-affairs/craig-thomson-fuels-the-hsu-fire/story-fn59niix-1226384015178>

⁴ <http://www.abc.net.au/news/2012-06-26/jacksons-at-centre-of-hsu-allegations/4093190>

⁵ <http://www.heraldsun.com.au/news/national/hsus-whistleblower-at-the-centre-of-the-craig-thomson-scandal-named-in-complaint/story-fndo317g-1226454456943?nk=9de3885f5ad8a59a25effbcfb3ea602f>

⁶ <http://www.heraldsun.com.au/news/national/call-for-kathy-jackson-to-resign/story-fndo317g-1226456080977>

⁷ <http://www.smh.com.au/national/kathy-jackson-slush-fund-supported-political-allies-20140429-zr1eo.html>

⁸ <http://www.smh.com.au/national/investigations/questions-but-few-answers-surround-curious-bank-account-20140429-zr1ev.html>

⁹ <http://www.abc.net.au/am/content/2014/s3994704.htm>

¹⁰ <http://www.abc.net.au/lateline/content/2014/s3995460.htm>

¹¹ <http://www.theaustralian.com.au/national-affairs/hsu-demands-1m-from-kathy-jackson-for-misusing-union-funds/story-fn59niix-1227075132834>

¹² <http://www.theaustralian.com.au/national-affairs/exhsu-secretary-kathy-jackson-moved-250k/story-fn59niix-1226912373326>

¹³ <http://www.smh.com.au/national/whistleblower-used-1m-in-union-funds-20140605-39lxl.html>

¹⁴ <http://www.smh.com.au/national/statement-says-jackson-knew-about-graft-claims-for-a-decade-20140605-39lxx.html>

- 15 June 2014** **Australian (Norington) - Whistleblower Kathy Jackson faces heat¹⁵**
- 16 June 2014 ABC Lateline - *Royal Commission focus shifts to Jackson*¹⁶
- 17 June 2014** **Telegraph (Benns) (1.34pm) - Health Services Union whistleblower Kathy Jackson had access to \$250,000 of members' entitlements¹⁷**
- 17 June 2014 ABC PM – *Union whistleblower Kathy Jackson to front Royal Commission to face questions about misuse of members' funds*¹⁸
- 17 June 2014** **Australian (Norington) - Kathy Jackson approved shifting of \$284,000 in HSU funds, inquiry told¹⁹**
- 17 June 2014** **SMH (Schneiders) - Workers' underpayment settlement went to Health Services Union slush fund²⁰-**
- 18 June 2014 AFR (Mather Parker) - *\$1.1m spent on cards*²¹
- 18 June 2014** **Australian (Norington) - Kathy Jackson attacked over cash 'siphons'²²**
- 18 June 2014** **Australian (Norington) - Kathy Jackson says Bill Shorten part of Labor smear campaign against her²³**
- 18 June 2014 Mr Norington interviewed on Sky News *Paul Murray Live*²⁴
- 18 June 2014** **SMH (Schneiders) - Settlement money was used for 'slush fund', royal Commission hears²⁵**

¹⁵ <http://www.theaustralian.com.au/national-affairs/industrial-relations/whistleblower-kathy-jackson-faces-heat/story-fn59noo3-1226955240805>

¹⁶ <http://www.abc.net.au/lateline/content/2014/s4026538.htm>

¹⁷ <http://www.dailytelegraph.com.au/news/nsw/health-services-union-whistleblower-kathy-jackson-had-access-to-250000-of-members-entitlement-money/story-fni0cx12-1226957557950?nk=9de3885f5ad8a59a25effbcfb3ea602f>

¹⁸ <http://www.abc.net.au/pm/content/2014/s4027190.htm>

¹⁹ <http://www.theaustralian.com.au/news/nation/kathy-jackson-approved-shifting-of-284000-in-hsu-funds-inquiry-told/story-e6frg6nf-1226957806334>

²⁰ <http://www.smh.com.au/national/workers-underpayment-settlement-went-to-health-services-union-slush-fund-20140617-zsamh.html>

²¹ http://www.afr.com/p/national/spent_on_credit_cards_ISQc2rvhfAG1p0cvX2YjiK

²² <http://www.theaustralian.com.au/news/investigations/kathy-jackson-attacked-over-cash-siphons/story-fng5kxvh-1226957959177>

²³ <http://www.theaustralian.com.au/national-affairs/industrial-relations/kathy-jackson-says-bill-shorten-part-of-labor-smear-campaign-against-her/story-fn59noo3-1226958622836>

²⁴ https://www.dropbox.com/s/ukqotitwmnuqxku/14_06_18%20-%20Paul%20Murray%20-%20HSU%20In%20The%20Spotlight%20-%20Norington.mp4?dl=0

²⁵ <http://www.smh.com.au/national/settlement-money-was-used-for-slush-fund-royal-commission-hears-20140617-3abku.html>

- 18 June 2014** **Telegraph (Benns) - Whistleblower Kathy Jackson has three union credit cards, inquiry hears: Accused of misusing HSU funds**²⁶
- 18 June 2014 ABC News (Grimm) - *Questions about different accounts, as whistleblower Kathy Jackson continues evidence*²⁷
- 18 June 2014 Australian (**Norington**) - *Kathy Jackson supporter reported to police over alleged intimidation*²⁸
- 18 June 2014** **SMH (Schneiders) - Kathy Jackson's memory fails on slush fund withdrawals**²⁹
- 18 June 2014 Telegraph (**Benns**) - *HSU whistleblower Kathy Jackson says book with details of \$250,000 account was in her desk but is now missing*³⁰
- 20 June 2014** **Australian (Norington) - Kathy Jackson fell short on standards**³¹
- 20 June 2014 Herald Sun (**Benns**) - *Kathy Jackson's book of secrets - Struggles to answer questions at HSU corruption inquiry*³²
- 21 June 2014 Australian (**Norington**) - *Unions reject Kathy Jackson on funds*³³
- 21 June 2014 SMH (**Schneiders**) - *HSU's Kathy Jackson_ brave whistleblower or union crook*³⁴
- 26 June 2014 Australian (**Norington**) - *Kathy Jackson in spending spree with HSU funds*³⁵
- 28 June 2014 Australian (**Norington**) - *Kathy Jackson spent in absentia*³⁶

²⁶ <http://www.dailytelegraph.com.au/news/nsw/whistleblower-kathy-jackson-has-three-union-credit-cards-inquiry-hears-accused-of-misusing-hsu-funds/story-fni0cx12-1226958068147>

²⁷ <http://www.abc.net.au/news/2014-06-19/questions-about-different-accounts-as/5537072>

²⁸ <http://www.theaustralian.com.au/news/nation/kathy-jackson-supporter-reported-to-police-over-alleged-intimidation/story-e6frg6nf-1226960411376>

²⁹ <http://www.smh.com.au/federal-politics/political-news/kathy-jacksons-memory-fails-on-slush-fund-withdrawals-20140619-3ag27.html>

³⁰ <http://www.dailytelegraph.com.au/news/nsw/hsu-whistleblower-kathy-jackson-says-book-with-details-of-250000-account-was-in-her-desk-but-is-now-missing/story-fni0cx12-1226960136820>

³¹ <http://www.theaustralian.com.au/news/investigations/kathy-jackson-fell-short-on-standards/story-fng5kxvh-1226960545924>

³² <http://www.dailytelegraph.com.au/news/nsw/kathy-jacksons-book-of-secrets-struggles-to-answer-questions-at-hsu-corruption-inquiry/story-fni0cx12-1226960578475>

³³ <http://www.theaustralian.com.au/national-affairs/state-politics/unions-reject-kathy-jackson-on-funds/story-e6frgczx-1226961808107>

³⁴ <http://www.smh.com.au/federal-politics/political-news/hsus-kathy-jackson-brave-whistleblower-or-union-crook-20140620-zsf0g.html>

³⁵ <http://www.theaustralian.com.au/national-affairs/industrial-relations/kathy-jackson-in-spending-spreewith-hsu-funds/story-fn59noo3-1226967008649>

³⁶ <http://www.theaustralian.com.au/national-affairs/state-politics/kathy-jackson-spent-in-absentia/story-e6frgczx-1226969437505>

- 28 June 2014 Australian (**Norington**) - *Messenger Kathy Jackson becomes focus of suspicion*³⁷
- 21 July 2014 SMH (**Schneiders**) - *Peter MacCallum scientists miss out on millions as union leader Kathy Jackson cuts deal*³⁸
- 29 July 2014 Age (**Schneiders**) - *Workers 'amazed' that Kathy Jackson's HSU got \$250,000 payment*³⁹
- 30 July 2014 Australian (**Norington**) - *I've been ambushed Kathy Jackson faces new evidence at union inquiry*⁴⁰
- 30 July 2014 SMH (**Schneiders**) - *HSU's Kathy Jackson forced to confront serious corruption allegations against her*⁴¹
- 2 August 2014 Australian (**Norington**) - *Kathy Jackson could face tax bill*⁴²
- 6 August 2014 Australian (**Norington**) - *Another \$58,000 in union funds paid to Kathy Jackson's ex-husband*⁴³
- 7 August 2014 Australian (**Norington**) - *Kathy Jackson deal to benefit lawyer*⁴⁴
- 10 August 2014** SMH (**Schneiders**) - *Peter MacCallum cancer hospital warned payment to union could be a 'bribe'*⁴⁵
- 11 August 2014** SMH (**Schneiders**) - *State told Peter MacCallum hospital not to cut \$250,000 deal with Kathy Jackson*⁴⁶
- 25 August 2014** Australian (**Norington**) - *Kathy Jackson's divorce in spotlight over big payments to ex-husband*⁴⁷

³⁷ <http://www.theaustralian.com.au/national-affairs/opinion/messenger-kathy-jackson-becomes-focus-of-suspicion/story-e6frgd0x-1226969268082>

³⁸ <http://www.smh.com.au/federal-politics/political-news/peter-maccallum-scientists-miss-out-on-millions-as-hsu-leader-kathy-jackson-cuts-deal-20140720-zuodr.html>

³⁹ <http://www.theage.com.au/victoria/workers-amazed-that-kathy-jacksons-hsu-got-250000-payment-20140729-zy4h4.html>

⁴⁰ <http://www.theaustralian.com.au/news/live-been-ambushed-kathy-jackson-faces-new-evidence-at-union-inquiry/story-e6frg6n6-1227007281460>

⁴¹ <http://www.smh.com.au/federal-politics/political-news/hsus-kathy-jackson-forced-to-confront-serious-corruption-claims-against-her-20140730-zyjxl.html>

⁴² <http://www.theaustralian.com.au/national-affairs/industrial-relations/kathy-jackson-could-face-tax-bill-on-union-funds-sent-to-her-account/story-fn59noo3-1227010724271>

⁴³ <http://www.theaustralian.com.au/national-affairs/industrial-relations/another-58000-in-union-funds-paid-to-kathy-jacksons-exhusband/story-fn59noo3-1227014733381>

⁴⁴ <http://www.theaustralian.com.au/national-affairs/industrial-relations/kathy-jackson-deal-to-benefit-lawyer/story-fn59noo3-1227015983120>

⁴⁵ <http://www.smh.com.au/federal-politics/political-news/peter-maccallum-cancer-hospital-warned-payment-to-union-could-be-a-bribe-20140809-101uun.html>

⁴⁶ <http://www.smh.com.au/federal-politics/political-news/state-told-peter-maccallum-hospital-not-to-cut-250000-deal-with-kathy-jackson-20140810-101x9j.html>

⁴⁷ <http://www.theaustralian.com.au/national-affairs/industrial-relations/kathy-jacksons-divorce-in-spotlight-over-big-payments-to-exhusband/story-fn59noo3-1227035240203>

- 27 August 2014 Australian (**Norington**) - *Kathy Jackson's ex claims \$50,000 payment 'was divorce settlement'*⁴⁸
- 28 August 2014 Australian (**Norington**) - *Kathy Jackson cross-examined by HSU barrister Mark Irving*⁴⁹
- 29 August 2014 Australian (**Norington**) - *Kathy Jackson torched by old flame*⁵⁰
- 29 August 2014** *SMH (Schneiders) - Forget the sex, the real issue for Kathy Jackson is possible theft of thousands of dollars*⁵¹
- 30 August 2014 Australian (**Norington**) - *Kathy Jackson calls on PM to help with HSU*⁵²
- 31 August 2014** *SMH (Schneiders Millar) - Peter MacCallum directors deny knowledge of secretive payment to Kathy Jackson's union*⁵³
- 25 September 2014 Australian (**Norington**) - *Ex-Health Services Union chief Michael Williamson tried to hide fraud*⁵⁴
- 29 September 2014 Australian (**Norington**) - *Whistleblower Jackson keen to keep lid on Thomson: HSU*⁵⁵
- 1 October 2014 Australian (**Norington Akerman**) - *HSU pursues Kathy Jackson over \$660,000 in expenses*⁵⁶
- 2 October 2014 Australian (**Norington**) - *The quest to trace former union leader Kathy Jackson's jaunts*⁵⁷
- 20 October 2014 Australian (**Norington**) - *Do no work, still get paid: Kathy Jackson and Michael Williamson's union ally deal*⁵⁸

⁴⁸ <http://www.theaustralian.com.au/news/kathy-jacksons-ex-claims-50000-payment-was-divorce-settlement/story-e6frg6nf-1227038826206>

⁴⁹ <http://www.theaustralian.com.au/national-affairs/industrial-relations/kathy-jackson-crossexamined-by-hsu-barrister-mark-irving/story-fn59noo3-1227040028354>

⁵⁰ <http://www.theaustralian.com.au/national-affairs/industrial-relations/kathy-jackson-torched-by-old-flame/story-fn59noo3-1227040592285>

⁵¹ <http://www.smh.com.au/national/forget-the-sex-the-real-issue-for-kathy-jackson-is-possible-theft-of-thousands-of-dollars-20140828-109m2c.html>

⁵² <http://www.theaustralian.com.au/national-affairs/state-politics/kathy-jackson-calls-on-pm-to-help-with-hsu/story-e6frgczx-1227041841061>

⁵³ <http://www.smh.com.au/federal-politics/political-news/peter-maccallum-directors-deny-knowledge-of-secretive-payment-to-kathy-jacksons-union-20140830-10a9bh.html>

⁵⁴ <http://www.theaustralian.com.au/national-affairs/industrial-relations/exhealth-services-union-chief-michael-williamson-tried-to-hide-fraud/story-fn59noo3-1227069548615>

⁵⁵ <http://www.theaustralian.com.au/national-affairs/industrial-relations/whistleblower-jackson-keen-to-keep-lid-on-thomson-hsu/story-fn59noo3-1227073315033>

⁵⁶ <http://www.theaustralian.com.au/news/nation/hsu-pursues-kathy-jackson-over-660000-in-expenses/story-e6frg6nf-1227075746821>

⁵⁷ <http://www.theaustralian.com.au/news/nation/the-quest-to-trace-former-union-leader-kathy-jacksons-jaunts/story-e6frg6nf-1227077064654>

⁵⁸ <http://www.theaustralian.com.au/national-affairs/do-no-work-still-get-paid-kathy-jackson-and-michael-williamsons-union-ally-deal/story-fn59niix-1227095550531>

21 October 2014 Australian (**Norington**) - *Police threat for Kathy Jackson over misuse of union funds*⁵⁹

81. This list bespeaks the extraordinary magnitude of the malicious media campaign waged against Ms Jackson by her enemies in the HSU and beyond.

D - ISSUES RELATING TO THE CONDUCT OF THE ROYAL COMMISSION

(a) Procedure adopted by Counsel Assisting

82. Counsel Assisting initially foreshadowed a thematic approach to the hearings involving Ms Jackson. That initial plan, however, was not adhered to.
83. What occurred when Ms Jackson gave evidence was detailed cross-examination of her on numerous specific issues based upon literally thousands of documents.
84. This change in approach gave rise to a degree of unfairness in relation to Ms Jackson. This was recognised by the Commissioner, who intervened to comment upon this manner of dealing with Ms Jackson (Tr 28.8.14 p 812).
85. The unfairness to Ms Jackson is apparent in the cross-examination of her by Counsel Assisting on 30 July 2014 in respect of a \$50,000 payment made to Jeff Jackson from the NHDA fund on 24 March 2009 (Tr 30.7.2014 p 410ff).
86. Although unprepared for cross-examination, Ms Jackson responded to Counsel Assisting's questions by stating that she thought the \$50,000 payment was made in relation to the Victoria No 1 Branch and related to the Jeff Jackson/Fegan fight.
87. Counsel Assisting now acknowledges the existence of the Jeff Jackson/Fegan fight and correctly notes the date of the separation between Ms Jackson and Jeff Jackson (CAS 12.3, paras 59-62 and 67).
88. Ms Jackson's complaint, made on 30 July 2014, that she felt "ambushed" (Tr 30.7.2014, pp 416-8) has a degree of validity. This issue is dealt with more fully in Ms Jackson's statement of 14 August 2014 at paras 41 to 125.

(b) Destruction of documents

89. There is a fundamental unfairness in expecting Ms Jackson to respond to serious allegations and potential referral to answer serious criminal charges in circumstances where a large amount of relevant and exculpatory documentation has either gone missing or been destroyed by Mr Williamson and his supporters. Ms Jackson raised this issue on numerous occasions during the course of her evidence (eg., Jackson MFI 1, para 461, Tr 28.8.2014, pp 806, 829 to 832, 859, 864)
90. Counsel Assisting correctly makes findings to the effect that some 76 boxes of relevant material has either gone missing or been destroyed since it passed into the custody of Mr Williamson and his supporters in September 2012. (CAS 12.2 *passim*).

⁵⁹ <http://www.theaustralian.com.au/national-affairs/industrial-relations/police-threat-for-kathy-jackson-over-misuse-of-hsu-funds/story-fn59noo3-1227096588489>

91. Counsel Assisting correctly describes this as “an issue of central importance to the Commission’s enquiries” (CAS 12.2, para 1).
92. The missing documentation includes Ms Jackson’s record of payments made from the NHDA account (the exercise book); relevant Vic 3 Branch BCOM minutes (almost in their entirety); and the creditor payments folders containing the supporting documents assembled by the bookkeeper, Ms Holt, in support of expenditure authorised by Ms Jackson or otherwise incurred on union credit cards.
93. Ms Jackson’s ability to defend herself has been severely prejudiced by the wrongful conduct of those persons who the Commission has evidence were in possession of the 96 or so boxes of documents within the HSU.
94. This is an important matter that the Commission should take into account in considering whether adverse findings should be made against Ms Jackson or whether the missing documents would have changed the very nature of the evidence put before the Royal Commission.
95. It is submitted that:
- (a) Since the documents passed through the hands of Mr Williamson & others whose statement intention in the telephone intercepts (with Brown) was to manufacture a case against Ms Jackson; and
 - (b) The documents were to be used to allow Mr Irving of counsel to draft charges against Ms Jackson such they would be able to commence proceedings in the Federal Court of Australia and sack her from the Union; and
 - (c) They were the last people to see the 96 odd boxes;

the Commissioner should draw an inference that the missing documents would have assisted Ms Jackson and would not have assisted the claims made by her opponents within the HSU.

(c) Family Law Settlement

96. The Commissioner should find that confidential documents recording Ms Jackson’s family law settlement were stolen from Ms Jackson’s office when it was ransacked in early September 2011, as Ms Jackson stated in evidence (Tr 28.8.2014, p 794), and that these documents were leaked to the media – and the Commission - on or shortly before 24 August 2014, facilitating the publication on 25 August 2014 of Mr Norington’s front page article “Kathy Jackson’s divorce in spotlight over big payments to ex-husband” – just as Ms Jackson was to be recalled to give further evidence.
97. Counsel Assisting used these documents to cross-examine Ms Jackson with a view to suggesting that monies from the NHDA fund were utilised by her to pay Jeff Jackson monies on account of the family law settlement between them, then being negotiated. (Tr 28.8.2014, pp 793ff, 800ff).
98. It is now clear that this allegation is without substance, and is not pursued by Counsel Assisting in CAS.

99. In the circumstances, the Commissioner should make a finding that either there was no monies or that there is no evidence that monies from the NHDA fund were applied by Ms Jackson in respect of her family law settlement.

E - ISSUES ARISING FROM CAS

(a) Allegations the subject of litigation

100. Counsel Assisting has submitted, in relation to many of the allegations made against Ms Jackson, that the Commission should not deal with them further because they are subject of litigation (CAS 1.1, paras 79 to 81; CAS 12.3, para 75, CAS 12.4, paras 8, 58 and 67).
101. Having made this submission, Counsel Assisting qualifies it by submitting that such matters could, nevertheless, be reconsidered during the course of the Commission's life "should circumstances change" (CAS 1.1, para 81).
102. It is submitted that Counsel Assisting's primary submission is correct and should be accepted by the Commissioner, but that the qualifying submission is incorrect as a matter of principle and should not be accepted.
103. There are compelling reasons why the Commission should not deal with matters that are the subject of litigation. The Commission has an extraordinarily large range of issues to deal with and it is an unproductive use of the Commission's limited resources –especially hearing time – to investigate and make findings in respect of matters which will be dealt with between the parties by the Courts.
104. If this proposition is correct, then there is no room for a qualification which in essence negates it.
105. This submission is made even though a degree of unfairness flows to Ms Jackson from the fact that Counsel Assisting has raised a number of matters (which have received extensive press coverage adverse to Ms Jackson) in respect of which no findings will now be made.
106. Notwithstanding that unfairness, given what Ms Jackson has been through during the last three years, she is entitled, as a matter of basic fairness, to some finality.
107. It would be unjust for her to have, in effect, an ongoing inquiry hanging over her head.

(b) Destruction of documents

108. We repeat the submissions made on this topic under the heading "Issues relating to the conduct of the Royal Commission" above.



F - RESPONSE TO SPECIFIC ALLEGATIONS RAISED IN CAS

F.1 Peter Mac Settlement

109. Counsel Assisting deals with the Peter Mac settlement at CAS 12.3 and makes three interrelated allegations against Ms Jackson in relation to the settlement:
- (a) that Ms Jackson deceived Peter Mac by misrepresenting the expenses that the Vic 3 Branch had incurred, and expected to incur, to procure payment of \$250,000 from Peter Mac (CAS 12.3, para 3);
 - (b) that Ms Jackson's evidence in relation to the "dressing up" of the settlement ought not to be accepted on the basis that it is inconsistent with the available documentary evidence, Dr Hillis' evidence, Dr Wellington's evidence and Mr Cook's evidence (CAS 12.3, para 27); and
 - (c) that Ms Jackson may have breached s.81/s.82 of the *Crimes Act 1958* (Vic) and should be referred to the Victorian Director of Public Prosecutions (CAS 12.3, para 40).
110. It is submitted on behalf of Ms Jackson that:
- (a) there was no deception on her part;
 - (b) Ms Jackson's evidence in respect of the "dressing up" of the settlement should be accepted in preference to the evidence of Mr Cook because it is the only plausible explanation, in all the circumstances, which explains the final Peter Mac settlement; and
 - (c) in any event, there is no basis for suggesting that Ms Jackson breached s. 81 and 82 of the *Crimes Act 1958* (Vic) or that she should be referred to the Victorian Director of Public Prosecutions.
111. The Commission should accept these submissions, and reject Counsel Assisting's submissions for the reasons set out below.
- (a) Background
112. The right of unions to bring award breach prosecution proceedings against employers in respect of award breaches has been a feature of Australia's industrial relations system almost from its inception, with penalties awarded ordinarily paid to the union as a moiety.⁶⁰
113. The specific and general deterrence effects of such 'prosecution' proceedings is one of the key ways in which, historically, employers have been induced to comply with their obligations in relation to their employees.
114. Award breaches in relation to the wages paid to staff in the Peter Mac Research Division were discovered during the course of negotiations being conducted in early

⁶⁰ In 2003 the right to bring such proceedings was conferred by s.178 and s.357 of the RAO Schedule to the *Workplace Relations Act 1996*.

2003 for a new Certified Agreement to apply to Peter Mac and its employees (“**the Award Breaches**”).⁶¹

115. It is fundamental that the Commission recognise that the following are established facts and propositions:
- (a) the Union made two distinct claims against Peter Mac, arising from the underpayment of employees in the Research Division:
 - (i) a claim on behalf of employees for unpaid wages (**the Employee Back-pay Claim**); and
 - (ii) a claim on its own behalf for penalties in respect of the Award breaches (**the Union Penalties Claim**).
 - (b) the Award Breaches were serious and exposed Peter Mac to
 - (i) a significant back-pay liability (more than \$2.5m); and
 - (ii) significant penalties at the suit of the Union.
 - (c) the consequences of fully rectifying the Award Breaches were disastrous for Peter Mac.
 - (d) Peter Mac’s fundamental objects in any settlement were to:
 - (i) resolve the Employee Back-pay Claim in a manner that minimised the amount it was required to pay (thereby minimising the damage to its research program).
 - (ii) resolve the Union Penalties Claim and its exposure to penalties without admission of the Award Breaches - and in a manner that minimised the amount it was required to pay and secure a release in relation to the Union Penalties Claim.
116. As early as 3 March 2003 Human Resources Services Advice (Mr Gunzberg) advised Peter Mac that it had an exposure arising from the fact that “[t]he HSUA#3 could commence proceedings to prosecute PMCI for a breach of the s.17MX award as it currently stands.”⁶²

⁶¹ On 15 May 2003 the Peter Mac CEO, Dr Hillis, wrote a letter to Mr Shane Solomon (Executive Director, Metropolitan Health and Aged Care Services) in which he stated that “There is little doubt that under the terms of the Award as it currently stand Peter Mac has been underpaying these staff.” There is no document that suggests that Peter Mac had any defence to the Award Breaches alleged by the Union. The main alternative considered by Peter Mac, but discarded, was an application to vary the s.170MX Award retrospectively to exclude Research Division employees from the coverage of that award.

⁶² HSU Court Book Vol 6, p 843.

(b) Relevant Chronology

117. The documents demonstrate that at a very early stage of the dispute (March/April 2003) Peter Mac management was “working towards an outcome” that, inter alia, avoided “prosecution for breaches under the Award”.⁶³
118. Peter Mac sought external specialist professional industrial relations advice during the course of the 2003 dispute from the following:
- Mr Brian Cook, principal of Service Industry Advisory Group (SIAG)
 - Mr David Gunzberg, principal of Human Resources Services Advice.
 - Mr Rohan Millar of counsel (a specialist industrial counsel)
 - Ms Bernice Wearne, of counsel
119. It is clear from the documents that the negotiations between Peter Mac and the Union occurred between Mr Cook, as principal negotiating representative of Peter Mac, and Ms Jackson, as principal negotiating representative of the Union.
120. The Union and Peter Mac had reached agreement on a new structure and set of rates by 21 March 2003, together with a security of employment guarantee for Research Division employees, as set out in a Memorandum of Understanding signed that day.⁶⁴
121. On 2 May 2003 Slater & Gordon provided an advice re breaches of award.⁶⁵ It is clear that this advice was provided to Peter Mac in support of its claims. It was attached to Peter Mac Board Report of 2 July 2003.⁶⁶
122. It is evident from the documents that by the beginning of June 2003 the settlement eventually negotiated by the parties would have two distinct components:
- (a) a new structure, a new set of rates and a security of employment guarantee for employees, to be incorporated in a new Single Enterprise Collective Agreement (SECA) in return for which employees would abandon their right to backpay; and
 - (b) a Deed of Release in respect of the Union’s claim for penalties for the Award Breaches.
123. By 20 June 2003 the only significant outstanding issue between the Union and Peter Mac was the Deed of Release. On that day, one of Mr Cook’s staff sent an important email prepared by Mr Cook to Ms Jackson.⁶⁷ That email refers to a meeting between Mr Cook and Ms Jackson on 18 June 2003 and records Peter Mac’s agreement on various bargaining issues. Critically, it states:

Deed of Release

⁶³ Summary and Progress Reports” dated 17 March 2003 (Vol 3 p 902) and 9 April 2003 (Vol 4 p 851) prepared for the Board by Ms Wendy Wood (Research Management & HSUA Working Group Chair and, during the early period, Acting CEO).

⁶⁴ HSU Court Book Vol 4, 893, MOU at 985.

⁶⁵ HSU Court Book Vol 4, p 907

⁶⁶ HSU Court Book Vol 1, p 16.

⁶⁷ HSU Court Book Vol 1, p 16.


This appears to be the **only issue where the parties are yet to reach full agreement**. From our meeting on 18 June it is understood that a mutually acceptable construction of the Deed can be reached. The Deed would become effective from the date of certification of the new agreement. **The matter of quantum does require further work and I will speak to you further on this.**

124. The earliest draft of the Deed of Release in the material before the Commission appears to have been prepared on 23 June 2003 (“**Draft A**”) – it is indicated in the footer as coming from a file named “Deed of Release PMCC 2nd draft 230603”.⁶⁸ It should be inferred that “230603” is a reference to 23 June 2003. The file name suggests that Draft A is a “PMCC” draft and that it is the “2nd draft”, following on the first draft provided by the Union.
125. The next draft Deed of Release before the Commission appears to have been prepared on 27 June 2003 (“**Draft B**”).⁶⁹ The footer on that draft (on the second page) as coming from a file named showing a file name “Deed of Release 27603 [27 June 2003]”.
126. The marked up changes in Draft A are formal only. A comparison of Drafts A and B reveals that changes marked in Draft A have been accepted Draft B.
127. It ought be inferred that the Union’s first draft formed the basis for Draft A which contains marked up changes (changes most likely made by Mr Cook as the authorised negotiating representative of Peter Mac) such that the text of the Union’s initial draft is discernible.
128. The best inference is that the Union’s first draft was prepared after the meeting on 18 June 2003 to reflect the understanding of the terms that would form the basis of “a *mutually acceptable construction of the Deed*” – that is, a construction acceptable to Peter Mac as well as to the Union.
129. It is clear that Peter Mac did not want to execute a settlement agreement that carried an implication that it had in fact committed the Award Breaches.
130. The third draft in the sequence in the material before the Commission appears to have been prepared on 1 July 2003 (“**Draft C**”).⁷⁰ The footer on Draft C indicates that it came from a file with the name “HSUA Deed of releases 010703 (2)”. The footer has strike out text indicating the draft initially provided by SIAG (Mr Cook) was contained in a file named “Deed of Release from SIAG – with comments 010703” and then saved as a file named “HSUA Deed of releases 010703 (2)” after the “comments” had been removed. Any comments directed at clause 1 of the Draft C will be highly significant. The Commission should seek to obtain a copy of that draft with comments before any adverse finding could fairly be made against Ms Jackson.
131. Clause 1 of Draft B states:
1. Peter Mac will pay the HSUA Victoria No. 3 Branch the sum of (“the sum”) being reimbursement to the HSUA for legal expenses and to defray expenses

⁶⁸ HSU Court Book Vol 1, p 13.

⁶⁹ HSU Court Book Vol 1, p 5.

⁷⁰ HSU Court Book Vol 1, p 1 with the month of July indicated in a marked up change to the date of the Deed at Vol 1, p 4. The footer on Vol 4, p 4 indicates that the document came from SIAG (Mr Cook’s firm).



incurred by senior union officials in the preparation of the Certified Agreement annexed hereto as Schedule "A".

132. Clause 1 of Draft C – prepared by SIAG (Mr Cook) on 1 July 2003 - states:
1. Peter MacCallum Cancer Centre will pay the HSUA Victoria No. 3 Branch the sum of ("the sum") being reimbursement to the HSUA for legal expenses and to defray expenses incurred by ~~senior~~ union officials in the preparation of the Certified Agreement annexed hereto as Schedule "A".
133. Note that the deletion of the adjective "senior" – by Mr Cook – expands the scope of the reimbursement because by extending it to expenses incurred by all union officials rather than just "senior" union officials. It is more likely than not that it was Mr Cook who was responsible for that alteration.
134. It is important to note that there is **no** reference in any of the documents before the Commission to the payment of union "expenses" as part of any settlement **prior to its appearance in Draft A on 23 June 2003.**
135. Plainly, it is more likely than not that the idea of characterising any payment to the Union as a reimbursement of the Union's "expenses" arose in the meeting between Ms Jackson and Mr Cook on 18 June 2003 as an element of "a **mutually acceptable** construction of the Deed".
136. The quantum of the settlement payment to the Union had not been agreed by 20 June 2003. Mr Cook was to "speak to [Ms Jackson] further about this." It may be inferred that such discussions occurred and that the quantum of the settlement payment had been agreed because the settlement amount finally paid was specified in the recommendation by the Peter Mac CEO, Dr Hillis, in his Board Report of 2 July 2003, prepared for the meeting of the Board of Peter Mac on 8 July 2003.
137. Dr Hillis' 2 July 2003 Board Report states:
- Key issues have been the audit of salary and conditions with rectification of concerns/development of the Single Employment collective Agreement (final version attachment 2) and maintaining the support of the Union. This is in the context of Slater and Gordon advice to HSUA3 clearly stating the breaches by Peter Mac (attachment 3).
- The Union has raised several key concerns, most of which could be responded to at a senior management level (attachment 4⁷¹). The outstanding issue is the Deed of Release (final version attached 5⁷² [Draft C]) and the payment to HSU#3, in respect to their legal costs and time impost on senior officials. Given the requirement to work closely and collaboratively to achieve Australian Industrial Relations Commission approval and then the implementation, this is a significant cost.
- Legal opinion has been obtained from Mr Rohan Miller, Owen Dixon Chambers, (attachment 6) as to the standing of the Deed. Advice (verbal) has been received from Mr Shane Solomon, Executive Director, Metropolitan Health and Aged Care

⁷¹ HSU Court Book Vol 3, p 862

⁷² HSU Court Book Vol 4, p 1014

Services, Department of Human Services as to process moving forward. **Concerns were raised about associating any payment with true costs.**

138. That last sentence is critical. The better inference is that the “concerns” about “associating any payment with true costs” were concerns raised by Mr Solomon in the verbal advice that he gave Dr Hillis.

139. It follows that it is likely that:

- (a) Dr Hillis disclosed to Mr Solomon in their conversation that the Union’s claim included a claim in its own right for penalties in respect of the Award Breaches but that the Deed securing a release in respect of that liability would characterise the payment to the Union as a payment in respect of the Union’s costs rather than as a payment referable to a settlement of the Union’s claim for penalties for the Award Breaches; and
- (b) Mr Solomon had concerns that the settlement figure proposed – \$250,000 – did not reflect the true costs of the Union in relation to the dispute.⁷³

140. This conclusion should be drawn notwithstanding Dr Hillis’s evidence to the contrary.

141. Dr Hillis’ 2 July 2003 Board Report continues with a recommendation:

Recommendation

That the Board accept the Deed of Release as the appropriate vehicle to seek resolution of this issue.

That the Board approves 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.

That this payment be made as a “one-off” payment with no ongoing arrangements.

142. It is submitted on Ms Jackson’s behalf that any industrial practitioner with any degree of experience would have known that it was most unlikely that “the true union costs associated in achieving approval of the Certified Agreement” could be anywhere near \$250,000 (albeit that such an amount as a penalty was realistic given the magnitude of the Award Breaches). Peter Mac had a number of such practitioners advising it, including Mr Millar of counsel and Mr Cook who was an experienced industrial relations adviser.


143. On 8 July 2003, there was a meeting of the Peter Mac Board that considered Dr Hillis’ 2 July Board Report. The minutes of the 8 July 2003 Board meeting record:⁷⁴

The Board considered a range of alternative options including:

- Making an application to correct the terms of the section 170MX Award

⁷³ Counsel Assisting did not call evidence from Mr Solomon. Did either Mr Hillis or Mr Solomon make any notes of their verbal discussions? We do not know.

⁷⁴ Vol 3, p.831.



- Jointly, with the HSUA#3, approach the Australian Industrial Relations Commission to seek guidance in conference of the proposed way to pursue the matter
- Enter the proposed SECA
- Enter into a Deed of Release with the HSUA#3 but only upon an assurance been provided by the HSUA #3 about disclosure to its members and staff of making a payment to the HSUA #3

In the interest of Peter Mac and in order to maintain an effective Research Division the Board resolved that.

- Negotiations to continue with the HSUA #3 to determine the quantum of expenses incurred by HSUA #3 in the successful certification of the SECA
- Negotiations to continue on the option of Peter Mac paying HSUA #3 expenses
- If it is agreed that any payment is made to the HSUA#3, staff will be advised.
- The Deed of Release should ideally incorporate HSUA #3 union members.
- Peter Mac to continue to pay the SECA rates and conditions from 1 March 2003 possible.
- Responsibility to be clarified on the recording of a contingent liability in the accounts for the financial year 2002/2003
- A full communication strategy to be developed.

144. As at 20 June 2003, the *only* material issue outstanding between the parties was the quantum of the payment that would be made to the Union pursuant to a Deed of Release. The SECA had been finalised (and provided to the Board as an attachment to Dr Hillis' report of 2 July 2003) and "negotiations... to determine the quantum of expenses incurred by HSUA #3 in the successful certification of the SECA" were continuing.

145. On 22 July 2003, Dr Hillis prepared a Memorandum for a special meeting of the Board with the subject "HSUA#3 / Research and Deed of Release". The memo states:⁷⁵

There continues to be three ways of resolving the Research HR related issues:

1. Progression to the SECA, with a signed Deed of Release. This means we provide salary increase and condition changes from 1 March 2003.
2. Paying the full back pay applicable from 2000.
3. Going to the Federal Court with the HSUA#3 pursuing penalties for breaches.

The size of the back-pay is over 2.5 million. This is between 123 current staff and 24 previous staff. The back pay is on average \$19,000 per person.

⁷⁵ Vol 6 p 874.

At the Board meeting on 8 July, key issues were raised including:

- 1 Transparency of the process so that all staff are aware of Peter Mac paying legal costs and key official cost to achieve the SECA
- 2 Invoiced and detailed accounts of the amounts to be reimbursed recognising this will cover the costs of the successful certification and implementation of the SECA.
- 3 The binding of union members, by the Union as an agent.

In discussion with the Union, they have received advice that they cannot binding members. However they are prepared not to assist any action is brought by individuals.

...

HSUA#3 are now agitated over delays in the process and have indicated commencement of Federal Court Action (option 3) by Thursday 24 July unless the Deed issues are resolved. The latest version of the Deed is attached and it is recommended to the Board that this be used.

146. The Board of Peter Mac knew that, unless the Deed of Release was finalised to the parties' satisfaction, it was facing imminent prosecution by the Union for penalties in respect of the Award Breaches.
147. That circumstance was sufficiently serious to prompt the calling of a "special meeting" of the Board of Peter Mac that was held at 5pm on 22 July 2003.
148. The minutes of that "special meeting" record:

Dr Hillis advised that as per the Board of Directors resolution at their meeting held a July 2003, negotiations have continued with the HSUA #3 to determine the quantum of expenses incurred by the union in progressing the certification of the SECA and to ensure that if any payment is made to the HSUA #3 that staff will be advised.

...

Mr Cook further advised the union are becoming hostile at the apparent lack of progress with this issue and are taking the view that Peter Mac may not wish to resolve this matter.

The Board discussed in detail with Mr Miller the risks and benefits of alternative courses of action. The Board was unanimous in its view that should there be a payment made to the HSUA#3 that there is transparency and disclosure of information and that staff are to be advised of this fact price would vote on the SECA.

Resolved that:

- Negotiations to continue with the HSUA #3 on the option of Peter Mac paying HSUA #3 expenses up to a maximum of \$250,000
- In the event of the payment being made to the HSUA #3 that staff will be advised of the payment.

- An itemised statement is to be provided to the HSUA #3 outlining the expenses associated with the payment of up to \$250,000.
 - Contingency plans to be drawn up for the winding back of Research.
 - Any payment to the HSUA #3 is conditional on the successful voting on of the SECA by Peter Mac staff and the successful certification of the SECA in the AIRC.
 - The Department of Human Services to be advised in writing of the Board's approach to settle this matter.
 - And updated Deed of Release to be prepared incorporating confidentiality between Peter Mac and the HSUA #3 save that Peter Mac make disclosure of the amount and purpose of the payment of up to \$250,000 to its staff.
149. On 23 July 2003 Dr Hillis wrote to Mr Solomon of the Department stating that "signing of a Deed of Release between Peter MacCallum Cancer Centre (Peter Mac) and HSUA#3" was now a "critical" step (with the obvious inference that it was "critical" because Peter Mac wanted to avoid the Union commencing prosecution proceedings). The letter continues:
- The Deed of Release is a key document that is currently being finalised. The key components include the payment of the HSUA#3 related costs (legal, staff time and other costs), which will be up to \$250,000. The payment will be made on the provision of an itemised statement of costs. This will be paid if the SECA is successfully certified by the AIRC. The payment of the costs and the quantum will be notified to the staff in the intensive communication strategy that will accompany the circulation of the SECA.
150. Note that the quantum of the Union's costs was to be notified to staff before the SECA was voted upon by staff. This could only occur if, as the Board had directed on 8 July 2003 should occur, there were "negotiations... with the HSUA #3 to determine the quantum of expenses incurred by HSUA #3". There is nothing the documents produced by Peter Mac evidencing any attempt to obtain or record particulars of the HSU expenses *prior* to the execution of the Deed of Release and the approval of the SECA.
151. On 24 July 2003 Mr Cook sent a fax to Mr Gostencnick, a partner at Corrs Chambers Westgarth, apparently seeking further high level advice, and noting, once again, the dual nature of the Union's claim.⁷⁶
152. On 1 August 2003 the Department of Human Services sent a reply⁷⁷ to Dr Hillis' letter of 23 July 2003. The letter notes that:

The quantum of the financial risk exposure to the PMCI is estimated by your health service to be over \$3 million for the back pay the entitlements, and an additional ongoing payroll expense of over \$1 million. You advise that these amounts if claimed through breach of award proceedings would threaten the continued viability of the PMC I research activities.

⁷⁶ HSU Court Book Vol 1 of 2, p 16.

⁷⁷ HSU Court Book Vol 4, p 888

153. The letter then summarises the two steps that Peter Mac “proposes to take to resolve” its exposure to the Union’s claims, namely, the certification of the SECA and the Deed of Release. A full page of text is then redacted. The letter concludes:

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

154. The non-redacted portions of that letter do not identify the Department’s reasons for *not* supporting the proposal presented to the Department in Dr Hillis’ letter of 23 July 2003. Nor is that reason expressly identified in any of the other evidence made available to the parties through the online Court Book.

155. However, given the chronology, it is more likely than not that a concern that an amount of \$250,000 was far in excess of the true costs of the Union was at least part of the explanation.

156. The Union Deed of Release, in its final form, was executed on 9 September 2003.⁷⁸

157. The SECA was certified by the AIRC on 21 October 2003.⁷⁹

158. Ms Jackson her itemised statement of costs the following day, 22 October 2003.⁸⁰

(c) Argument

159. It is submitted that the Commission should acknowledge the following matters:

- (a) the Union’s causes of action against Peter Mac in relation to the Award Breaches – both on behalf of employees in respect of the Employee Back-Pay, and on its own behalf in respect of the Union Penalties Claim - were causes of action under s.178 of RAO Schedule to the *Workplace Relations Act 1996* (**WR Act**);
- (b) any penalties were likely payable to the Union as a moiety (cf s.357 WR Act);
- (c) there was no prospect that the union could recover legal costs against Peter Mac in any such proceedings because the relevant jurisdiction is effectively a “no costs” jurisdiction: see the limitation on the ordering of costs in s.347 of the WR Act;
- (d) there is *no cause of action known to the law* pursuant to which a union can sue to recover from an employer the costs associated with time spent by Union officials in relation to an industrial dispute or the negotiation or implementation of a statutory enterprise agreement;
- (e) in particular, there was *no cause of action* by which the Union could have recovered from Peter Mac the expenses referred in clause 1 of the Deed of Release

⁷⁸ HSU Court Book Vol 1, p 36

⁷⁹ HSU Court Book Vol 4, p 924

⁸⁰ HSU Court Book Vol 1, p 97

- (f) it follows that the *only* legal exposure Peter Mac had to the Union in its own right was in respect of the Union Penalties Claim;
 - (g) the Deed of Release provided a release in respect of the Union Penalties Claim. On *any* view, the payment to the Union provided for in the Deed of Release was part of the consideration given by the Peter Mac to the Union in return for that release; and
 - (h) the settlement amount paid was not more than 10% of the value of the Award Breaches – a realistic and commercial amount if the payment was in truth referable to the Union Penalties Claim that was being settled.
 - (i) At all material times Peter Mac engaged professional industrial law advisors.
160. Neither Ms Jackson nor the Vic 3 Branch had any reason to seek or insist upon a payment characterised as a reimbursement of expenses as opposed to a simple payment of a specified amount made in consideration of granting a release to Peter Mac in respect of the Union Penalties Claim.
161. Crucially, there was **no** advantage that accrued to Ms Jackson or the Vic 3 Branch from characterising the settlement payment to the Union as referable to the Union's expenses in the manner done in clause 1 of the Deed of Release - other than because Peter Mac, through its lead negotiator, wanted the agreed "quantum" characterised in that way and because agreeing to that request would assist in achieving the settlement.
162. The only party advantaged by that characterisation was Peter Mac because it avoided the implicit acknowledgment of breach in such a construction of the Deed.
163. All matters in dispute, other than the Deed of Release, had been resolved by 20 June 2003. Mr Cook's important email of that day states that the Deed of Release is "the *only* issue where the parties are yet to reach full agreement." Mr Cook "understood" that a "*mutually* acceptable construction of the Deed" could be reached. "The matter of *quantum*" did "require further work" and Mr Cook was to "speak to [Ms Jackson] further on this".
164. The fact that the "construction of the Deed" was identified by Mr Cook as a "mutually acceptable" construction gives rise to the inference that it was Mr Cook who sought that "construction of the Deed" to which Ms Jackson agreed, rather than vice versa.
165. Notwithstanding that the Deed of Release was the only outstanding issue as at 20 June 2003, and notwithstanding that Peter Mac had approved a maximum quantum of \$250,000 by 8 July 2003, the Deed of Release was not executed until 9 September 2003.
166. It is clear on the face of the documents that the main cause of that delay arose from the sensitivity of Peter Mac's CEO and its Board in relation to the "concerns" (expressed by the Department prior to 8 July 2003, reported to the Board on 8 July 2003 and reinforced in the Department's letter of 1 August 2003) that a settlement




amount of \$250,000 could not reflect the true costs and expenses of the Union (even after the alteration *by Mr Cook* that expanded the scope of Clause 1 of the Deed).⁸¹

167. There is nothing in the evidence that suggests that these “concerns” were ever raised with the Union or Ms Jackson. Ms Jackson did not attend any of the Peter Mac Board Meetings. She did not have access to Peter Mac’s board papers, minutes and internal management papers. She did not have access to the correspondence passing between Peter Mac and the Department. There is no evidence that she had any awareness of the debate that occurred within Peter Mac about the need to ensure that the amount of the settlement payment reflected the true expenses of the Union.
168. More importantly, on the available evidence, Peter Mac did nothing to address the concerns raised by Mr Solomon, recorded in Dr Hillis’ Board Report of 2 July 2003 and acknowledged by the Board in the minutes of its meeting of 8 July 2003 and instead proceeded to settle on the basis outlined in Dr Hillis’ letter to Mr Solomon of 23 July 2003 – a basis that Peter Mac knew the Department did not support.
169. Peter Mac could have removed the Department’s concerns by varying the draft Deed of Release to make payment to the Union of a stated amount the consideration for the release granted by the Union. It may safely be inferred that Ms Jackson would have agreed to such a change. Peter Mac did not seek such a change.
170. Notwithstanding:
- (i) The resolution of the Peter Mac Board on 8 July 2003 that “[n]egotiations to continue with the HSUA #3 to determine the quantum of expenses incurred by HSUA #3 in the successful certification of the SECA”;
 - (ii) The warning of Mr Solomon, reflected in the Board resolution of 8 July 2003.
 - (iii) The reference in Dr Hillis’ Board Memorandum of 22 July 2003 to the need to obtain “invoiced and detailed accounts of the amounts to be reimbursed”;
 - (iv) Dr Hillis’ advice to the Board on 22 July 2003 that “negotiations have continued with the HSUA #3 to determine the quantum of expenses incurred by the union in progressing the certification of the SECA” (“negotiation” as to the *quantum* of unions expenses!); and
 - (v) Dr Hillis’ statement to the Department in his letter of 23 July 2003 that “the payment of the costs and the quantum will be notified to the staff in the intensive communication strategy that will accompany the circulation of the SECA,

there is no evidence before the Commission that Peter Mac ever sought any details of the union’s expenses, or took any other steps, prior to execution of the Deed of Release on 9 September 2003 “*to determine the quantum of expenses incurred by*

⁸¹ There was also a delay arising from concern over the capacity of the Union to bind employees in relation to the settlement of the Employee Back-Pay Claim with the sequent need to prepare a separate Deed of Release for employees to execute.



HSUA #3”, let alone let alone obtaining “*invoiced and detailed accounts of the amounts to be reimbursed*” as referred to in Dr Hollis’ Board Memorandum of 22 July 2003.

171. Given the caution counselled by Mr Solomon, and purportedly adopted by the Board in accepting Dr Hillis’ recommendation in his 2 July 2003 Board Report, the only proper inference is that Peter Mac was expecting to receive an itemised statement of expenses amounting to the maximum agreed amount and that insisting upon that the provision of details of expenses and adequate supporting evidence would jeopardise the settlement on the “mutually acceptable construction of the Deed” that Peter Mac wanted before executing the Deed of Release on 9 September 2003 - as any party in Peter Mac’s position, acting with the care and commerciality otherwise demonstrated in the documents, would have done.
172. There is **no** document in the material produced by Peter Mac and tendered in evidence before the Commission that records any notification of expenses by the Union to Peter prior to the execution of the Deed of Release.
173. It would have been uncommercial in the extreme, and indeed inexplicable, for Peter Mac to agree to pay for the Union’s expenses for any reason other than to avoid being prosecuted by the Union for the Award Breaches.
174. On the documentary evidence, Peter Mac agreed to a maximum settlement amount of \$250,000 before it had sought or been provided with any itemised list of the Union’s costs and paid that amount without seeking invoices or other supporting information to justify the amounts claimed by the Union.
175. It is odd that, approaching the settlement commercially, the upper limit of the settlement amount could have been agreed and paid before there was any provision of supporting information to justify the amounts claimed by the Union.
176. The fact is that the Union’s costs and expenses referred to in clause 1 of the Deed of Release could not possibly have reached \$250,000. Ms Jackson and Ms Cresshall could not have devoted more than the equivalent of a couple of months of full time work to the matter. No proceedings had been commenced and the certification of an enterprise agreement that has Union support (in this case finalised by 8 July 2003) is an inexpensive rubber-stamping exercise. Peter Mac had expert industrial advisers who would have been well aware of those matters. We are left wondering what is in the redacted portions of the key documents.
177. The reality is that the “dressing-up” of settlement agreements, such as occurred in this case, is commonplace in the real world of industrial relations in Australia, as the Commission would be aware if it had called expert evidence on real world industrial relations practice in Australia. There is no evidence before the Commission to establish that matter but we understand it to be so.
178. The only claim made by the Union in its own right that could justify a settlement payment on a proper basis was the Union’s Penalties Claim in respect the Award Breaches. It is as plain that the amount negotiated was the primary consideration for the release in relation to the Union’s Penalties Claim and was, in real terms, referable to Peter Mac’s likely exposure to penalties rather than union “expenses”.

179. In relation to the “dressing-up” issue, the evidence of Dr Wellington can essentially be ignored as she “had no direct knowledge of the negotiations” (Wellington witness statement, 26.8.2014, para 10).
180. There are difficulties with accepting Mr Cook’s evidence, including the following:
- (a) in his statement of evidence, Mr Cook correctly notes of the relevant events took place a “approximately 11 years ago” (para 3);
 - (b) in his evidence before the Commission, Mr Cook was at pains to distance himself from involvement in the latter stage of negotiations. He sought to give the impression that his role was to conduct negotiations solely in relation to the SECA from March to July 2003. These contentions are not borne out by the relevant documents;
 - (c) Mr Cook suggested that Dr Hillis was the principal negotiator during the latter stage of the negotiations. This contention is also not borne out by the relevant documents.
181. It is clear from all the evidence that Mr Cook was the primary negotiator in relation to all aspects of the Peter Mac settlement.
182. Mr Cook denies Ms Jackson’s evidence in respect of the “dressing up” of the settlement of the Union Penalties Claim (Tr 695).
183. There is, however, a fundamental difficulty in accepting Mr Cook’s evidence on the “dressing-up” point – it involves accepting two propositions which, on the undisputed evidence, are inherently improbable, namely:
- (a) that Peter Mac paid the HSU \$250,000 in respect of a claim which had no proper legal basis, and which could not have been enforced through Court action; and
 - (b) that the HSU simply abandoned, without recompense, a proper legal claim which was likely to sound in significant penalties; which the Vic 3 Branch had threatened to commence proceedings in respect of; and which Peter Mac had spent months negotiating to resolve.
184. In fact, on the evidence in its entirety, it is inherently implausible that either party could have entered into a settlement on the basis contended for by Mr Cook.
185. If Mr Cook’s evidence is accepted, one might rhetorically ask: what happened to the Union Penalties Claim? Did it simply disappear?
186. The law is familiar with the need to look beyond the literal wording of a document in circumstances where a literal interpretation gives rise to improbable consequences. It is submitted that, in order to properly understand the true nature of the Peter Mac settlement, that is what needs to be done here.
187. Mr Cook’s account also ignores the very real concern that Peter Mac had at being “exposed to substantial penalties” (Dr Wellington, 28.8.2014, Tr 857).

188. A “dressed up” settlement, of course, eliminates this concern entirely - a matter of some importance to an organisation which relied upon donations to fund its research activities.
189. If, however, one accepts Ms Jackson’s evidence on the “dressed-up” point, then the settlement is perfectly explicable, makes commercial sense and accords with the realities of industrial practice.
190. Moreover, the improbability inherent in accepting the two above-stated corollaries of Mr Cooks’ evidence disappears.
191. In fact, Ms Jackson’s account of what happened is the only rational and realistic explanation for what occurred.
192. On the basis of the preceding analysis, it is submitted that the Commission should prefer Ms Jackson’s evidence on this issue to Mr Cook’s untested evidence.

(d) No arguable breach of s.81, s.82

193. Section 81 of the Crimes Act 1958 (Vic) relevantly provides:

Obtaining property by deception


- (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).
- (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or to retain.

194. As Counsel Assisting correctly notes “a person dishonestly obtains property belonging to another (or a financial advantage) if he or she knows he or she has no legal right to the property or financial advantage”.⁸²
195. Even if Mr Cook’s evidence on the “dressing-up” point is preferred to Ms Jackson’s, no offence under s.81 or s.82 could have been committed by Ms Jackson.
196. It is clear from the definition of “dishonestly” in s.81(2) that, it requires the prosecution to establish the necessary *mens rea* and, that if an accused believes that he or she has a “legal right” to the property or financial advantage in question, there can be no dishonesty in the requisite sense.
197. The evidence incontrovertibly shows that the Vic 3 Branch had a legitimate claim in respect of the Union Penalties Claim. Peter Mac, Mr Cook, Dr Hillis and Dr Wellington all accepted that this claim existed and was legitimate. (In fact, the documentary evidence demonstrates that it was indefensible).
198. Nor can it be disputed that protracted negotiations to settle the Union Penalties Claim took place between 20 June 2003 and 9 September 2003, after *all* other issues in dispute had been resolved.

⁸² *R v Todo* [2004] VSCA 177 at [24] and [26], following *R v Salvo* [1980] VR 401 quoted at CAS 12.3, para 33

199. Ms Jackson was the chief negotiator on behalf of the Union in those negotiations. Mr Cook was the chief negotiator for Peter Mac.
200. During the course of these further negotiations, Ms Jackson informed Peter Mac (presumably through Mr Cook) that the Union proposed to commence proceedings in respect of the Union Penalties Claim by 24 July 2003 if the issue of quantum was not resolved. The evidence shows that Peter Mac resolved the Union Penalties Claim, in part, to avoid the commencement of proceedings in respect of that claim.
201. It follows from the above that Ms Jackson must have genuinely believed that this claim existed, that it was legitimate and that it was *this* claim that was being settled through the Deed of Release. Otherwise the entire negotiation process is simply inexplicable.
202. Indeed, it cannot seriously be contended that Ms Jackson did not believe that the Union - qua the Vic 3 Branch - had a "legal right" to whatever financial benefit accrued from the settlement of the Union Penalties Claim.
203. The fact that the terms of the deed made the settlement sum referable to the Union's costs and expenses is, on this view, irrelevant.
204. Whatever the precise terms of the deed recording the settlement, they did not alter the fact that the Union had a legitimate legal right to recover penalties from Peter Mac; or that Ms Jackson believed in the existence of that right.
205. It is, therefore, submitted that the Commission should reject Counsel Assisting's submissions in respect of sections 81 and 82 of the Crimes Act 1958 (Vic) together with his submission that Ms Jackson should be referred to Victorian Director of Public Prosecutions.
206. Rather, the Commission should make an affirmative finding that there could have been no offence committed by Ms Jackson.

F.2 NHDA Allegations and Issues (CAS 12.3, paras 41 to 86)

207. Counsel Assisting makes a number of submissions favourable to Ms Jackson in relation to the NHDA fund.
208. Counsel Assisting accepts Ms Jackson's account of the BCOM resolution establishing the fund. He also accepts that the BCOM was made aware of transactions to and from the NHDA, and that payments to the NHDA were recorded in the Vic 3 Branch financial records. Counsel Assisting also accepts that there was no attempt to hide those transactions.
209. It is submitted that the Commission should accept these submissions and make findings to similar effect
- (a) Exercise book - unsatisfactory governance (CAS 12.3, para 54)
210. Counsel Assisting submits that "all on any view, maintaining is the only record of the expenditure of significant sums a hand written exercise book is entirely unsatisfactory from a governance perspective". Ms Jackson accepts this submission.
- 

(b) Minutes of 3 July 2008 and 25 February 2010 (CAS 12.3, para 56)

211. Counsel Assisting notes the existence of these minutes, but makes no further submission about them.
212. Ms Jackson was cross-examined by Counsel Assisting in relation to the minutes of the BCOM meeting of 3 July 2008 and she questioned the authenticity of the document on the basis that it was the invariable practice within the branch for the President to sign minutes, and not Ms Jackson. She also pointed out that staple marks appearing on the copy which were inconsistent with the manner in which the Vic 3 Branch minutes were kept). (Tr 30.7.2014, pp 402-405)
213. During the course of this cross examination, Counsel Assisting accepted that the payments referred to in the minutes had never in fact been made.
214. Ms Jackson was never cross-examined in relation to the 25 February 2010 minutes.
215. In the circumstances, it is submitted that the Commission should make no findings in relation to this issue.

(c) Overseas trips (CAS 12.3, para 58)

216. In this paragraph Counsel Assisting raises the application of NHDA monies for overseas travel. Counsel Assisting does not make any submission as to any finding that ought be made, let alone a finding adverse to Ms Jackson.
217. Ms Jackson insists that all union money, and NHDA money, spent on overseas travel was spent with lawful and informed BCOM approval (the BCOM Peter Mac Approval or the BCOM HESTA Board Fees Approval).
218. In the circumstances, it is submitted that no adverse findings should be made against Ms Jackson in relation to this matter.

(d) Withdrawals from March 2008 and the \$50,000 payment to Jeff Jackson(CAS 12.3, paras 59 to 63)

219. Counsel Assisting correctly submits that these payments from the NDHA fund were made in respect of the Jeff Jackson/Fegan fight then going on within the Vic 1 Branch.
220. Ms Jackson agrees with that submission – which accords with the evidence given on 30 July 2014 (Tr 411 to 14/12) on 28 August 2014 (Tr 791) and contained in her witness statement of 14 August 2014 (at para 97).
221. In the circumstances, it is submitted that is not open to the Commission to make any adverse finding against Ms Jackson in relation to these matters.



(e) Related Party issue (CAS 12.3, paras 64 and 65)

222. Counsel Assisting submits that “Ms Jackson did not disclose the payment in the accounts of HSU Victoria No 3 Branch as a ‘related party transaction’”. Counsel Assisting also asserted that “Ms Jackson accepted that the payment would have constituted an impermissible use of union money had the money been paid directly from the HSU Victoria No 3 Branch account to Mr Jackson”.
223. Ms Jackson accepts that disclosure was not made in respect of the payment.

(f) \$50,000 payment to Jeff Jackson - Property Settlement (CAS 12.3, paras 66-75)

224. Counsel Assisting makes various submissions in respect of this issue before concluding that it ought not be considered further because it will be determined in the Federal Court proceedings against Ms Jackson.
225. It is clear, however, on the basis of CAS that there is no evidence to support a finding that any NHDA funds were utilised by Ms Jackson to make payments in respect of her family law settlement.
226. Ms Jackson denied in evidence that any NHDA funds were so used (28.8.2014 Tr 795-796; 29.8.2014 Tr 898-899).
227. In the circumstances, it is submitted that the Commission should make a finding that no NHDA funds were utilised by Ms Jackson to make payments in respect of her family law settlement.

(g) Payments after amalgamation (CAS 12.3, paras 76-79) and Payments after ceasing to hold office. (CAS 12.3, paras 80-82)

228. Counsel Assisting makes no submission adverse to Ms Jackson in respect of these issues.
229. On the evidence, there is no basis for any adverse finding to be made in respect of Ms Jackson.

(h) Governance issues (CAS 12.3, paras 83 to 86)

230. In relation to para 83, it is submitted that the evidence does not paint quite as stark a picture of poor governance in the Vic No 3 Branch.
231. Ms Jackson accepts such criticisms in relation to the “slush fund” constituted by the NHDA, but contends that, in all other respects, the governance of the Vic 3 Branch was anything but poor.
232. In relation to the NHDA, non-disclosure and other aspects of “poor governance” identified by Counsel Assisting are the *sine qua non* of a slush fund. Ms Jackson accepts the governance submissions made by Counsel Assisting on this topic.

F.3 Other Allegations Against Kathy Jackson (CAS 12.4)

(a) Credit cards (CAS 12.4, paras 4-8)

233. Counsel Assisting submits that, because this is an issue to be determined in the Federal Court proceedings, it is not appropriate for the Commission to deal with it. Ms Jackson accepts that submission.

(b) Neranto Pty Ltd (CAS 12.4, paras 9-12)

234. Counsel Assisting submits that, because this is an issue to be determined in the Federal Court proceedings, it is not appropriate for the Commission to deal with it. Ms Jackson accepts that submission.

(c) \$58,000 payment to Jeff Jackson

235. Counsel Assisting correctly prefers Ms Jackson's, Ms Holt's and Mr Bolano's evidence on this topic to that of Jeff Jackson (CAS 12.4, paras 13 to 24).
236. Ms Jackson accepts Counsel Assisting's submission that the Vic 3 Branch did not lodge the requisite statement under s. 237 of the *Fair Work (Registered Organisations) Act 2009 (Cth)*.

(d) Honorariums – kitty. (CAS 12.4, paras 25-54)

237. Ms Jackson accepts Counsel Assisting's submissions that BCOM authorised the payment of the honorarium to members (CAS 12.4, para 31); and that BCOM had the power to authorise these payments (CAS 12.4, para 42).
238. Ms Jackson accepts that the arrangement led to breaches of section 237 of the *Fair Work (Registered Organisations) Act 2009 (Cth)*, but does not accept that the arrangement breached s. 190 of the Act. Ms Jackson.

(e) Cheques (CAS 12.4, paras 55-58)

239. Counsel Assisting submits that, because this is an issue to be determined in the Federal Court proceedings, it is not appropriate for the Commission to deal with it. Ms Jackson accepts that submission.

(f) Ab Hinc (CAS 12.4, paras 59-64)

240. Ms Jackson accepts Counsel Assisting's submission that there was no attempt to conceal the nature of the \$5000 payment, and asks the Commission to make a finding to that effect.



(g) \$63,000 honorarium to KJ (CAS 12.4, paras 65-67)

241. Counsel Assisting submits that, because this is an issue to be determined in the Federal Court proceedings, it is not appropriate for the Commission to deal with it. Ms Jackson accepts that submission.

(h) Governance issues re above (CAS 12.4, paras 68-70)

242. Ms Jackson did not accept the submissions made by Counsel Assisting at paras 68 and 69. She does accept, however, that there were some breaches of proper governance principles.

G - MR BROWN'S EVIDENCE RE THOMSON (CAS 13.1)


243. It is submitted that the analysis in CAS 13.1, paras 1 to 36, is flawed.
244. For the reasons that follow, it is submitted that the Commission should not make the finding sought by Counsel Assisting in CAS 13.1, para 36.
245. Counsel Assisting's analysis is based upon an acceptance of Mr Brown's evidence in preference to Ms Jackson's. It is submitted that Mr Brown's evidence should be rejected on this topic for the following reasons:
- (a) Mr Brown's evidence has not been properly tested. Counsel Assisting's examination of Mr Brown was adjourned on account of illness. Counsel Assisting did not complete his examination. Mr Brown has not been made available for cross-examination;
 - (b) the telephone intercepts Brown MFI 1 and 2 demonstrate that Mr Brown's evidence should not be accepted. The picture he paints is incompatible with his conspiring with Mr Williamson evidenced in those intercepts;
 - (c) the adverse matters demonstrated against Mr Brown in CAS count against according weight to his evidence against Ms Jackson;
 - (d) Mr Brown's contention is inconsistent with his own evidence. On Mr Brown's own analysis, if Ms Jackson and Mr Williamson wanted to pass a retrospective approval resolution in relation to Mr Thomson's questionable expenses, then they had the numbers between them to pass that resolution and it would have been passed. No such resolution was passed;
 - (e) Mr Brown's evidence is implausible given the weight of evidence demonstrating Ms Jackson's principled pursuit of Mr Thomson's corruption.
246. When one compares the actions of Mr Brown and Ms Jackson in respect of the allegations of corruption levelled against Mr Williamson during the period 12 September 2011 and 4 April 2012 the contrast could not be starker.
247. Ms Jackson pursued those allegations with vigour and sought to have the HSU deal with those allegations in a proper manner. Mr Brown, however, protected Mr Williamson and prevented the HSU from calling him to account.

248. It is submitted that all these matters are telling against the acceptance of the submission in CAS 13.1, para 36, and the Commissioner should make no such finding.
249. Rather, the Commission should accept Ms Jackson's evidence on this topic, and make a positive finding that she was the instrumental force in exposing Mr Thomson's misconduct.

H - POLICY ISSUES

250. It has not been possible to obtain specific instructions from Ms Jackson on Counsel Assisting's recommendations in relation to policy issues.
251. It can be said, however, on the basis of Ms Jackson's evidence to the Commission and previous public statements that she is a forceful advocate for reform and would appear to be in general agreement with the recommendations made in CAS 19.2, paras 39 to 58; CAS 19.3, para 43; CAS 19.4, para 18 and CAS 19.7.

I - CONCLUSION - WHAT SHOULD THE COMMISSION DO IN RESPECT OF MS JACKSON?

252. Counsel Assisting was correct to acknowledge that Ms Jackson has paid "a heavy price" for being a whistleblower and exposing the corrupt conduct of Craig Thomson and Michael Williamson.
253. Ms Jackson is the first to admit that she has engaged in actions that fall short of proper governance standards, but those lapses cannot account for the extraordinary campaign against her conducted by the HSU for the past three years.
254. She has been pilloried in the media, deserted by her union, left without a salary, dragged through the Courts and had her health destroyed.
255. Further, when she appeared before the Royal Commission to give evidence in respect of her knowledge for the benefit of the Royal Commission's investigation, she became a target of inquiry, and the subject of preliminary findings that her conduct should be referred for prosecution. This alone would persuade any potential whistleblowers from coming forward.
256. No other trade union official has suffered her fate, and this gives rise to the question "why has she been treated in this way"?
257. The answer, it is submitted, is clear - because she is a whistle-blower who had the courage to expose endemic corruption within the HSU.
258. Whatever Ms Jackson's failings - and she has candidly admitted them, unlike those who sought to destroy her - she does not deserve what has befallen her, and, she ought not be condemned by the Commission.
259. Counsel Assisting has submitted that Ms Jackson should be referred to the Victorian DPP for consideration as to whether she should be prosecuted for breaches of s. 81/s. 82 of the *Crimes Act 1958 (Vic)*.
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260. In that he was mistaken, and, for the reasons set out above, the Commission should reject that submission.
261. It is further submitted, however, that the Commission should go further than that, and make findings which:
- (a) give her a measure of finality; and
 - (b) give her a measure of vindication, by acknowledging what she has done and condemning those who have sought to destroy her.
262. The Commission should do this, not only because Ms Jackson's actions warrant it, but because if the Commission does not do it, no one in the future will come forward to expose systemic corruption within the trade union movement.



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