

PARTS 9 - 13: HEALTH SERVICES UNION

1. This part of the Submissions in Reply of Counsel Assisting concerns submissions received in response to Parts 9 to 13 of the submissions of Counsel Assisting in Chief.¹ Those parts concerned the Health Services Union of Australia and the Health Services Union of New South Wales (an organisation registered in New South Wales). The chapter numbers, chapter titles and abbreviations adopted in the Submissions in Chief are employed again here.
2. The general approach taken by Counsel Assisting to the Submissions in Reply has already been explained in Part 1 above and is not restated in full here – in short, the Submissions in Reply are limited to addressing a number of specific identified points raised by affected parties. In this part, specific reply is made to submissions made in response to Chapters 10.3, 11.3, 12.3 and 12.4 of the submissions of Counsel Assisting in Chief. Where a particular point raised by an affected party is not dealt with in these Submissions in Reply (whether in respect to those chapters or any others in Parts 9 to 13 of the Submissions in Chief), the answer to it already appears in the Submissions in Chief and it is not necessary or desirable to state it again in this document.

¹ In these submissions in reply, references to chapter numbers correspond to chapters in Counsel Assisting's submissions in chief dated 31 October 2014 (**Counsel Assisting's Submissions in Chief**).

CHAPTER 10.3: MR PETER MYLAN – ACTING GENERAL SECRETARY

INTRODUCTION

3. This section of the Reply concerns submissions received by Mr Peter Mylan in response to Chapter 10.3 of the Submissions in Chief of Counsel Assisting the Royal Commission. Those submissions related to Mr Mylan’s conduct during the HSU East period.
4. The Commission received submissions from:
 - (a) Mr Peter Mylan; and
 - (b) HSU National Branch.
5. The approach of Counsel Assisting in making submissions in reply is set out in detail in Part 1 above. This chapter of the submissions in reply, consistent with that approach outlined earlier, will only respond to matters raised in submissions by other parties that raise new arguments not addressed (expressly or implicitly) in the submissions of Counsel Assisting in Chief and to which Counsel Assisting considers a specific response is appropriate. Counsel Assisting otherwise relies on their submissions in chief in response to the balance of the submissions received from other parties.

REPLY TO SUBMISSIONS OF MR MYLAN

A APPROACH OF COUNSEL ASSISTING AND THE COMMISSION

6. The submissions made on behalf of Mr Mylan make a number of criticisms of the approach of Counsel Assisting and the recommendations made in the submissions of Counsel Assisting in Chief.

7. First, the submissions made on behalf of Mr Mylan contend that no adverse findings ought be made against Mr Mylan because they would ‘directly relate to the HSU’s breach of contract claims against [Mr Mylan]’.²
8. It should be noted that Mr Mylan had every opportunity to present the Commission with a copy of the pleadings the subject of the civil proceedings pending in the Supreme Court of New South Wales but did not take up that opportunity. Mr Mylan however seeks to rely upon the possibility of a contempt argument (with no reference to case law on the topic) and to a paragraph of an interlocutory decision of Hammerschlag J in support of the contention that the Commission should abstain from making findings adverse to him.
9. What Mr Mylan’s submissions fail to appreciate is that no submission has been made by Counsel Assisting that this Commission make a finding that Mr Mylan breached his employment contract with HSU NSW. The findings and recommendations are more limited and relate to the potential breach of s 192H of the *Crimes Act (NSW) 1900* and contraventions of various provisions of the *Fair Work (Registered Organisations) Act*. The fact that they may have some relationship with factual issues that may be in dispute in civil proceedings in respect of a breach of contract claim does not raise either the prospect of direct overlap or, in any event, the possibility of contempt.
10. Further, in the submissions of Counsel Assisting, the role of Mr Mylan was integral to what Mr Mylan’s submissions have identified as a key theme explored by this Commission, namely the circumstances in which Mr Williamson was able to attain a position of extraordinary trust and power – including after the raising of very serious allegations of misconduct against him. Mr Mylan seeks to characterise those issues as having little to do with him and to be, in truth, matters about the role of the ‘Union Council in controlling the affairs of the Union’.³ However that submission fails to take account of the fact that after Mr Williamson was on leave, it was Mr Mylan who accepted the position of Acting General Secretary of HSU East. The CANME invoices story represents a powerful demonstration of the myriad of ways in which Mr Williamson, assisted by Mr Mylan and others, continued to exert the influence he did to

² Submission of Peter Mylan, 19/11/2014, para 11.

³ Submission of Peter Mylan, 19/11/2014, paras 1-2.

the detriment of the union which at that point was paying for the services of Mr Temby QC and Mr Robertson and was under an increasingly public cloud of scandal because of Mr Williamson's conduct and its handling of the allegations.

11. The second general criticism made on behalf of Mr Mylan is that he has been denied procedural fairness by not having advance notice of the criticisms that have been made of his conduct in the submissions of Counsel Assisting in Chief.⁴
12. Again, no case law is relied upon in support of the implicit contention that it was necessary Mr Mylan be notified in advance of any criticisms that might be in contemplation or subsequently made by Counsel Assisting in their submissions. No mention is made by Mr Mylan of the fact he was specifically asked to prepare a witness statement directed to various topics. Mr Mylan did not request that any particular witness be recalled so that his counsel might cross-examine that person on matters relevant to Mr Mylan's conduct. Nor do the submissions made on behalf of Mr Mylan identify any particular witness Mr Mylan relies upon as being a witness the cross-examination of whom might have elicited answers supportive of Mr Mylan's position and of assistance to him in meeting the criticisms made of his conduct both during the course of his examination by Senior Counsel Assisting and in the submissions of Counsel Assisting in Chief. The specific contentions of Mr Mylan that certain relevant evidence has been overlooked by Counsel Assisting are addressed separately below.

B SIGNING REPLACEMENT CANME INVOICES TO CREATE A FALSE IMPRESSION

13. The submissions made by Mr Mylan contend that in his evidence, Mr Mylan 'did not go so far as agreeing that the false impression that was created was the false impression that the invoices were created at the time of payment.'⁵ This submission rests on the transcript extract reproduced at paragraph 24 of Mr Mylan's submissions. With respect, it is impossible to understand how the submission is correct by reference to the very transcript reference extracted.
14. Similarly, in paragraph 30 of Mr Mylan's submissions it is contended that he 'correctly' rejected the proposition that he participated in the process set out in paragraph [62] of

⁴ Submission of Peter Mylan, 19/11/2014, paras 14-17.

⁵ Submission of Peter Mylan, 19/11/2014, para 25.

the Police Agreed Facts.⁶ The submissions are misconceived in so far as they characterise the ‘process’ set out in paragraph [62] of the Police Agreed Facts as limited to the mere *creation* of supplier invoices, whereas the ‘process’ referred to in paragraph [62] includes creating the invoices and creating the appearance of authorisation as at the date of the invoice so as to give the misleading impression of work being ‘done or approved in accordance with the proper process’.⁷ Mr Mylan’s involvement in the process was to sign the replacement invoices (which included the misleading indicia of proper and contemporaneous authorisation); his involvement was a necessary component of a process by which documents were created that falsely suggested ‘work had been done in accordance with proper process’⁸ when it had not.

15. As to paragraph 31 of the submissions of Mr Mylan it too is misconceived. Not only was it not necessary as a matter of procedural fairness for it to be put to Mr Mylan that he had contravened s 192H specifically, but moreover and in any event, the elements of the offence were put to him. Further, it is not submitted on Mr Mylan’s behalf that had the questions been any different he could and would have proffered a further explanation of relevance to any consideration as to whether he contravened s 192H of the *Crimes Act (NSW) 1900*.

C MR MYLAN’S DUTIES AS AN OFFICER OF THE UNION

16. In paragraph 33 of the submissions made on behalf of Mr Mylan there appears to be a submission that Mr Mylan’s conduct could not have contravened his obligations as an officer of the HSU pursuant to the *Fair Work Act 2009* (Cth) because in signing the CANME invoices he was exercising his powers as an officer of the state-registered HSU NSW, not a branch of the federal union.
17. If there is some technical issue as to in which capacity Mr Mylan was exercising powers to authorise expenditure, then the resolution to the issue is that Mr Mylan ought be considered for contravention of a corresponding duty pursuant to s 267 of the *Industrial Relations Act 1996* (NSW) which provides that ‘an officer of a State organisation must not, with intent to deceive or defraud the organisation or the members of the

⁶ Mylan MFI-3, 25/9/2014, p 9.

⁷ Mylan MFI-3, 25/9/2014, p 9.

⁸ Mylan MFI-3, 25/9/2014, p 9.

organisation or for any other fraudulent purpose, act dishonestly in the exercise of any of the powers or the discharge of any of the duties of his or her office’.

D MR MYLAN’S COMMITTEMENT TO TRANSPARENCY

18. The intent of paragraphs 39 – 42 of the submissions made on behalf of Mr Mylan are, with respect, difficult to fathom. The general point made in the submissions of Counsel Assisting in Chief was that Mr Mylan’s conduct as the Deputy General Secretary and, from September 2011, the Acting General Secretary of HSUeast and the HSU East branch of the federal union fell far short of what members could reasonably have expected from an officer of that seniority and in receipt of the salary that was then paid to Mr Mylan. There is no answer to that point in the submissions made on behalf of Mr Mylan in paragraphs 39 – 42. The attempt to rely on technicalities in the wording used by Mr Mylan in putting the 22 September 2011 resolution to Union Council,⁹ and to rely upon the absence of a commitment not to undermine the efficacy of Strikeforce Carnavon is hardly exculpatory of Mr Mylan. If anything, it is more damning.

E MR WILLIAMSON’S CONTINUAL INVOLVEMENT

19. There is an elaborate attempt in paragraphs 61 – 65 of the submissions made on behalf of Mr Mylan to defend the transparency of his conduct to other members of Union Council on the basis that other people who have given evidence were not asked about whether they were aware of Mr Williamson’s continued involvement and the extent of it. What Mr Mylan’s submissions fail to confront is the very absurdity of the conduct by himself and others in closing down the meeting on a number of occasions in order to have a number of private telephone calls with Mr Williamson for advice – in at times excruciating detail – on how to conduct the meeting and word the resolutions being proposed. If the nature and extent of Mr Williamson’s continuing involvement really was an openly acknowledged matter, then this conduct, and the content of the intercepted calls admitted into evidence, would make little sense at all. The only logical explanation for what was going on was that Mr Mylan and others were content to, and desirous of, having Mr Williamson maintain almost complete control despite the public perception that he was ‘on leave’.

⁹ Hart MFI-1, 16/6/2014, pp 14-17.

20. In paragraphs 66 to 71 the submissions made on behalf of Mr Mylan attempt to argue that Mr Mylan may not really have been acting so as to maintain Mr Williamson's influence. It is said that the existence of a factional battle, and the fact Mr Mylan also consulted with persons other than Mr Williamson, means that a finding Mr Mylan was essentially acting as Mr Williamson's puppet cannot be maintained. The fact that there is a factional battle on foot does not mean an acting leader must look to his predecessor for direction. The fact that an acting leader also speaks to other advisers – including where recommended to do so by Mr Williamson – does not refute the allegation Mr Mylan was really Mr Williamson's puppet. It is further said that Counsel Assisting never put to Mr Mylan the proposition that he, Mr Mylan, did not want Mr Williamson to lose control (paragraph 71). There is an element of absurdity to that submission. It was clearly put to Mr Mylan – and indeed the flavour of his own evidence – was that he was acting so that Mr Williamson, the leader of the team that he belonged to, continued to run the union and that he saw it as being in his own self-interest for that to be the case:¹⁰

Q. Your recount in paragraph 68 that Mr Williamson had asked you to provide a version to Mr Temby and Mr Robertson --

A. Yes.

Q. -- telling them, "I did know about Canme Services."

A. Yes.

Q. Telling them something false; is that right?

A. Yes.

Q. And in asking you to do this, Michael said:

You have to do this one, mate.

A. Yes.

Q. Meaning, "You've got to tell a falsehood for me"?

A. Well, I understood I had to do that for him or, you know, I was in the situation where there was going to be an outcome which wouldn't be favourable to me. Mr Williamson was a fairly powerful person and asked people to do lots of things.

THE COMMISSIONER: Q. What I don't quite understand is this, I can quite understand why you say he was once a very powerful person, but by 25 January or so 2012, Mr Williamson was supposed to be on leave, completely sidelined, not doing anything within the union?

¹⁰ Peter Mylan, 25/9/14, T:1266.15-1267.43

SUBMISSIONS IN REPLY OF COUNSEL ASSISTING

A. Yes, he would have been at that time, that's right.

Q. Well, what power did he have?

A. The power he had was that he was still the General Secretary.

Q. No, you were the General Secretary.

A. I was the Acting General Secretary.

Q. But he was nothing, he was --

A. Well --

Q. It is a euphemism: "stepped aside", "stepped down"?

A. I can only - with respect, I can only answer the question as I understood the set of circumstances at the time. It was my understanding that counsel provided Williamson with a request to take leave. So he was still - as I understood - elected by the membership as the General Secretary. I was just acting in the role for that period of time. I would still see that I would take instruction from him in that capacity and the other position of power he had that he was the leader of the team that I belonged to, the electoral faction in the HSU.

Q. I think you're rather on --

A. That is how the union worked. It might not work, you know, in an office situation, but that's how the union works, as far as I understood it to be. If I was advised or told differently at the time, I may have taken a different view, but that's how I understood it to be.

MR STOLJAR: Q. "That's how the union works." You mean if your boss tells you to lie, you lie?

A. Well, as I said, he's a powerful man. He had a lot of, you know, contacts and he held various powerful positions.

Q. If you could just attend to my question. Is that what you meant when you said, "That's how the union works", if your boss tells you to lie, you lie?

A. No, I wasn't referring to that. I was referring to the fact how the union works, that in answer to the Commissioner's question, why would you still take instruction from him, what power did he have? And I said my understanding is the power he had was that he was still the General Secretary. I was only acting in that role for a set period of time as determined by union council.

F ASSISTANCE PROVIDED BY THE COMMISSION'S STAFF

21. The assertion made at paragraph 54 of the submissions of Mr Mylan, that the Office of Counsel Assisting provided no response to requests for assistance, are incorrect. Requests for the location of documents in evidence by Mr Mylan's solicitors were responded to by Commission staff.

CHAPTER 11.3: RIGHT OF ENTRY PERMIT TESTS

INTRODUCTION

22. This section of Counsel Assisting's submissions in reply concerns submissions received in response to Chapter 11.3 of Counsel Assisting's Submissions in Chief, which related to the Health Services Union (HSU) No.1 Branch (now named the Health Workers' Union) and its practices regarding right of entry permits.
23. The Commission received submissions made on behalf of the following employees and officials of the HWU: Ms Diana Asmar, Mr David Eden, Mr Nick Katsis, Ms Kimberley Kitching, Mr Darryn Rowe and Mr Sasha Trajcevski-Uzunov (the **HWU Officials' Submissions**).
24. The approach of Counsel Assisting in making submissions in reply is set out in detail in Part 1 above.

REPLY TO THE HWU OFFICIALS' SUBMISSIONS

G NICK KATSIS AND SASHA TRAJCEVSKI-UZUNOV

25. The HWU Officials' Submissions contend that the evidence of Mr Katsis and Mr Trajcevski-Uzunov should be accepted.
26. Set out below are tables setting out the evidence given by Mr Katsis and Mr Trajcevski-Uzunov and comparing those accounts with the evidence which is against them.

G1 Mr Nick Katsis

27. In September 2013, the Fair Work Commission commenced an investigation into the No. 1 Branch's procedures for obtaining right of entry permits. In September 2013, the Fair Work Commission contacted Mr Katsis regarding his right of entry test. Mr Katsis told the Fair Work Commission that:

SUBMISSIONS IN REPLY OF COUNSEL ASSISTING

- (a) he recalled taking the test on 15 February 2013 in the No. 1 Branch office before visiting a workplace early in the afternoon; and
- (b) he recalled printing off the training material earlier that afternoon before completing the test and that the test took him more than 30 minutes to complete.¹¹

28. Mr Katsis gave the following evidence regarding his right of entry test to the Royal Commission:

- (a) he personally sat and undertook a right of entry test during the early stages of his employment as an organiser;¹² and
- (b) neither Ms Kimberley Kitching or any other person completed his right of entry test for him.¹³

29. This evidence cannot be maintained in light of the following facts and contradictory evidence.

Facts
<ol style="list-style-type: none">1. On 30 January 2013, an application form for the Australian Council of Trade Unions (ACTU) online training course for Mr Nick Katsis was emailed to a generic ACTU email account by Ms Peggy Lee.¹⁴2. The records of the ACTU show that Mr Katsis' right of entry test was commenced on 15 February 2013 at 2.59pm (AEST) or 3.59pm (AEDT) and completed at 3.02pm (AEST) or 4.02pm (AEDT).¹⁵3. On 15 February 2013 at 4.03pm, a generic email from the ACTU was sent to Mr Katsis attaching a Certificate of Completion for the right of entry course.¹⁶

¹¹ McCubbin, MFI-1, 25/8/14, p 1672.

¹² Nick Katsis, witness statement, 19/9/14, para 7.

¹³ Nick Katsis, 19/9/14, T:1059.17-23; 25-37.

¹⁴ McCubbin MFI-1, 25/8/14, p 1689.

¹⁵ McCubbin MFI-1, 25/8/14, p 1698.

¹⁶ McCubbin MFI-1, 25/8/14, p 1697.

4. Mr Katsis' telephone records show that on 15 February 2013, he made telephone calls from South Melbourne where the No. 1 Branch office is located from around 11.39am to 1.33pm (AEDT). Mr Katsis then made telephone calls from Albert Park at 1.39pm (AEDT) and Armadale at 1.50pm, 1.51pm and 1.52pm (AEDT). Mr Katsis made telephone calls from Malvern at 1.53pm and 3.48pm (AEDT).¹⁷
5. On 25 February 2013, Ms Lee sent an email to the Fair Work Commission which attached an application for a right of entry permit for Mr Katsis.¹⁸
6. On 25 February 2013, the application was returned by the Fair Work Commission to Mr Katsis for amendment as the training received had not been further described as required by the application.¹⁹
7. On 22 March 2013, Ms Lee sent an email to the Fair Work Commission which attached an amended right of entry permit application for Mr Katsis.²⁰
8. On 10 April 2013, Mr Katsis was issued with a right of entry permit.²¹
9. In September 2013, the Fair Work Commission investigation commenced. On 4 September 2013, Mr Chris Enright of the Fair Work Commission wrote to Mr Katsis regarding the investigation and asked Mr Katsis to provide a statutory declaration confirming that he had received the appropriate training and had completed the right of entry test.²²
10. On 16 September 2013, Mr Katsis supplied a statutory declaration dated 12 September 2013 to the Fair Work Commission which provided that he had received the right of entry training and completed the right of entry test himself.²³

Contrary evidence

Computer records

1. The Fair Work Commission engaged the services of an independent computer forensic expert, Mr Scott Mann of Invest-e-gate Pty Ltd, who conducted tests and inquiries and provided a report to the Fair Work Commission dated 17 February 2014.²⁴ The report found:²⁵
 - a. the ACTU computer records display time as GMT+10 with no automatic adjustment for daylight savings, therefore if daylight savings was applicable, the times should be adjusted by adding one hour to the time shown on the ACTU records to align with the time the activity actually occurred;
 - b. testing showed that the external IP addresses were recorded correctly;

¹⁷ McCubbin MFI-1, 25/8/14, p 1681.

¹⁸ McCubbin MFI-1, 25/8/14, p 1690.

¹⁹ McCubbin MFI-1, 25/8/14, p 1576.

²⁰ McCubbin MFI-1, 25/8/14, p 1690.

²¹ McCubbin MFI-1, 25/8/14, p 1577.

²² McCubbin MFI-1, 25/8/14, p 1577.

²³ McCubbin MFI-1, 25/8/14, pp 1578, 1603.

²⁴ McCubbin MFI-1, 25/8/14, p 1584.

²⁵ McCubbin MFI-1, 25/8/14, pp 1699-1719.

- c. limited testing showed that the times and dates recorded in the ACTU records as well as the record of the material that was accessed was correct;
 - d. testing showed that the ACTU records showed consistent logging with no gaps and no obvious inconsistencies with times and dates; and
 - e. if further evidence was required, the host provider could be requested to produce the system logs and configuration settings and evidence of maintenance over time including any errors.
2. The HWU engaged KPMG to consider the Invest-e-gate report and consider whether the allegations of misuse of the ACTU online right of entry training course could be substantiated. On 11 November 2014, KPMG issued its report which found:²⁶
 - a. as original source data was not provided to KPMG it was not clear to KPMG (and hence KPMG could not say) what transformation, migration, backup and restore processes occurred and how they may have impacted on the records;
 - b. no information was provided to KPMG on the specific processes or the testing conducted on those processes' and their reliability; and
 - c. some discrepancies in time zones were observed and it was not clear what time zone the ACTU records were in.
 3. The Invest-e-gate report and the KPMG report both acknowledge that further information could be obtained to assess the reliability of the data. The main point of contention in the reports is whether the times were accurate or not. The ACTU record shows that Mr Katsis' right of entry test was completed at 3.02pm and it is submitted that this should be adjusted to 4.02pm for daylight savings. The ACTU record shows that Mr Katsis' Certificate of Completion was viewed at 3.02pm.²⁷ The Certificate of Completion was emailed to Mr Katsis from a generic ACTU email address at 4.03pm.²⁸ As soon as the test is successfully completed, a generic email attaching the Certificate of Completion is sent to the applicant's email address. As Mr Katsis' Certificate of Completion was sent at 4.02pm, this suggests that the ACTU record should be adjusted by adding one hour to account for daylight savings. Further, the coincidence in timing between the completion of the test (as adjusted for daylight savings time) and the receipt of the generic email from the ACTU is strong evidence that the ACTU's records as to time are accurate and reliable.

Telephone records

4. As noted above, Mr Katsis' telephone records show that on 15 February 2013, he made telephone calls from South Melbourne where the No. 1 Branch office is located from around 11.39am to 1.33pm (AEDT). Mr Katsis then made telephone calls from Albert Park at 1.39pm (AEDT) and Armadale at 1.50pm, 1.51pm and 1.52pm (AEDT). Mr Katsis made telephone calls from Malvern at 1.53pm and 3.48pm (AEDT).²⁹
5. It is highly unlikely that Mr Katsis could make a telephone call at 3.48pm (AEDT) near Malvern and then be sitting at a computer at the No.1 Branch at Park Street, South Melbourne 11 minutes later to commence his right of entry test at 3.59pm (AEDT). Malvern is approximately 7.6 kilometres from the No. 1 Branch office in South Melbourne. The trip alone would take longer than 11 minutes, and that does not account

²⁶ Submissions on behalf of named HWU officials, attachment 2.

²⁷ McCubbin MFI-1, 25/8/14, p 1698.

²⁸ McCubbin MFI-1, 25/8/14, p 1697.

²⁹ McCubbin MFI-1, 25/8/14, p 1681.

for any time spent getting into and out of the car, or parking.

6. Mr Katsis produced a diary entry for 15 February 2013 which records that he had a meeting scheduled from 2 – 3pm with delegates and members followed by a meeting with human resources at the Cabrini Hospital.³⁰ There is a Cabrini Hospital on Wattletree Road, Malvern. Mr Katsis' diary record and telephone records support a finding that he was in Malvern from around 1.50pm to 4pm on 15 February 2013.

Robert McCubbin's evidence

7. Mr McCubbin deposed that Ms Kitching completed the right of entry tests for a number of people including Mr Katsis.³¹
8. Mr McCubbin said that he was concerned about this because Mr Katsis did not have any experience in accessing work sites.³²

Jayne Govan's evidence

9. Ms Govan deposed that Mr Katsis did not complete his right of entry test. Ms Govan said that Mr Katsis started at the No. 1 Branch at the same time as she did and she recalled discussing the right of entry test with him.³³
10. Ms Govan deposed that it was common knowledge that Ms Kitching was sitting right of entry tests on behalf of the organisers and it was not something that was hidden from anyone.³⁴
11. Ms Govan deposed that Mr Katsis had told her that Ms Kitching sat his right of entry test for him.³⁵
12. No compelling reason has been given to disbelieve Ms Govan as to the fact of the conversations to which she has deposed or their content.

Peggy Lee's evidence

13. Ms Lee deposed that she was on annual leave in Hong Kong from 13 February 2013 to 6 March 2013 and that during this time she did not access the online ACTU training course or have anything to do with right of entry permits.³⁶
14. Ms Lee deposed that when she returned from annual leave there were a bundle of right of entry applications, Certificates of Completion and right of entry test results for lodgement

³⁰ McCubbin MFI-1, 25/8/14, 1688.

³¹ Robert McCubbin, witness statement, 25/8/14, para 19.

³² Robert McCubbin, witness statement, 25/8/14, para 21.

³³ Jayne Govan, witness statement dated 16/9/13, 25/8/14, paras 17-18.

³⁴ Jayne Govan, witness statement dated 16/9/13, 25/8/14, paras 17-18.

³⁵ Jayne Govan, 16/9/14, T:965.6-25.

³⁶ Peggy Lee, witness statement, 25/8/14, paras 38-39.

with the Fair Work Commission. Ms Lee said that when she asked Ms Kitching about the forms, Ms Kitching told her that she had completed the right of entry tests for organisers. Ms Lee said it was clear that Ms Kitching was talking about having completed the tests for the organisers whose applications were in the bundle given to Ms Lee. Mr Katsis' application was in this bundle.³⁷

15. Ms Lee deposed that as far as she was aware, Ms Kitching, Ms Asmar and the individual organiser were the only people who had access to the organiser's ACTU account.³⁸

Leonie Flynn's evidence

16. Ms Flynn deposed that on 4 September 2013 she had the following text message conversation with Ms Govan:³⁹

Ms Flynn: "Hi Jayne, who did your Right of entry? Was it Kimberley? I'm at FWC. Do you know whose permit tests she sat? Lones.

Ms Govan: "She sat mine, Nick's, Dean, David Eden. Not sure about others. Lee I think. And yes, it was Kimberley. I think she did Rob's too."

Ms Flynn: "Thanks Jayne. Do you know when? What about Diana's?"

Ms Govan: "She would of done Diana's. It was when we started. I'm going home I can look on my right of entry."

G2 Mr Sasha Trajcevski-Uzunov

30. In September 2013, the Fair Work Commission contacted Mr Trajcevski-Uzunov regarding his right of entry test. On 3 October 2013, Mr Trajcevski-Uzunov sent an email to Mr Enright of the Fair Work Commission confirming that he was the person who received appropriate training about right of entry. Mr Trajcevski-Uzunov told Mr Enright that he completed the online right of entry test on or around 15 February 2013, with his application for a right of entry permit being lodged on or around 15 March 2013.⁴⁰

31. Mr Trajcevski-Uzunov gave the following evidence regarding his right of entry test to this Royal Commission:

³⁷ Peggy Lee, witness statement, 25/8/14, paras 44-46, 50.

³⁸ Peggy Lee, witness statement, 25/8/14, para 33.

³⁹ Leonie Flynn, witness statement, 25/8/14, para 123.

⁴⁰ McCubbin MFI-1, 25/8/14, p 2088.

SUBMISSIONS IN REPLY OF COUNSEL ASSISTING

- (a) he deposed that he completed the right of entry test on or about 15 February 2013 but could not remember the exact time or date he took the test;⁴¹
- (b) he denied that Ms Kitching completed his right of entry test for him;⁴²
- (c) he deposed that it took him a couple of minutes to take the test and it was the first time he had sat the test;⁴³
- (d) when it was put to Mr Trajcevski-Uzunov that Ms Govan had said that he was on site at Monash Health on 15 February 2013 at the time that his right of entry test was undertaken, he said that he could not recall where he was on that date and he could not recall being with Ms Govan at Monash Health,⁴⁴ and
- (e) he was an organiser for the northern and western suburbs of Melbourne and that Monash Health was not part of his territory.⁴⁵

32. This evidence cannot be maintained in light of the following facts and contradictory evidence.

Facts
1. On 30 January 2013, an application form for the ACTU online training course for Mr Trajcevski-Uzunov was emailed to the generic ACTU email account by Ms Peggy Lee. ⁴⁶
2. On 6 February 2013, Mr Trajcevski-Uzunov forwarded his confirmation letter from the ACTU for the right of entry training course which included his login details and password to Ms Kitching. ⁴⁷
3. On 15 February 2013, Mr Trajcevski-Uzunov's right of entry test was commenced at 2.54pm (AEST)

⁴¹ Trajcevski-Uzunov, witness statement, 19/9/14, para 9.

⁴² Trajcevski-Uzunov, 19/9/14, T:1101.8-10; 1102.14-17.

⁴³ Trajcevski-Uzunov, 19/9/14, T:1101.12-22.

⁴⁴ Trajcevski-Uzunov, 19/9/14, T:1101.47; 1102.1-2; T:1102.4-5.

⁴⁵ Trajcevski-Uzunov, 19/9/14, T:1102.23-28.

⁴⁶ McCubbin MFI-1, 25/8/14, p 2157.

⁴⁷ McCubbin MFI-1, 25/8/14, p 2158.

or 3.54pm (AEDT) and concluded at 2.56pm (AEST) or 3.56pm (AEDT) taking 1 minute and 57 seconds to complete.⁴⁸ Mr Trajcevski-Uzunov answered all questions correctly.⁴⁹

4. On 15 February 2013 at 3.57pm, a generic email from the ACTU was sent to Mr Trajcevski-Uzunov attaching a Certificate of Completion for the right of entry training course.⁵⁰
5. Mr Trajcevski-Uzunov's phone records show that on 15 February 2013, he made the following telephone calls:⁵¹
 - a. at 9.22am, a telephone call which lasted 0.57 minutes and used the Sydenham tower;
 - b. at 2.54pm, a telephone call which lasted 0.16 minutes and used the Moorabbin tower; and
 - c. at 6.47pm, a telephone call which lasted 1.15 minutes and used the Reservoir tower.
6. On 25 February 2013, an application for a right of entry permit for Mr Trajcevski-Uzunov was sent to the Fair Work Commission.⁵²
7. On 25 February 2013, the application was returned by the Fair Work Commission to Mr Trajcevski-Uzunov for amendment as the training received had not been further described as required by the application.⁵³
8. On 15 March 2013, an amended application for a right of entry permit for Mr Trajcevski-Uzunov was emailed to the Fair Work Commission by Ms Peggy Lee.⁵⁴
9. On 10 April 2013, Mr Trajcevski-Uzunov was issued with a right of entry permit.⁵⁵

Contrary evidence

Computer records

10. As set out above in relation to Mr Katsis, the same analysis of the Invest-e-gate Pty Ltd report ordered by the Fair Work Commission and KPMG report commissioned by the HSU applies to Mr Trajcevski-Uzunov. The finding by Invest-e-gate Pty Ltd that the ACTU record should be adjusted to add one hour to reflect daylight savings should be accepted.
11. The ACTU record shows that Mr Trajcevski-Uzunov's right of entry test was completed at 2.56pm (AEST) or 3.56pm (AEDT) and his Certificate of Completion was viewed at 2.57pm (AEST) or 3.57pm (AEDT).⁵⁶ A generic email was sent to his email address attaching his Certificate of Completion at 3.57pm (AEDT).⁵⁷ As Mr Trajcevski-Uzunov's Certificate of Completion was sent at 3.57pm, this suggests that the ACTU record should be adjusted by adding one hour to account for daylight savings.

⁴⁸ McCubbin MFI-1, 25/8/14, p 2164.

⁴⁹ McCubbin MFI-1, 25/8/14, p 2166.

⁵⁰ McCubbin MFI-1, 25/8/14, p 2167.

⁵¹ McCubbin MFI-1, 25/8/14, p 2153.

⁵² McCubbin MFI-1, 25/8/14, p 2061.

⁵³ McCubbin MFI-1, 25/8/14, p 2061.

⁵⁴ McCubbin MFI-1, 25/8/14, p 2159.

⁵⁵ McCubbin MFI-1, 25/8/14, p 2062.

⁵⁶ McCubbin MFI-1, 25/8/14, p 2164.

⁵⁷ McCubbin MFI-1, 25/8/14, p 2167.

H MR LEE ATKINSON

36. In his evidence to the Commission, Mr Atkinson admitted that he did not sit his own test,⁷¹ however he deposed that Ms Lee said to him, ‘a few days after [he] had signed the paper’: ‘I completed your test and you got 100%’.⁷²
37. Mr Atkinson steadfastly maintained that he had heard Ms Lee say that she had done the test for him.⁷³
38. It is submitted that Mr Atkinson was mistaken in his recollection. Ms Lee was not challenged in her evidence that she was on annual leave in Hong Kong from 13 February 2013 to 6 March 2013, during which (on 15 February 2013) Mr Atkinson’s test was undertaken.⁷⁴
39. In those circumstances it is not possible to infer that Ms Lee might have sat any of the organisers’ tests on 15 February 2013 instead of Ms Kitching.

I MS KIMBERLEY KITCHING

40. The Submissions made on behalf of Ms Kitching contend that Ms Kitching’s evidence of substantial periods of time out of the No.1 Branch office in South Melbourne on 15 February 2013 support a finding that it was improbable that she had the opportunity to complete the organisers’ right of entry tests.⁷⁵
41. That does not necessarily follow. As set out below, the records provided by Ms Kitching do not lead inevitably to the conclusion that she could not have been the person who sat the organisers’ right of entry tests on 15 February 2013.

⁷¹ Lee Atkinson, 19/9/14, T:1038.7-8.

⁷² Lee Atkinson, witness statement, supplementary HSU tender 25/11/14; para 10; Lee Atkinson, 19/9/14, T:1037-1038.

⁷³ Lee Atkinson, 19/9/14, T:1037.42-45; 1038.15.

⁷⁴ Peggy Lee, witness statement, 25/8/14, paras 38-39.

⁷⁵ Submissions on behalf of the named HWU officials, para 19.

Facts

1. The ACTU records provide that the organisers' right of entry tests were opened, attempted, completed and the corresponding Certificate of Completion were viewed within the following timeframes on 15 February 2013:⁷⁶
 - a. Mr Lee Atkinson's right of entry online test was opened at 9.02am (10.02am AEDT) and concluded at 9.21am (10.21am AEDT);
 - b. Ms Jayne Govan's right of entry online test was opened at 9.22am (10.22am AEDT) and concluded at 9.35am (10.35am AEDT);
 - c. Mr Robert McCubbin's right of entry online test was opened at 1.55pm (2.55pm AEDT) and concluded at 2.00pm (3.00pm AEDT);
 - d. Mr Dean Sherriff's right of entry online test was opened at 2.10pm (3.10pm AEDT) and concluded at 2.13pm (3.13pm AEDT);
 - e. Mr Sasha Trajcevski-Uzunov's right of entry online test was opened at 2.54pm (3.54pm AEDT) and concluded at 2.58pm (3.58pm AEDT); and
 - f. Mr Nick Katsis' right of entry online test was opened at 2.59pm (3.59pm AEDT) and concluded at 3.02pm (4.02pm AEDT).
2. There is also evidence that the organisers forwarded their login details to Ms Kitching which would have enabled her to sit the test for them. It would be difficult to conceive of a reason for this conduct, other than for the reason of enabling Ms Kitching or someone organised by Ms Kitching to sit those organisers' right of entry tests on their behalf. There has been no other explanation proffered by Ms Kitching or the HWU for each organiser providing these details to Ms Kitching.
 - a. On 8 February 2013 at 10.57am, Mr Atkinson forwarded his enrolment confirmation details including his username and password for the ACTU online right of entry training course to Ms Kitching.⁷⁷
 - b. On 13 February 2013 at 4.16pm, Ms Govan forwarded her enrolment confirmation details including her username and password for the ACTU online right of entry training course to Ms Kitching.⁷⁸
 - c. On 11 February 2013 at 8.49pm, Ms Sandra Porter on behalf of Mr McCubbin forwarded Mr McCubbin's enrolment confirmation details including his username and password for the ACTU online right of entry training course to Ms Kitching.⁷⁹
 - d. On 15 February 2013 at 2.57pm, Mr Dean Sherriff forwarded his enrolment confirmation details including his username and password for the ACTU online right of entry training course to Ms Kitching.⁸⁰
 - e. On 6 February 2013 at 3.14pm, Mr Trajcevski-Uzunov forwarded his enrolment confirmation details including his username and password for the ACTU online right of entry training course to Ms Kitching.⁸¹

⁷⁶ McCubbin MFI-1, 25/8/14, p 2067.

⁷⁷ McCubbin MFI-1, 25/8/14, p 1424.

⁷⁸ McCubbin MFI-1, 25/8/14, p 1167.

⁷⁹ McCubbin MFI-1, 25/8/14, p 1787.

⁸⁰ McCubbin MFI-1, 25/8/14, p 1945.

⁸¹ McCubbin MFI-1, 25/8/14, p 2158.

Ms Kitching's evidence

3. Ms Kitching deposed that she was at the No.1 Branch office at Park Street, South Melbourne for part of the morning and part of the afternoon on 15 February 2013.⁸²
4. Ms Kitching deposed that she had seen a City Link toll account which suggested she was driving to work over the Bolte Bridge at 7.54am on 15 February 2013.⁸³
5. Ms Kitching deposed that she went to a café in South Melbourne where she made some telephone calls before going to the No.1 Branch office. Ms Kitching was not able to provide any supporting telephone records.⁸⁴
6. Ms Kitching deposed that after she left the café she made a cash withdrawal at an ATM in South Melbourne at 9.42am.⁸⁵ Ms Kitching produced an ATM receipt showing that a withdrawal was made at 9.41am.⁸⁶ The ATM is located on 277 Clarendon Street on the corner of Dorcas Street, South Melbourne. This ATM is approximately 350 metres from the No.1 Branch office at Park Street, South Melbourne. Given that the first organisers' test (Mr Atkinson's right of entry test) was started at 10.02am that day, Ms Kitching's evidence of the time she crossed the Bolte Bridge and the time of the ATM withdrawal are not in any way inconsistent with her having also sat Mr Atkinson's test for him.
7. Ms Kitching deposed that she had a telephone conversation about an issue at Barwon Health with Mr Atkinson at 10.08am which lasted for more than nine minutes. Ms Kitching produced the Telstra telephone records for the No. 1 Branch which show that a telephone call was made from Mr Atkinson's mobile at 10.08am on 15 February 2013 which lasted for 9.05 minutes.⁸⁷ Mr Atkinson deposed that he possibly could have called Ms Kitching on 15 February 2013 at 10.08am.⁸⁸ It is possible that Mr Atkinson spoke with Ms Kitching as she was completing his right of entry test. Mr Atkinson's telephoning Ms Kitching at this time does not mean she was not able to complete his right of entry test.
8. Ms Kitching deposed that after speaking to Mr Atkinson she made some telephone calls to representatives of Barwon Health and that she was on the telephone until around 10.30am.⁸⁹ Ms Kitching has not produced any documentary evidence in support of this version of events.
9. Ms Kitching deposed that she was at the No.1 Branch from around 10am to 1.30pm.⁹⁰ Ms Kitching produced an email she sent to an external service provider at 12.55pm on 15 February 2013.⁹¹
10. Ms Kitching deposed that she left the office at around 1.30pm to purchase a gift for her mother and that her bank statements show that she purchased the gift at 1.54pm.⁹² The Commission has not received any documentary evidence demonstrating that this occurred. In any event, that purchase is also not inconsistent with Ms Kitching also undertaking the right of entry tests as none was being completed (when the timing is adjusted for daylight savings time) at the time of the

⁸² Kimberley Kitching, witness statement dated 16/9/14, 19/9/14, para 9.

⁸³ Kimberley Kitching, witness statement dated 16/9/14, 19/9/14, para 10.

⁸⁴ Kimberley Kitching, witness statement dated 16/9/14, 19/9/14, para 11.

⁸⁵ Kimberley Kitching, witness statement dated 16/9/14, 19/9/14, para 14.

⁸⁶ Kimberley Kitching, witness statement dated 17/9/14, 19/9/14, attachment A.

⁸⁷ Kimberley Kitching, witness statement dated 16/9/14, attachment 2.

⁸⁸ Lee Atkinson, 19/9/14, T:1039.15-23.

⁸⁹ Kimberley Kitching, witness statement dated 16/9/14, 19/9/14, paras 19-21.

⁹⁰ Kimberley Kitching, witness statement dated 16/9/14, 19/9/14, para 22.

⁹¹ Kimberley Kitching, witness statement dated 17/9/14, 19/9/14, attachment B.

⁹² Kimberley Kitching, witness statement dated 16/9/14, 19/9/14, para 25.

transaction or even close to that time.

11. Ms Kitching deposed that she received a text message at 1.35pm on 15 February 2013 from Ms Kerry Georgiev, the finance manager of the No.1 Branch, asking her to purchase milk for the office. Ms Kitching deposed that she remembers being out of the office at the time she received the text message.⁹³ A copy of this text message has been provided to the Commission.⁹⁴ Ms Kitching purchased milk at 1.57pm and has produced a receipt to the Commission recording this purchase.⁹⁵ Again, that purchase is not inconsistent with Ms Kitching also undertaking the right of entry tests as none was being completed (when the timing is adjusted for daylight savings time) at the time of the transaction or even close to that time.
12. Ms Kitching deposed that she arrived at the European Restaurant on Spring Street, Melbourne around 2.15pm on 15 February 2013 for lunch with her husband, Andrew Landeryou, and a friend, Clinton Carey, and that she stayed at the restaurant for about an hour and a half.⁹⁶ Ms Kitching has not produced any documentary evidence concerning this lunch. It is submitted that whatever lunch break Ms Kitching had, she was back in the office by just before 3pm in time to sit Mr McCubbin's right of entry test at 2.55pm (AEDT) and Mr Sherriff's right of entry test at 3.10pm (AEDT).
13. Ms Kitching said she received an email from Mr Sherriff at 2.57pm on 15 February 2013 but has not seen a record of her responding to the email. Ms Kitching deposed that this would have been because she was out of the office.⁹⁷ Alternatively, it may be because she was busy completing Mr McCubbin's and then Mr Trajcevski-Uzunov's and Mr Katsis' right of entry tests in quick succession and Mr Sherriff's email did not warrant an urgent response or attention.

42. To the evidence against Ms Kitching (and the deficiencies in the documents produced and her explanations) should be added the evidence which is set out above in relation to Mr Katsis and Mr Trajcevski-Uzunov. Ms Lee has given evidence she did not do these organisers' tests which Ms Kitching is alleged to have done. Indeed Ms Lee's unchallenged evidence was that she was out of the country – on annual leave in Hong Kong – on 15 February 2013 when the tests were done.⁹⁸ Further, a number of organisers have all deposed to hearing that Ms Kitching sat the right of entry tests on behalf of those other organisers (or, in the case of Ms Govan and Mr McCubbin, themselves); and the documentary evidence is overwhelmingly against the possibility that any of these organisers sat their own tests.

⁹³ Kimberley Kitching, witness statement dated 16/9/14, 19/9/14, para 26.

⁹⁴ Kimberley Kitching, witness statement dated 17/9/14, 19/9/14, attachment C.

⁹⁵ Kimberley Kitching, witness statement dated 17/9/14, 19/9/14, attachment D.

⁹⁶ Kimberley Kitching, witness statement dated 16/9/14, 19/9/14, para 29.

⁹⁷ Kimberley Kitching, witness statement dated 16/9/14, 19/9/14, para 31.

⁹⁸ Peggy Lee, witness statement, 25/8/14, paras 38-39.

J FURTHER SUBMISSIONS

43. The HWU Officials' Submissions contend that Ms Lee did not allege in her evidence that Ms Kitching directed her to do the right of entry tests.⁹⁹

44. That submission is incorrect. Ms Lee deposed:¹⁰⁰

Q. Nor did Ms Asmar or Ms Kitching?

A. They asked me to do the tests.

Q. Did they?

A. Yes.

45. Ms Lee further deposed:¹⁰¹

Q. And Ms Kitching never asked you to do any tests, did she?

A. She asked me, like, what happened to the rough [sic] entry, both of them - I mean, Ms Asmar and Ms Kitching continued to ask me about the right of entry.

Q. She continued to ask you about what was happening to the rights of entry to ensure that the applications had been lodged. Isn't that right?

A. It isn't not what I got at that time.

Q. But whatever you got, in terms of their utterances, they certainly never said to you that you should do the test, did they?

A. They did say that.

⁹⁹ Submissions on behalf of named HWU officials, para 32.

¹⁰⁰ Peggy Lee, 16/9/14, T:995.22-26.

¹⁰¹ Peggy Lee, 16/9/14, T:997.7-21.

CHAPTER 12.3: THE PETER MAC SETTLEMENT AND THE NHDA

CHAPTER 12.4: KATHY JACKSON ALLEGATIONS

INTRODUCTION

46. This section of Counsel Assisting's Submissions in Reply concerns the submissions received in response to Chapters 12.3 and 12.4 of Counsel Assisting's Submissions in Chief, which related to the HSU Victoria No 3 Branch during the time Ms Jackson was Secretary of that Branch.
47. The Commission has received submissions from:
- (a) the HSU;
 - (b) Katherine Jackson;
 - (c) Peter Mylan;
 - (d) the State of Victoria; and
 - (e) Dr John Lourens.
48. The general approach taken in these submissions is set out in Part 1 above. Consistently with that approach, these submissions in reply respond specifically to a number of additional matters raised by Ms Jackson not addressed in the submissions of Counsel Assisting in Chief. Counsel Assisting otherwise relies on the submissions of Counsel Assisting in Chief with respect to all other respondents.

SUBMISSIONS IN REPLY TO KATHERINE JACKSON

K REPLY TO PARAGRAPHS 82-88

49. As to paragraph 82 one policy question – or theme - with which this Commission is and has always been concerned is the treatment of whistleblowers. This was the subject of Issues Paper 1 released by the Commission on 13 June 2014. It was highlighted, or – to adopt the word used in Ms Jackson’s submissions – ‘foreshadowed’ in the opening given by Senior Counsel Assisting to the first block of hearings concerning Ms Jackson on 16 June 2014. It was also the subject of detailed consideration in Chapter 19.2 of Counsel Assisting’s Submissions in Chief. There has been no change to the Commission’s position in this regard.
50. Further, on 28 August 2014 senior counsel for Ms Jackson advised the Commission that he made no contention that she had been ambushed.¹⁰² In the light of this fair concession the submissions contained in paragraphs 83-88 of Ms Jackson’s submissions will not be addressed further here.

L REPLY TO PARAGRAPH 130

51. At paragraph 130 of her submissions, Ms Jackson refers to an iteration of a draft Deed of Release between Peter Mac and the HSU saved (or which appears to have been saved) with the file name: ‘Deed of Release from SIAG – with comments 010703’. The submission goes on to say: ‘The Commission should seek to obtain a copy of that draft with comments before any adverse finding could fairly be made against Ms Jackson’.
52. The Commission issued notices to produce 251 and 252, both dated 22 July 2014, to The Peter MacCallum Cancer Institute and Service Industry Advisory Group, respectively, requiring them to produce:

All Documents which relate or refer to the discussions or negotiations recorded prior to the settlement reached in 2003 between The Peter MacCallum Cancer Institute and the Health Services Union Victoria No 3. Branch.

¹⁰² Katherine Jackson, 28/8/2014, T:803.14.

53. No document answering the description in Ms Jackson’s submissions at paragraph 130 was produced. Counsel Assisting submits that if such a document was in the addressees’ possession, it would have been caught by the notice.

M CHARACTERISATION OF DEED OF RELEASE

54. In terms, the Deed of Release between Peter Mac and the HSU confers on the HSU an entitlement to reimbursement of ‘its legal expenses and other expenses and expected future expenses incurred’ up to a maximum amount of \$250,000, upon presentation of an itemised statement. But, in basic terms, Ms Jackson says that, notwithstanding what the Deed says, the *actual* agreement was that Peter Mac would pay the HSU \$250,000 in consideration for the union not pursuing a claim against Peter Mac for a penalty as a result of Peter Mac’s alleged breaches of various industrial instruments, which led to a substantial underpayment of Peter Mac research employees.¹⁰³
55. This ground has already been traversed in Counsel Assisting’s Submissions in Chief.¹⁰⁴ What is said in those submissions – in support of the argument that Ms Jackson’s characterisation of the Deed ought to be rejected – need not be repeated now. Nevertheless, a few short points can be made in reply to Ms Jackson’s submissions.
56. First, it is not to the point that Peter Mac could have reached agreement with the HSU on different terms.¹⁰⁵ No doubt, Peter Mac and the HSU could have entered into an agreement that provided for Peter Mac to pay the HSU a specified amount – without admission of liability – in consideration for the HSU not pursuing its claim. The fact that they did not execute a Deed in those terms provides no reason to doubt the authenticity of the agreement that was reached. The simple explanation is Peter Mac and the HSU could have settled their dispute in a number of ways, but they chose a particular resolution. The only relevant question is what was the agreement Peter Mac and the HSU in fact reached. The best evidence of that – contradicted only by Ms Jackson – is the Deed itself.

¹⁰³ Katherine Jackson submissions, 14/11/2014, paras 110(b), 159-192.

¹⁰⁴ Counsel Assisting’s submissions in Chief, 31/10/2014, Chapter 12.3, paras 21-27.

¹⁰⁵ Katherine Jackson submissions, 14/11/2014, paras 159-161.

57. Second, Peter Mac is not the only party that was ‘advantaged by [the] characterisation’ of the Deed as a reimbursement of expenses rather than a payment of an amount in settlement of a legal claim.¹⁰⁶ The agreement between Peter Mac and the HSU needs to be understood against the backdrop that the Peter Mac employees who had been underpaid received no back pay. An *ex gratia* payment to the HSU – rather than reimbursement of the HSU’s expenses in connection with the settlement of the industrial dispute between Peter Mac, its employees and the HSU – may well have been apt to generate resentment among the HSU’s members at Peter Mac who had been underpaid but received no monetary recompense in the settlement reached (and negotiated for them by the HSU).
58. Third, there is nothing ‘odd’ about a party to a Deed of Release placing an ‘upper limit’ on an amount it would be prepared to pay based, in this case, on an estimate of the expenses the HSU might have incurred.¹⁰⁷ In fact, a party acting commercially would wish to be certain of their potential liability. Setting an upper limit achieves certainty. There is also no reason to doubt Dr Wellington’s evidence that the \$250,000 maximum amount the Peter Mac Board had agreed to pay the HSU was understood by Peter Mac, including on the basis of the legal expenses it had incurred, as a ‘reasonable estimate of what was likely to have been incurred’ by the HSU.¹⁰⁸

N REPLY TO ‘NO ARGUABLE BREACH OF S 81, S 82’: PARAGRAPHS 193-206

59. Ms Jackson seeks to characterise the Deed of Release as effecting a settlement of a claim for a penalty the HSU could have pursued against Peter Mac. That may be accepted. However, it does not negate the fact that Ms Jackson (and, through her, the HSU) negotiated a specific legal settlement that entitled the union to a payment limited as to possible quantum and limited also by terms constraining the circumstances in which any amount would be owed by Peter Mac to the HSU. Ms Jackson says, in short, that she genuinely believed that payment of the full \$250,000 by Peter Mac was the quid pro quo negotiated by the HSU in return for it not pursuing its claim for a penalty against Peter Mac. A bona fide claim of legal right negates the existence of ‘dishonesty’

¹⁰⁶ Katherine Jackson submissions, 14/11/2014, para 162.

¹⁰⁷ Katherine Jackson submissions, 14/11/2014, para 175.

¹⁰⁸ See Counsel Assisting’s Submissions in Chief, 31/10/2014, Chapter 12.3, para 19; compare Katherine Jackson submissions, 14/11/2014, para 176.

for the purpose of s 81 and s 82. But Ms Jackson did not negotiate an unqualified right in the settlement agreement for payment of \$250,000 to the HSU. She negotiated a more limited entitlement.

60. Ms Jackson's submission that she believed that the HSU had a "legal right" to whatever financial benefit accrued from the settlement of the Union Penalties Claim¹⁰⁹ is a belief that the union was entitled to whatever benefit in fact, and by the terms of that deed, actually accrued from that settlement. To the extent Ms Jackson's belief as to what the HSU was entitled was something different to that for which the terms of the deed provided, it derives no support from the documentary evidence; nor is it corroborated by any other witness who gave relevant evidence to the Commission. Her submission that no offence against s 81 or s 82 of the *Crimes Act 1958* (Vic) could be made out because she did not 'dishonestly' obtain the relevant property or financial advantage should be rejected.

¹⁰⁹ Katherine Jackson submissions, 14/11/2014, para 202.