

RIGHT OF ENTRY PERMIT TESTS

CHAPTER 11.3

A INTRODUCTION

1. This chapter of the submissions deals with events in and concerning the HSU Victorian No 1 Branch in 2013 (**No 1 Branch**).
2. Ms Diana Asmar has since 21 December 2012 been the Secretary of the No 1 Branch. The Commission has heard evidence raising a number of concerns relating to Ms Asmar's discharge of her duties as Secretary, including autocratic hiring and firing of staff and the appointment to paid positions of Ms Asmar's friends and acquaintances, bullying, attempting to undermine the outcome of the democratic elections, and serious lack of proper practices.
3. The most serious issue, however, relates to whether Ms Asmar directed and acquiesced in the General Manager of the No 1 Branch, Ms Kimberley Kitching, and a then industrial officer, Ms Pik ki (Peggy) Lee, sitting online right of entry tests purportedly carried out by other organisers, and thereby falsely and deceitfully obtaining right of entry permits for a number of organisers.
4. For the reasons which are set out below, it is submitted that the Commission should find that Ms Kitching sat the test for Ms Asmar on 25 January 2013 and for a number of other organisers on 15 February 2013; that Ms Lee sat the online test for Mr Darryn Rowe on 20 March 2013 and for Mr David Eden on 26 March 2013; and that all this occurred with the knowledge and at the direction of Ms Asmar.
5. In the event that submission is accepted a number of consequences follow. First, the Commission should find that Ms Asmar's and Ms Kitching's denials that they engaged in the above conduct should be disbelieved. Secondly, Ms Asmar and others have

committed criminal offences under the *Criminal Code Act 1995* (Cth)¹ such that recommendations should be made in terms of paragraph 98 below. Thirdly, other organisers including Mr Eden and Mr Rowe have also committed offences.

B RIGHT OF ENTRY TESTING

6. In order to enter workplaces, union officials must have a right of entry permit issued by the Fair Work Commission.²
7. Each application for a right of entry permit contains a declaration which provides, among other things, that the proposed permit holder has received the appropriate training.³ The declaration must be signed by a member of the Branch Committee of Management. The declaration specifically states that the proposed permit holder has:⁴

(a) received appropriate training about the rights and responsibilities of a permit holder, namely:
The ACTU Federal Right of entry online training course completed on [insert date].

8. The usual practice was that Ms Asmar signed these forms and indeed, she signed all of the forms for the applicants set out in paragraph 10 below and for Mr Rowe and Mr Eden.⁵
9. In order to show that the online training had been completed, proposed permit holders must complete an online test and if they pass this test, a certificate of completion is generated.

C RELEVANT FINDINGS OF FACT

10. In November 2012, elections were held for the No 1 Branch. On 21 December 2012 the outcome of the elections was announced. Ms Asmar's team secured 19 out of the 24 positions. Ms Asmar immediately assumed office as Branch Secretary of the No 1

¹ Schedule to the *Criminal Code Act 1995* (Cth).

² Ss 498 and 512 of the *Fair Work Act 2009* (Cth).

³ Section 51(1) of the *Fair Work Commission Rules 2013* (Cth).

⁴ McCubbin MFI-1, 25/8/14, pp 1782-1784.

⁵ McCubbin MFI-1, 25/8/14, pp 34, 123, 634, 1149, 1411, 1599, 2083.

Branch.⁶ On 15 February 2013, a series of right of entry online tests were conducted as follows:⁷

- (a) Mr Lee Atkinson's right of entry online test was undertaken at 9.02am and concluded at 9.21am, in 9 minutes;
- (b) Ms Jayne Govan's right of entry online test was commenced 1 minute later, at 9.22am and concluded at 9.35am, in 9 minutes and 9 seconds (Ms Govan has given sworn evidence that she did not sit this test herself);⁸
- (c) Mr McCubbin's right of entry online test was undertaken at 1.55pm and concluded at 2.00pm, in 2 minutes and 49 seconds (Mr McCubbin's evidence is that he did not sit this test himself);⁹
- (d) Mr Dean Sherriff's right of entry online test was undertaken at 2.10pm and concluded at 2.13pm, in 2 minutes and 31 seconds;
- (e) Mr Sasha Trajcevski-Uzunov's right of entry online test was undertaken at 2.54pm and concluded at 2.58pm, in 1 minute and 57 seconds; and
- (f) Mr Nick Katsis' right of entry online test was undertaken at 2.59pm and concluded at 3.02pm, in 2 minutes.

Evidence of Pik Ki (Peggy) Lee

11. From January 2013 Ms Lee continued in her role as Industrial Assistant.¹⁰ On 13 February 2013 Ms Lee went on holiday to Hong Kong.¹¹ Ms Lee returned to Australia on 6 March 2013 and appears to have returned to work shortly thereafter.

⁶ Diana Asmar, witness statement, 26/8/14, para 13.

⁷ McCubbin MFI-1, 25/8/14, 4/152; 4/1392; 4/1677; 4/1698.

⁸ Jayne Govan, 25/8/14,T:491.33-34.

⁹ Robert McCubbin, witness statement, 25/8/14, para 19.

¹⁰ Peggy Lee, witness statement, 25/8/14, para 14. A copy of Ms Lee's statement of evidence is contained within McCubbin MFI-1, p 100. For ease of reference in these submissions references to the six volume McCubbin MFI-1 will be given by reference to the number of the folder followed by the relevant page, such that the statement of Peggy Lee is at 1/100.

12. Ms Lee deposed that after returning from leave she was handed a bundle of permits and asked to deal with them. She said that she took the bundle of applications, certificates and test results into Ms Kitching's office and discussed the issue with Ms Kitching.¹²
13. Ms Lee deposed that Ms Kitching told her that she had completed the right of entry tests for various organisers. Ms Lee recounted that Ms Kitching became excited about the fact that she had achieved a perfect score (100%) in some of the tests.¹³
14. It was clear to Ms Lee that Ms Kitching was talking about having completed the right of entry tests for the organisers whose forms were in the bundle of documents that had been handed to Ms Lee and which she had taken into Ms Kitching's office. These included Mr Sherriff, Mr Katsis, Mr McCubbin and Ms Govan.¹⁴
15. On 15 March 2013 Ms Lee sent an email to Ms Govan, Mr Trajcevski, Mr Sherriff, Mr Atkinson and Mr Mitchell and copied in Ms Kitching and Ms Asmar advising them that their right of entry permit application had been lodged with the Fair Work Commission.¹⁵
16. Ms Lee gave evidence that around this time, Ms Asmar told the organisers to forward the emails they had received from the ACTU containing their course access passwords to Ms Kitching.¹⁶ Ms Lee said that as far as she knew, you could only access an organiser's online test and coursework if you had their password.¹⁷
17. Ms Lee realised that Mr David Eden and Mr Darryn Rowe had not completed their right of entry tests. This was in part because they were country organisers and were not always in the city office. Ms Lee raised the issue with Ms Kitching. At some stage while Mr Eden and Mr Rowe were in the branch office Ms Kitching asked them to sign an F42 Application for Permit forms although they were not dated at that time. Ms Lee

¹¹ Peggy Lee, witness statement, 25/8/14, para 38; 1/106.

¹² Peggy Lee, witness statement, McCubbin MFI-1, 25/8/14, para 44; 1/107.

¹³ Peggy Lee, witness statement, 25/8/14, para 45.

¹⁴ Peggy Lee, witness statement, McCubbin MFI-1, 25/8/14, para 46; 1/107.

¹⁵ Peggy Lee, witness statement, McCubbin MFI-1, 25/8/14, 1/118.

¹⁶ Peggy Lee, witness statement, 25/8/14, para 29.

¹⁷ Peggy Lee, witness statement, 25/8/14, para 30.

said that she asked them to sign these forms before they had done the test so that she could have signed forms ready to process once their tests had been done.¹⁸

18. Ms Lee's evidence was that at about this time Ms Asmar and Ms Kitching asked her to sit the tests for Mr Eden and Mr Rowe.¹⁹ Ms Lee resisted at first because she regarded it as wrong for her to do tests for other people. On 18 or 19 March 2013 Ms Lee seems to have accessed Mr Rowe's course details to check whether he had done his test and confirmed that he had not. Ms Lee deposed:²⁰

This was a time of significant stress for me because Diana had been angry that the tests had not been done and Kimberly had been constantly asking me about them.

19. Ms Lee further deposed that she was working at the HSU on a sponsored visa and felt under immense pressure to keep her job. Ms Lee deposed:²¹

Because of how angry Diana had been and the pressure I felt from Kimberly, I felt that if I did not complete the ROE tests for Darryn Rowe and David Eden that I might be fired and my visa would be immediately at risk.

20. Ms Lee deposed that although she knew it was wrong and although she found it stressful and distressing she decided that she would complete the right of entry tests for both Mr Rowe and Mr Eden.²²

21. On 18 March 2013 at 2.14pm, Mr Rowe forwarded his Australian Council of Trade Unions (ACTU) enrolment letter which included his login and password to Ms Lee.²³

22. On 20 March 2013, according to records created by the ACTU, Mr Rowe's online test was commenced at 9.07pm. Ms Lee's evidence is that the IP address recorded on the ACTU record was that of her home computer. Ms Lee said that she completed the test

¹⁸ Peggy Lee, witness statement, 25/8/14, paras 52-54; 1/109.

¹⁹ Peggy Lee, 25/8/14, T:478.30-34.

²⁰ Peggy Lee, witness statement, 25/8/14, para 60; 1/110.

²¹ Peggy Lee, witness statement, 25/8/14, para 62; 1/111.

²² Peggy Lee, witness statement, 25/8/14, para 63; 1/111.

²³ McCubbin MFI-1, 25/8/14, 1/137; 1/22.

from her home address on the evening of 20 March 2013.²⁴ On 26 March 2013 at 10.16am a 'Certificate of 'Completion' for Mr Rowe was sent via email from ACTU.²⁵

23. As noted above Ms Lee had already caused Mr Rowe to sign a Form F42 – Application for Entry Permit in relation to Mr Rowe.
24. On the morning of 21 March 2013 Ms Lee collated the necessary forms and documents and asked Ms Asmar to sign the Form F42 application. Ms Asmar did so, dating it 21 March 2013.²⁶
25. On 21 March 2013 at 9.21am Ms Lee sent this Form F42 by email to the Fair Work Commission.²⁷ On the same day the Fair Work Commission received Mr Rowe's signed and completed Form F42 application.²⁸
26. On 26 March 2013 Ms Lee deposes that she sat the online test for Mr Eden, commencing at 8.51am.²⁹ On 26 March 2013 at 10.16am a 'Certificate of 'Completion' for Mr Eden was sent via email from ACTU.³⁰
27. Again, Mr Eden had previously signed the form F42. Ms Lee printed out Mr Eden's certificate of completion and wrote in the date '26/3/2013' above his signature.³¹ On 26 March 2013 Ms Lee also arranged for Ms Asmar to sign and date her part of Mr Eden's application.³²
28. Later that morning, at 10.39am on 26 March 2013, Ms Lee sent an email to the Fair Work Commission attaching the form F42 and the signed declaration by both Ms Asmar

²⁴ Peggy Lee, witness statement, 25/8/14, para 65-66; 1/111.

²⁵ McCubbin MFI-1, 25/8/14, 1/154.

²⁶ Peggy Lee, witness statement, 25/8/14, 1/134.

²⁷ Peggy Lee, witness statement, 25/8/14, para 69; 1/129.

²⁸ McCubbin MFI-1, 25/8/14, 3/1001.

²⁹ Peggy Lee, witness statement, 25/8/14, para 76; McCubbin MFI-1, 25/8/14, 1/113.

³⁰ McCubbin MFI-1, 25/8/14, 1/419; Peggy Lee, 25/8/14, T:483.39-4.

³¹ Peggy Lee, witness statement, 25/8/14, para 79.

³² Peggy Lee, witness statement, 25/8/14, para 79; 1/113; 25/8/14 T:484.45-46;484.1-5.

and Mr Eden.³³ On the same day the Fair Work Commission received Mr Eden's signed and completed Form F42 application.³⁴

Evidence of David Eden

29. In deciding which version of events should be accepted, it is helpful to begin by considering one specific point of conflict, namely the conflict between the evidence of Ms Lee on the one hand and Mr Eden on the other. As noted above, Ms Lee deposed that she sat the online test for Mr Eden on 26 March 2013, in the No 1 Branch office in Melbourne. Mr Eden gave evidence that this was not true.³⁵

30. The first difficulty for Mr Eden is that he has propounded different versions of events at different times. On 12 September 2013 Mr Eden made a statutory declaration which stated, among other things, that he completed the ACTU Fair Work Right of Entry Online Training Course on 26 March 2013.³⁶

31. In his oral evidence, Mr Eden retreated from this statement:

Q. You knew that this stat dec was false when you signed it, that's right isn't it?

A. No, that's not correct. I thought it was correct at the time. My recollection wasn't correct.

Q. What do you mean by that, Mr Eden? You thought it was correct?

A. That's right. I thought it was correct when I signed it but I don't believe that – it may well have been 26 March, it may not have been. It was a long time ago.³⁷

32. As appears from this evidence Mr Eden was apparently sure on 12 September 2013 that he had sat the test on 26 March 2013, but had ceased to be sure of that fact at some later point.

33. However he was still sure on 26 November 2013. On that date the solicitors for the No 1 Branch, Holding Redlich, sent a detailed letter to the Fair Work Commission

³³ Peggy Lee, witness statement, 25/8/14, McCubbin MFI-1, 25/8/14, 1/132; McCubbin, MFI-1, 25/8/14, 1/416-417.

³⁴ McCubbin MFI-1, 25/8/14, 3/1001.

³⁵ David Eden, 19/9/14, T:1011.19-20.

³⁶ McCubbin MFI-1, 25/8/14, 2/585.

³⁷ David Eden, 19/9/14, T:1005.21-30.

addressing various allegations that had been raised concerning the obtaining of right of entry permits.³⁸ This letter included the following concerning the completion of the test by Mr Eden:

In relation to Mr Eden, the ACTU record shows that Mr Eden undertook his ROE test on 26 March 2013 at 8.51am and the time taken was 21 minutes and 49 seconds. Mr Eden has provided a Statutory Declaration as requested by you and **further instructs that he came down to Melbourne on the afternoon of 26 March 2013 to do his test** – he did not do the test at 9.14am that day. To the best of his recollection, it took longer than the 21 minutes and 49 seconds set out in the ACTU record. Mr Eden also recalls that Ms Kitching opened up the computer for him and that Mr Rowe also came down from Bendigo that afternoon to do his test.³⁹ (emphasis added)

34. Mr Eden accepted that he gave instructions to someone at Holding Redlich for the purposes of him or her drafting and sending this letter.⁴⁰ It follows that as at 26 November 2013 Mr Eden was giving instructions to Holding Redlich to the effect that he did the test on 26 March 2013, and indeed was able to recall that he did the test in the afternoon; incidental details to the effect that Ms Kitching opened the computer for him; and that Mr Rowe sat the test on the same afternoon.
35. On 19 December 2013 Mr Eden was interviewed by representatives of the Fair Work Commission. A transcript of that interview is in evidence.⁴¹ Mr Eden was accompanied by Mr David Shaw from Holding Redlich. The representatives of the Fair Work Commission conducting the interview were Mr Enright and Ms Fraser. In that interview Mr Eden said that he recalled doing his test in the evening of 26 March 2013 not in the morning.⁴² He said that he remembered Mr Rowe being present when he did his test and that Mr Rowe had done the test after Mr Eden did his.⁴³
36. By the time it came for Mr Eden to give evidence in the Commission his position had changed again. When asked about what he said to the Fair Work Commission concerning his alleged recollection of Ms Kitching opening up the computer for him and Mr Rowe coming down from Bendigo in the afternoon to do the test as set out in

³⁸ McCubbin MFI-1, 25/8/14, 1/407.

³⁹ McCubbin MFI-1, 25/8/14, 1/409-410.

⁴⁰ David Eden, 19/9/14, T:1006.8-13.

⁴¹ McCubbin MFI-1, 25/8/14, 1/421.

⁴² McCubbin MFI-1, 25/8/14, 2/465.

⁴³ McCubbin MFI-1, 25/8/14, 2/467.

paragraph 33 above he said, 'I was confused'.⁴⁴ He also retreated from the proposition that he had observed Mr Rowe doing his right of entry test on the afternoon of 26 March 2013. He said again that he was confused and added 'I did not witness him do his right of entry test that afternoon'.⁴⁵

37. Mr Eden's evidence in his witness statement was to the following effect:⁴⁶

Because so much time had passed, I do not know what time of day or what date I did the ROE test. I remember that I came especially to Melbourne to do the test. I also clearly remember that I did the test myself.

38. The evidence of Mr Eden is thereby entirely unsatisfactory. It seems common ground that only one online test was carried out – the test carried out on the morning of 26 March 2013 from the office of the No 1 Branch in Melbourne. Mr Eden's final position is that he does not know what day or when he purportedly sat the test. He does not point to any records which indicate that the test was carried out by him or on his behalf on some day other than that identified by Ms Lee (namely in the morning of 26 March 2013).

39. Yet Mr Eden was in Bendigo, on the morning of 26 March 2013, as appears from his phone records. When asked about those telephone records the examination proceeded as follows:⁴⁷

Q. One point we draw from that is that you are certainly at Bendigo when the test was done on the morning of 26 March; that's right?

A. If this is my phone record, it would indicate that.

Q. You know it's your phone record, Mr Eden. You've just said you had produced it to the Fair Work Commission that's correct?

A. That's right, we volunteered that information to the Fair Work Commission.

Q. So you know it is your phone record?

A. I believe it to be my phone record, yes.

⁴⁴ David Eden, 19/9/14, T:1007.46.

⁴⁵ David Eden, 19/9/14, T:1008.22.

⁴⁶ David Eden, witness statement, 19/9/14, para 20.

⁴⁷ David Eden, 19/9/14, T:1009.5-17.

40. Ms Lee's evidence should be accepted instead of Mr Eden's. In other words, it should be found that Ms Lee sat Mr Eden's online test on the morning of 26 March 2013.

Evidence of Mr Darryn Rowe

41. The evidence of Mr Darryn Rowe was similarly problematic. The letter of 26 November 2013 from Holding Redlich to the Fair Work Commission included the following:

As to Darryn Rowe, he does not agree that he did the test on 20 March 2013 starting at 9.08pm. Mr Rowe instructs that he, like Mr Eden, did his test on 26 March 2013. He recalls that both he and Mr Eden attended a meeting at 2.00pm in Bendigo and, following the conclusion of that meeting, they both drove to Melbourne to undertake the test.

42. Mr Rowe's story then changed and he told the Commission that he completed the test on 20 March 2013 as per the ACTU record.⁴⁸
43. In his oral evidence Mr Rowe accepted that someone from Holding Redlich asked him for an account of what had happened regarding his online test and that he knew that this was for the purposes of responding to the investigation that the Fair Work Commission was conducting.⁴⁹ It was put to Mr Rowe that he had been careful to give a truthful account to Holding Redlich and Mr Rowe accepted this and agreed he gave those instructions to Holding Redlich in November 2013.⁵⁰
44. In his oral evidence Mr Rowe attempted to explain the discrepancy in his evidence by saying that when he was interviewed by Holding Redlich he could not remember when he had sat the test so he discussed it with Mr Eden who suggested to him that they had travelled to Melbourne from Bendigo to do the test on 26 March 2013.⁵¹ Mr Rowe said:

Q: But you discussed it with Mr Eden, hadn't you?

A: I had - at that stage I was -

Q: You discussed it with Mr Eden hadn't you?

⁴⁸ Darryn Rowe, 19/9/14, para 8.

⁴⁹ Darryn Rowe, 19/9/14, T: 1022.5-12.

⁵⁰ Darryn Rowe, 19/9/14, T:1022.14-39; 1026.25-32.

⁵¹ Darryn Rowe, 19/9/14, T:1027.28.

A: At that stage, if you'd let me finish, I was having trouble as far as I couldn't remember the exact time or date that I'd done the – completed the test, and I did speak to Mr Eden to see if he could recollect when we had completed. He said, "I believe it was here", and because we had travelled to Melbourne, there was a recollection, yes, that's right, I had to go down to the office on that day I do remember travelling down.

45. When asked again to explain why his evidence had changed from what he told the Fair Work Commission in November 2013, Mr Rowe said:⁵²

A: The evidence that was initially put forward, and as I said to you prior, I had trouble recalling, I'd started a new job which I was trying to learn, and because of the amount of travel that we were doing at the time, it was very hard to recall exactly where I was at any given time. I remember doing the right of entry, but I could not recall exactly when I did it. Because of that I spoke to David [Eden] and said, "Look, do you remember?" He said, "Yes, I believe it was here". I remember travelling down to Melbourne from Bendigo with him and I thought, yep, that sounds fine, that's right, more than happy. So, as things progressed I looked at, and this is as we went down, we looked at the record, ironed that, okay, yes, I remember where I was clearly.

Q. So your memory gets better and better over time, does it, Mr Rowe?

A. Yeah.

46. It is submitted that Ms Lee's evidence should be accepted over Mr Rowe's. Mr Rowe was not a convincing witness. His story has changed repeatedly over time. His first attempt to defeat the allegations, when raised by the Fair Work Commission, was, in effect, to deny the accuracy of the computer records as to the time and date his test was done. Since then he has been confronted with the detailed forensic computer analysis obtained by the Fair Work Commission from an independent expert, Mr Scott Man of Invest-e-gate Pty Ltd. That analysis would appear to be irrefutable.

47. The No 1 Branch has had since at least 24 March 2014 to provide a contrary analysis, and has said on the record both to the Fair Work Commission and to this Commission that it has engaged the services of KPMG to prepare a response. No material from KPMG or any other computer expert has apparently been able to be produced to refute

⁵² Darryn Rowe, 19/9/14, T:1027.18-38.

the testing and conclusions of Mr Mann of Invest-e-gate Pty Ltd. It is telling then, that against this background, Mr Rowe has sought to change his story so that he now accepts the test was in fact done on 20 March 2013.

48. It should be found that Ms Lee sat Mr Eden's online test on the evening of 20 March 2013.

Evidence of Ms Diana Asmar

49. In her evidence Ms Asmar said she sat her own right of entry test and that each organiser was required to undertake his or her right of entry test.⁵³
50. The ACTU records show that Ms Asmar's right of entry test was completed on 25 January 2013 and she scored 99%.⁵⁴ Ms Asmar signed her declaration on 29 January 2013.⁵⁵ On 31 January 2013, Ms Asmar was issued with her right of entry permit.⁵⁶
51. Ms Asmar gave evidence that she did not tell a meeting of organisers in early 2013 that Ms Kitching would be sitting their right of entry tests.⁵⁷ Ms Asmar's evidence on 28 August 2014 was that no meeting or industrial day took place in April 2013 or on an earlier date.⁵⁸ However, Ms Asmar's evidence changed on 19 September 2014 during the following exchange:⁵⁹

Q: You attended the industrial day in February-March 2013?

A: I would have, yes.

52. Ms Asmar squarely denied instructing Ms Lee to sit the right of entry tests for Mr Rowe and Mr Eden.⁶⁰ However for the reasons set out above it is apparent that Mr Rowe and

⁵³ Diana Asmar, witness statement, 26/8/14, para 83.

⁵⁴ McCubbin MFI-1, 25/8/14, 4/1369.

⁵⁵ McCubbin MFI-1, 25/8/14, 2/845.

⁵⁶ McCubbin MFI-1, 25/8/14, 4/1372.

⁵⁷ Diana Asmar, 26/8/14, T:557.18-21.

⁵⁸ Diana Asmar, 26/8/14, T:557.23-29.

⁵⁹ Diana Asmar, 19/9/14, T:1094.10-12.

⁶⁰ Diana Asmar, 26/8/14, T:562.39-41.

Mr Eden did not complete their own tests and instead Ms Lee was asked by Ms Asmar to complete their tests which she did.⁶¹

53. Ms Asmar said that when she hired Ms Lee she said she was politically neutral. However, Ms Asmar later discovered that Ms Lee had assisted on the opposing campaign for Mr Marco Bolano. Ms Asmar said that Ms Lee ‘appeared to want to destabilise the current Branch leadership with a view to reinstating the previous team’.⁶²

Evidence of Ms Kimberley Kitching

54. In relation to Ms Lee’s statement that Ms Asmar and Ms Kitching told her that she would be sitting the right of entry tests for Mr Rowe and Mr Eden, Ms Kitching said that she refuted this and the conversation never took place.⁶³

D ASSESSMENT OF THE VARIOUS WITNESSES

55. There is clearly a collision in the evidence between, on the one hand, Ms Lee (who swears that she carried out the online tests for each of Mr Rowe and Mr Eden, and that she did so at the request and direction of Ms Asmar and Ms Kitching) and, on the other, the evidence of Mr Eden, Mr Rowe, Ms Asmar and Ms Kitching.

56. Ms Lee’s evidence is strongly supported by the contemporaneous written record. According to the ACTU records the test was done in the morning of 26 March 2013.⁶⁴ Immediately following the test, a certificate of completion was sent through to Ms Lee.⁶⁵ Less than an hour after receiving Mr Eden’s certificate of completion, Ms Lee emailed Mr Eden’s completed application and the certificate to the Fair Work Commission.⁶⁶ Mr Eden’s permit was issued on 15 April 2013 following these emails.⁶⁷

⁶¹ Peggy Lee, 25/8/14, T:480.18-19.

⁶² Diana Asmar, witness statement, 26/8/14, paras 86-87.

⁶³ Kimberley Kitching, 26/8/14, T:530.14-18.

⁶⁴ McCubbin MFI-1, 25/8/14, 1/113.

⁶⁵ McCubbin MFI-1, 25/8/14, 1/419; Peggy Lee, 25/8/14, T:483.39-4.

⁶⁶ McCubbin, MFI-1, 25/8/14, 1/416-417.

⁶⁷ McCubbin, MFI-1, 25/8/14, 1/290.

57. Ms Lee's evidence should be accepted on this issue. Ms Lee gave her evidence in a careful and thoughtful way. She was clearly distressed and remorseful about her actions in sitting a test for someone else. Her story has been consistent and unshaken from the outset. It carries weight because it is against interest. In contrast both Mr Eden and Mr Rowe have given inconsistent versions of events at different times. Mr Eden's explanation for his competing versions is simply to say he was 'confused'. On one occasion in Mr Eden's oral evidence he answered questions in a flippant way.⁶⁸
58. Both Mr Eden and Mr Rowe repeatedly changed their evidence regarding when and where they took their tests. Both Mr Eden and Mr Rowe gave evidence to the Fair Work Commission that they travelled to Melbourne and took the test at the No 1 Branch office on 26 March 2013. After being presented with his telephone records showing he was in Bendigo that day, Mr Eden's evidence changed and he said he took the test in Bendigo. After being confronted with irrefutable evidence that the computer records were correct, Mr Rowe's evidence also changed and he told the Commission that he completed the test on 20 March 2013 (not 26 March 2013 as previously claimed), a new story which attempted to fit with what was shown on the ACTU record as to the timing and date the test was done.
59. It is submitted that Ms Lee's version of the events should be accepted as truthful by the Commission over the evidence of Mr Eden and Mr Rowe. A finding should be made that Ms Lee completed Mr Eden's and Mr Rowe's right of entry tests at the direction of Ms Asmar and Ms Kitching.
60. Another contest in the evidence arises between organisers Mr Robert McCubbin and Ms Jayne Govan who said that Ms Kitching completed their right of entry tests and Ms Kitching who said that she was never asked to do any right of entry tests on behalf of any organisers and did not do them.

Evidence of Mr Robert McCubbin

61. On 18 March 2013 an application for a right of entry permit was lodged with the Fair Work Commission by the No 1 Branch on behalf of Mr McCubbin. The application

⁶⁸ David Eden, 19/9/14, T:1016.45-1017.6.

was dated 12 March 2013 and included a declaration from Ms Asmar, as the Committee of Management member making the application.

62. On the application a box had been ticked stating that the proposed permit holder, Mr McCubbin, was an employee of the No 1 Branch holding the position of occupational health and safety officer.⁶⁹
63. Mr McCubbin gave evidence that he commenced full time employment with the No 1 Branch as an occupational health and safety officer on 22 April 2013.⁷⁰ For approximately three months prior to commencing this role, Mr McCubbin said he had been assisting Ms Asmar on a voluntary basis until the No 1 Branch had the funds to start paying him wages.⁷¹ Ms Asmar gave evidence that when she signed the declaration she knew that Mr McCubbin was not an employee of the No 1 Branch.⁷²
64. Mr McCubbin said that he did not receive the training referred to in his right of entry permit application and that he knew he had not received this training at the time he signed the application.⁷³ Mr McCubbin said that he signed the application at the direction of Ms Asmar.⁷⁴ Mr McCubbin said that Ms Kitching did the online test for him.⁷⁵
65. Mr McCubbin also gave evidence that he recalled attending a meeting in April 2013 at the No 1 Branch office with his partner Ms Porter where Ms Asmar told them that Ms Kitching had completed her right of entry test for her and that at the upcoming industrial day she was going to tell the No 1 Branch staff that Ms Kitching would do their right of entry tests for them.⁷⁶

⁶⁹ McCubbin MFI-1, 25/8/14 3/1782.

⁷⁰ Robert McCubbin, witness statement, 25/8/14, para 14; Robert McCubbin, 25/8/14, T:469.8-20.

⁷¹ Robert McCubbin, witness statement, 25/8/14, para 14.

⁷² Diana Asmar, 26/8/14, T:559.23-29.

⁷³ Robert McCubbin, 25/8/14, T469.42-47.

⁷⁴ Robert McCubbin, 25/8/14, T:470.1-3.

⁷⁵ Robert McCubbin, witness statement, 19/9/14, para 19.

⁷⁶ Robert McCubbin, witness statement, 25/8/14, para 15.

Evidence of Sandra Porter

66. Ms Porter has been Mr McCubbin's partner since 2006. Ms Porter gave evidence that around January to March 2013, she and Mr McCubbin attended a barbecue at Ms Asmar's house. Ms Porter deposed that she recalled Ms Asmar saying that she had gotten Ms Kitching to do her right of entry test, and that Mr McCubbin should do the same.⁷⁷
67. Ms Porter also deposed that around the same time in early 2013, she and Mr McCubbin attended Ms Asmar's office at the No 1 Branch to discuss the commencement of Mr McCubbin's employment and other issues. Ms Porter said that Mr McCubbin asked Ms Asmar what was happening with the right of entry permit and testing to which she responded that Ms Kitching had already done her test and that she had asked her to do Mr McCubbin's test as well.⁷⁸

Evidence of Ms Jayne Govan

68. Ms Govan was an HSU Organiser in 2013. Ms Govan gave evidence that around February or March 2013, she attended an industrial day at the No 1 Branch offices on Park Street, Melbourne where the following occurred:⁷⁹

I recall that a number of organisers raised the issue of Right of Entry Permits because of the difficulties we had been experiencing. Most if not all the employees of the union would have been present at the meeting, including most if not all of the organisers. Diana Asmar told all of us present that we would not be required to complete our own Right of Entry tests and that Kimberly Kitching would be completing the tests for us.

69. Ms Govan said she understood that Ms Asmar arranged for Ms Kitching to complete the right of entry tests for the organisers because the organisers did not really have time to do the tests due to their workloads.⁸⁰

⁷⁷ Sandra Porter, witness statement, 16/9/14, para 11.

⁷⁸ Sandra Porter, witness statement, 16/9/14, para 16.

⁷⁹ Jayne Govan, witness statement dated 16 September 2013, 25/8/14, paras 13-14.

⁸⁰ Jayne Govan, witness statement dated 16 September 2013, 25/8/14, para 15.

70. Ms Govan gave evidence that the following people did not complete their own right of entry tests:⁸¹

- (a) Nick Katsis;
- (b) Dean Sherriff;
- (c) Diana Asmar;
- (d) Sasha (whose surname Ms Govan could not recall);
- (e) David Eden; and
- (f) Rob McCubbin.

71. Ms Govan said that she, Mr Katsis, Mr Sherriff and ‘Sasha’ all commenced their employment as organisers at the same time and they spoke about the right of entry tests amongst themselves. Ms Govan also said she recalled Ms Asmar boasting that Ms Kitching got around 99% or 100% when she completed Ms Asmar’s right of entry test.⁸²

Evidence of Lee Atkinson

72. Mr Atkinson is an Organiser at the HSU. Mr Atkinson gave evidence that he did not sit his right of entry test but obtained a right of entry permit.⁸³ Mr Atkinson said that Ms Lee told him that she completed his right of entry test and he got 100%.⁸⁴ Mr Atkinson said that Ms Lee did not mention Ms Kitching.⁸⁵

Evidence of Kimberley Kitching

73. Ms Kitching said she was at the No 1 Branch office for part of the morning and part of the afternoon on 15 February 2013 but denied that she completed right of entry tests for

⁸¹ Jayne Govan, witness statement dated 16 September 2013, 25/8/14, para 17.

⁸² Jayne Govan, witness statement dated 16 September 2013, 25/8/14, paras 18-19.

⁸³ Lee Atkinson, 19/9/14, T:1038.5;1039.10-11.

⁸⁴ Lee Atkinson, 19/9/14, T:1037.42-45.

⁸⁵ Lee Atkinson, 19/9/14, T:1038.3-5.

other people that day.⁸⁶ Ms Kitching denied that she was in the No 1 Branch office at the times that the right of entry tests referred to in paragraph 10 above were completed.⁸⁷

74. Ms Kitching has produced some documentary evidence to the Commission which indicates that she was away from the No 1 Branch office at times during the day on 15 February 2013.⁸⁸ This documentary evidence shows that Ms Kitching left the No 1 Branch office for short periods of time but does not exclude the possibility of Ms Kitching returning to the Branch.

75. Ms Kitching said that she attended two industrial days at the No 1 Branch office in February and March 2013. Ms Kitching said that Ms Asmar addressed staff on various topics at both meetings but did not say that Ms Kitching was going to complete the organisers' right of entry tests for them.⁸⁹

76. Ms Kitching gave evidence that she never told Ms Lee, or anyone else, that she had completed right of entry tests for organisers.⁹⁰

77. When asked why numerous witnesses would say that Ms Asmar told them that Ms Kitching would sit their right of entry tests, Ms Kitching said the following:⁹¹

Q. You heard yesterday, when you were listening to the evidence, a number of witnesses say that there was a meeting of organisers in the office in early 2013 at which Ms Asmar directed all the organisers present that you would sit the test for them?

A. What I can tell you, Mr Stoljar, is that did not happen. That conversation did not happen. I can also tell you that perhaps some of these witnesses are politically motivated. They're running on other tickets. We have elections coming up and they may be motivated by malicious purposes.

⁸⁶ Kimberley Kitching, witness statement dated 16 September 2014, 19/9/14, paras 8-9.

⁸⁷ Kimberley Kitching, witness statement dated 16 September 2014, 19/9/14, paras 8-9.

⁸⁸ Kimberley Kitching, third witness statement, dated 17 September 2014, 19/9/14, paras 2,4-5; annexures A, C.

⁸⁹ Kimberley Kitching, witness statement dated 16 September 2014, 19/9/14, para 33.

⁹⁰ Kimberley Kitching, witness statement dated 16 September 2014, 19/9/14, para 34.

⁹¹ Kimberley Kitching, 26/8/14, T:529.18-28.

78. When asked whether Ms Lee was running for any office, Ms Kitching said she was not, but that she helped in the previous campaign on the ticket that ran against Ms Asmar.⁹²
79. Ms Kitching also proffered that the reason for why organisers may have given evidence that Ms Kitching did their right of entry tests for them was because they were ‘disgruntled former employees’.⁹³
80. Ms Kitching gave evidence that she does not hold a right of entry permit and has never sat the test for a right of entry permit. Ms Kitching said she had never been instructed or asked to do a right of entry test.⁹⁴
81. Ms Kitching gave evidence that she never discussed right of entry tests with the Senior Industrial Officer at the No 1 Branch at the time, Mr Leszcynski.

Evidence of Alexander Leszcynski

82. Mr Leszcynski was a Senior Industrial Officer at the No 1 Branch from late 2012 to March 2013. Mr Leszcynski gave evidence that Ms Kitching told him that Ms Asmar was too busy to complete her right of entry training and test so Ms Kitching was going to do it for her.⁹⁵

Evidence of Robert Morrey

83. Mr Morrey was a member of the Branch Committee of Management from late 2012 until March-April 2013.
84. Mr Morrey gave evidence that Mr Leszcynski told him that employees of the No 1 Branch were not permitted to do their own right of entry permit applications and Ms Kitching completed the right of entry tests and applications on their behalf.⁹⁶

⁹² Kimberley Kitching, 26/8/14, T:529.38-46.

⁹³ Kimberley Kitching, 26/8/14, T:529.36.

⁹⁴ Kimberley Kitching, 26/8/14, T:529:13-16; Kimberley Kitching, witness statement dated 23/8/14, paras 31-32.

⁹⁵ Alexander Leszcynski, witness statement dated 6 January 2014, 19/9/14, para 47.

⁹⁶ Robert Morrey, witness statement dated 18 July 2014, 25/8/14, paras 34-35.

Evidence of Nick Katsis

85. Two of the organisers, Mr Katsis and Mr Trajcevski-Uzunov, whose right of entry tests were completed on 15 February 2013 purportedly by Ms Kitching, gave evidence that they completed their own tests.
86. Mr Katsis was an Organiser with the No 1 Branch from January to May 2013 and an Industrial Officer with the No 1 Branch from May to June or July 2013. Mr Katsis is currently a Lead Organiser with the No 1 Branch.
87. Mr Katsis gave evidence that he completed his own right of entry test during the early stages of his employment as an Organiser. Mr Katsis denied that Ms Kitching or anyone else completed his right of entry test for him.⁹⁷

Evidence of Saso (Sasha) Trajcevski-Uzunov

88. Mr Trajcevski-Uzunov was an Organiser with the No 1 Branch from late January to early April 2013.
89. Mr Trajcevski-Uzunov's evidence was that on or about 15 February 2013 he completed an online right of entry test.⁹⁸

E ASSESSMENT OF THE VARIOUS WITNESSES

90. There is conflict in the evidence of Mr McCubbin and Ms Govan who said that Ms Kitching completed their tests for them and Ms Kitching who said that she has never completed a right of entry test. Ms Kitching purportedly also sat tests for Mr Katsis and Mr Trajcevski-Uzunov, however all three witnesses denied that this occurred.
91. The contemporaneous written record from the ACTU shows that six right of entry tests were undertaken on 15 February 2013. The time taken to complete the tests gets progressively quicker throughout the day. The Fair Work Commission when investigating this matter retrieved data from three applicants not associated with the No

⁹⁷ Nick Katsis, 19/9/14, T:1059.17-37.

⁹⁸ Saso Trajcevski-Uzunov, witness statement, 19/9/14, paras 9-10.

1 Branch who also took the test on 15 February 2013. These people took 43 minutes and 7 seconds; one hour; and 52 minutes and 2 seconds respectively to complete the tests.⁹⁹ It is submitted that this improved response time for the No 1 Branch applicants suggests that one person took these tests.

92. Three of the organisers whose tests were taken that day, Mr McCubbin, Ms Govan and Mr Atkinson gave evidence that they did not complete those tests. Mr McCubbin and Ms Govan gave this evidence against their interests. Several witnesses said they were informed that Ms Kitching was doing right of entry tests for No 1 Branch organisers. Ms Kitching flatly denied that she performed any right of entry tests. She suggested the many witnesses whose evidence conflicted with hers was simply false and that at least some of them may be giving false evidence under oath because they were contesting the upcoming elections. That is not credible.
93. The witnesses whose testimony conflict with Ms Kitching – Ms Lee, Ms Govan, Mr McCubbin, Ms Porter, Mr Morrey and Mr Leszcynski – were all witnesses who evidently understood the gravity of the allegations and the seriousness of their obligations to tell the truth to the Commission.
94. It is submitted that the documentary evidence Ms Kitching provided showing she was away from the No 1 Branch office on 15 February 2013 does not outweigh the overwhelming weight of the documentary and oral evidence against her. The material provided by Ms Kitching shows that she was away from the office for short periods but remained in the vicinity of the No 1 Branch office and hence capable of sitting the tests at the times shown on the ACTU record.
95. It is submitted that the evidence of Mr McCubbin and Ms Govan that Ms Kitching did their right of entry tests should be accepted. It is supported by the evidence of other previous HSU members including Mr Leszcynski and Mr Morrey who said that Ms Kitching was completing right of entry tests for Organisers. The documentary evidence presented by Ms Kitching and her denial that she completed the tests is not sufficient to prevent this conclusion.

⁹⁹ McCubbin MFI-1, 25/8/14, 1/24-25.

96. Finally, as to Ms Asmar's test, the evidence of Mr McCubbin, Ms Porter and Ms Govan was that Ms Asmar said to them that Ms Kitching completed her test for her and the evidence of Mr Leszcynski that Ms Kitching told him that she had done Ms Asmar's test should be accepted. This finding is supported by the larger context in which the alleged test was sat, namely the practice in the No 1 Branch for Ms Kitching or Ms Lee to sit applicants' right of entry tests. In those circumstances, it is submitted that it is possible to make a finding that Ms Asmar did not sit her own test, and that Ms Kitching was the person who did it for her. It is also significant that those who have given evidence against Ms Asmar's interest on this point did not have any personal interest in the content of that evidence. On the other hand, Ms Asmar and Ms Kitching evidently had a strong interest in denying the allegations.

F CRIMINAL CODE ACT 1995 (CTH)

97. It is now necessary to consider the possible consequences of the findings suggested above.

98. It is submitted that the evidence is sufficient for the Commission to recommend that the Commonwealth Office of Public Prosecutions consider prosecuting:

- (a) Ms Asmar for contravention of ss 136 and 137 of the *Criminal Code Act 1995* (Cth); and
- (b) Mr Eden, Mr Rowe, Mr Atkinson, Mr Trajcevski-Uzunov and Mr Katsis for contravention of ss 136 and 137; and
- (c) Ms Kitching for aiding and abetting these offences.

Mr McCubbin's application

99. Ms Asmar's conduct in signing the declaration stating that Mr McCubbin was an employee of the No. 1 Branch when she knew he was not, leads to consideration of s 136.1(1) of the *Criminal Code Act 1995* (Cth). The question is whether Ms Asmar committed an offence by providing a false or misleading statement in an application to

the Fair Work Commission. At the relevant time, a person was guilty of making a false or misleading statement in an application where:

- (a) the person makes a statement (orally or in a document);
- (b) the person knows the statement is false or misleading or omits any matter without which the statement is misleading;
- (c) the statement is made in connection with an application for a licence, permit, authority, registration, or claim for a benefit; and
- (d) the statement was made to a Commonwealth entity or to a person exercising powers or performing functions under a Commonwealth law or in compliance or purported compliance with a Commonwealth law.

100. As to consideration of the possible application of s 136:

- (a) Ms Asmar knew that she was making a false or misleading statement to the Fair Work Commission as she knew that Mr McCubbin was not an employee of the No. 1 Branch.¹⁰⁰ Alternatively, she was reckless as to whether the declaration was false or misleading;¹⁰¹
- (b) the statement was made to obtain a right of entry permit;
- (c) the statement was made in compliance or purported compliance with a law of the Commonwealth, namely, the *Fair Work Act 2009* (Cth) under which a right of entry permit must be acquired by an official¹⁰² (an official is defined in the *Fair Work Act 2009* (Cth) as including an employee);¹⁰³

101. At the relevant time, the elements of the offence of recklessly making a false or misleading statement were that:

¹⁰⁰ Diana Asmar, 26/8/14, T:559.23-29.

¹⁰¹ See s 136.1(4) of the *Criminal Code Act 1995* (Cth).

¹⁰² Section 512 of the *Fair Work Act 2009* (Cth).

¹⁰³ Section 12 of the *Fair Work Act 2009* (Cth).

- (a) the person makes a statement (orally or in a document);
- (b) the person makes the statement reckless as to whether the statement is false or misleading or omits any matter without which the statement is misleading;
- (c) the statement is made in connection with an application for a licence, permit, authority, registration, or claim for a benefit; and
- (d) the statement was made to a Commonwealth entity or to a person exercising powers or performing functions under a Commonwealth law or in compliance or purported compliance with a Commonwealth law.

102. 'Recklessness' occurs where a person is aware of a substantial risk that the circumstance exists or will exist and accordingly it is unjustifiable to take the risk.¹⁰⁴ By knowing that Mr McCubbin was not formally employed by the No 1 Branch, Ms Asmar knew there was a very substantial risk that her declaration was false or misleading and that it was unjustifiable to make the statement to the Fair Work Commission that she had made proper inquiries, reviewed the No 1 Branch's records and that Mr McCubbin was employed by the No 1 Branch.

103. As to the consideration of a contravention of s 137.1 by Ms Asmar, at the relevant time, the elements of the offence were:

- (a) the person gives information to another person;
- (b) the person knows that the information is false or misleading or omits any matter or thing without which the information is misleading; and
- (c) the information was given to a Commonwealth entity or to a person exercising powers or performing functions under a Commonwealth law or in compliance or purported compliance with a Commonwealth law.

104. On the findings submitted, Ms Asmar's conduct is capable of meeting the elements of this offence.

¹⁰⁴ Section 5.4 of the *Criminal Code Act 1995* (Cth).

Mr Eden's and Mr Rowe's applications

105. If the Commission accepts the evidence of Ms Lee over the evidence of Mr Eden and Mr Rowe, consideration of ss 136.1 and 137.1 are also of relevance to Mr Eden and Mr Rowe's conduct in their applications for right of entry permits. If they did not do the tests – and if Ms Lee's evidence is accepted, they did not – then each knowingly made a false or misleading declaration to the Fair Work Commission that he had received the required training when he had not.
106. Ms Asmar's role in Mr Eden's and Mr Rowe's applications for right of entry permits may also constitute a contravention of ss 136.1(1), 136.1(4) and/or s 137.1(1) as she, too, knowingly gave a false or misleading declaration to the Fair Work Commission that she had made proper inquiries (when she had not), reviewed the records of the organisation and that Mr Eden and Mr Rowe had received the required training (when she knew that they had not, or alternatively was reckless as to this fact).

Ms Asmar's application

107. As to Ms Asmar's own application for a right of entry permit, this ought also be considered as to whether it constituted a contravention of ss 136.1(1), 137.1(1) and/or 137.2(2) of the *Criminal Code Act 1995* (Cth). In respect of Ms Asmar's application for a right of entry permit, if the suggested findings are accepted, Ms Asmar knowingly falsely declared that she had undertaken the required training when Ms Kitching had actually done this training and the relevant test for her.

The other organisers' applications

108. The Commission should find that Ms Asmar knew that Mr Atkinson, Ms Govan, Mr McCubbin, Mr Sherriff, Mr Trajcevski-Uzunov and Mr Katsis had not completed their right of entry training, or alternatively was reckless as to her certification that they had done so because she knew that she had made arrangements for Ms Kitching or Ms Lee to complete their training. If that submission is accepted, then with respect to these applications too Ms Asmar's conduct ought be investigated for contravention of ss 136.1(1), 136.1(4) and 137.1(2) of the *Criminal Code Act 1995* (Cth).

109. Further, if a finding is made that (as it is submitted would be appropriate), Ms Kitching completed Ms Asmar and these organisers' right of entry tests, then she too ought be the subject of a referral for investigation by the Office of the Director of Commonwealth Public Prosecutions for aiding and abetting the offences committed by Ms Asmar, Mr Atkinson, Ms Govan, Mr McCubbin, Mr Sherriff, Mr Trajcevski-Uzunov and Mr Katsis by sitting right of entry tests for them.¹⁰⁵ At the relevant time, the elements of aiding and abetting the commission of an offence were that:

- (a) the person's conduct must have in fact aided or abetted the commission of the offence by the other person;
- (b) the offence must have been committed by the other person; and
- (c) the person intended that his or her conduct would aid or abet the commission of the type of offence the other person committed or intended that his or her conduct would aid and abet the commission of an offence and the person was reckless about the commission of the offence which was committed.

110. The relevant conduct of Ms Kitching was sitting the tests on behalf of one or more of Ms Asmar, Mr Atkinson, Ms Govan, Mr McCubbin, Mr Sherriff, Mr Trajcevski-Uzunov and Mr Katsis. By so doing, Ms Kitching enabled each of them to make a false or misleading statement or to give false or misleading information to the Fair Work Commission that he or she had received the required training. If Ms Kitching is found to have sat those tests then she must also be found to have known that her completion of the tests for Ms Asmar and the organisers was so that they could submit applications for right of entry permits to the Fair Work Commission which among other things required a declaration that the required training had been undertaken. Accordingly, Ms Kitching would have known that her conduct in sitting the tests would and did aid or abet Ms Asmar and the organisers in the commission of offences under ss 136.1(1), 137.1(1) and 137.1(2) of the *Criminal Code Act 1995* (Cth).

111. It is submitted that there is sufficient evidence to warrant Ms Asmar, Ms Kitching, Mr Eden, Mr Rowe, Mr Atkinson, Mr Trajcevski-Uzunov and Mr Katsis being referred to

¹⁰⁵ See s 11.2 of the *Criminal Code Act 1995* (Cth).

the Commonwealth Office of Public Prosecutions so that it can consider whether to prosecute them for possible contraventions of the *Criminal Code Act 1995* (Cth).

G BULLYING AND HARRASSMENT

112. The issues concerning the No 1 Branch's practices regarding training and testing for right of entry permits are only one symptom of a highly dysfunctional and fractured workplace. Numerous former employees of the No 1 Branch gave evidence that they had either been subjected to, or witnessed, bullying.

113. In particular, Ms Leonie Flynn gave evidence that she had been subjected to serious and prolonged bullying in her role as Assistant Secretary/Treasurer of the No 1 Branch. Ms Flynn was elected Assistant Secretary/Treasurer after running on the opposing ticket to Ms Asmar (Mr Marco Bolano's ticket). Ms Flynn was also a member of the Branch Committee of Management.

114. Ms Flynn said that during her time as Assistant Secretary/Treasurer of the No 1 Branch she was subjected to extensive bullying and intimidation from Ms Asmar. Ms Flynn said that she had noticed what she thought was a breach by the No 1 Branch of the HSU Rules as the Secretary and the President both sat on the Audit and Compliance Committee.¹⁰⁶ When Ms Flynn raised this with Ms Asmar, Ms Flynn said that Ms Asmar:¹⁰⁷

...yelled hurtful remarks at me, intimidated me, made me feel "ganged up" on, criticised me and was abusive until I was reduced to tears and had to leave the meeting for about 10 minutes until I stopped sobbing hysterically. Ms Asmar yelled, "Leonie, move on. We're not listening to you. For God's sake, you're going around in circles. Where's your head space today? You are wrong... Ms Asmar continued to say things like 'So, get over it, we're not talking about it anymore, nobody is listening to you. Get over it.'" Ms Asmar then went on to say, "Some people are getting anxious and paranoid around the table". I believe she was referring to me at the time.

115. Ms Flynn also gave evidence that 'pre-meetings' before the Branch Committee of Management meetings were held in a local coffee shop near the No 1 Branch offices to which Ms Flynn was not invited. Ms Flynn said that another Branch Committee of Management member told her about these meetings and said they were attended by Ms

¹⁰⁶ Leonie Flynn, witness statement, 25/8/14, para 49.

¹⁰⁷ Leonie Flynn, witness statement, 25/8/14, para 50-51.

Asmar, Ms Kitching and other members of the Branch Committee of Management who had been on Ms Asmar's ticket.¹⁰⁸

116. Ms Flynn gave evidence that she felt that Ms Asmar obstructed, and directed others to obstruct, her from carrying out her duties regarding the No 1 Branch's finances. Ms Flynn gave evidence that Ms Asmar authorised all financial transactions and the disbursement of branch funds.¹⁰⁹

117. Ms Flynn's evidence that she was bullied and intimidated by Ms Asmar was supported by evidence given by Mr McCubbin, Ms Govan and former Branch Committee of Management members Mr Morrey and Ms Barbara Gregor.¹¹⁰

118. When asked why he thought Ms Asmar wanted to remove Ms Flynn, Mr McCubbin said:¹¹¹

Because she was opposite, or ran on an opposite unopposing ticket, and Ms Asmar believed that she would undermine her role in the office.

119. In respect of the allegations that she bullied Ms Flynn, Ms Asmar gave the following evidence:¹¹²

I deny that I ever bullied Leonie Flynn. I intended at all time to assist her to do her job. She came from a different political ticket. On day one, I said to her - we come from different political sides but we need to work together for the members. I said the members have chosen who they wanted. I said this was us. I said we needed to work together.

120. Ms Kitching also denied she had ever bullied Ms Flynn.¹¹³

I did not bully Leonie Flynn. There was never any bullying of anyone. Although meetings sometimes became heated, I never got "stuck in" to Leonie.

¹⁰⁸ Leonie Flynn, witness statement, 25/8/14, para 87.

¹⁰⁹ Leonie Flynn, witness statement, 25/8/14, para 28.

¹¹⁰ Robert McCubbin, witness statement, 19/9/14, paras 39-40; Robert Morrey, supplementary witness statement, 25/8/14, paras 20-22, 24-25; Barbara Gregor, supplementary witness statement, 25/8/14, paras 1926; Barbara Gregor, supplementary witness statement, 25/8/14, paras 41-42; 44-48; Jayne Govan, witness statement dated 16 September 2013, 25/8/14, paras 50-51; Jayne Govan, witness statement dated 6 August 2014, 25/8/14, paras 13, 19, 64;

¹¹¹ Robert McCubbin, 25/8/14, T:464.36-39.

¹¹² Diana Asmar, witness statement, 26/8/14, para 66.

¹¹³ Kimberley Kitching, witness statement, 25/8/14, paras 20-30.

There was never any plan to have Leonie embarrassed or to have her the subject of any persecution or prosecution. Leonie put forward her point of view at meetings.

121. On 5 August 2013 Ms Sarah Aird, a professional note-taker from Pacific Transcription, was engaged by the No 1 Branch to take minutes of the meetings of the Branch Committee of Management and the Audit and Compliance Committee. Ms Aird attended meetings and took notes for around eight months from 5 August 2013 to April 2014.¹¹⁴

122. In her oral evidence Ms Aird was asked about what she observed at the meeting of the Branch Committee of Management held on 5 August 2013 to which she replied:¹¹⁵

Clearly emotions were running quite high at that meeting. There was quite a bit of raised voices going on, a lot of confusion about who should be in the meeting and who should not be in the meeting, confusion about who was due to give reports and who wasn't, about the general make up of the committee. There was lots of raised voices and general disharmony in the room.

123. Ms Aird gave detailed evidence of the behaviour she observed in the meeting on 5 August 2013:¹¹⁶

...the behaviour that I saw that day, even though certainly a couple of people were targeting their conversations at other certain people, the behaviour that I saw that day was, you know, sometimes people get aggressive and emotional in meetings. Sometimes that happens.

124. Ms Aird was also asked about evidence she had given in her witness statement:¹¹⁷

Q: You say in paragraph 6 I saw nothing that I would regard as victimisation of any person including Ms Flynn. What did you meant by that?

A: Again, that was a sentence written by Mr van de Wiel, he was quiet determined to use the word "victimisation", I'm happy with that because I changed it to, but I suppose that he was going for, I didn't specifically see anything that was aimed at certain people.

¹¹⁴ Sarah Aird, 16/9/14, T:946:11-18.

¹¹⁵ Sarah Aird, 16/9/14, T:948:32-46.

¹¹⁶ Sarah Aird, 16/9/14, T:949:32-37.

¹¹⁷ Sarah Aird, 16/9/14, T:949:1-13.

125. Ms Aird said that some time after a meeting in October 2013, Ms Kitching directed her to stop adding in so much information in the minutes and Ms Asmar told her to only record the motions that were taken with no context or discussion.¹¹⁸ Ms Aird said that this was not her usual note-taking practice and she raised her concerns with Ms Kitching and her employer, Pacific Transcription. Ms Kitching told her that was what Ms Asmar wanted so that was what she should do. Pacific Transcription told Ms Aird to ‘give the client what they wanted.’¹¹⁹
126. The evidence of Ms Aird is particularly powerful as she was an independent and objective witness. Ms Aird was impartial and had no interest in any of the matters discussed at the meetings she attended. It is submitted that Ms Aird was a highly credible witness and her evidence should be accepted. Ms Aird’s evidence highlights the dysfunction and irregular behaviour within the No 1 Branch.
127. There is conflicting evidence as to whether, and to what extent, Ms Flynn was bullied by Ms Asmar and other employees at the No 1 Branch. Those conflicts in the evidence are difficult to resolve. However, what is clear was that the management of the No 1 Branch has been highly dysfunctional and fostered a culture of unhappiness, bitterness and fear. Ms Lee was compelling in her evidence as to how Ms Asmar and Ms Kitching ran the office whilst she was an employee and the distrust and accusations levelled at any person who Ms Asmar perceived to be disloyal. Ms Flynn, too, was convincing in her description of why the No 1 Branch office was not a place one would like to work.

¹¹⁸ Sarah Aird, 16/9/14, T:951:36-43.

¹¹⁹ Sarah Aird, 16/9/14, T:952:9-14.