

**CHECK AGAINST DELIVERY**

**ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION**

**HEARINGS COMMENCING 28 MAY 2015**

**AUSTRALIAN WORKERS' UNION – MEMBERSHIP NUMBERS**

**COUNSEL ASSISTING OPENING STATEMENT**

In the hearings beginning today the Commission will investigate the payment of what are described as membership fees by various employers or organisations to the Australian Workers' Union (AWU) or the Victorian branch of the AWU (AWU (Vic)).

The issues arising in relation to this investigation may be more clearly explained by reference to a specific example.

Take the first of the case studies which these hearings will examine, namely that of a cleaning business operating through the corporate vehicle Cleanevent Australia Pty Ltd (Cleanevent).

The central issue here is whether the AWU (Vic) inflated its membership numbers by issuing invoices for membership fees in circumstances in which there were no such members.

Cleanevent is, and at all relevant times was, part of a large business providing cleaning services across Australia. The Cleanevent business provides cleaning services for sporting and other events. Cleanevent was in 2010 acquired by Spotless Group Pty Ltd or its related companies (Spotless).

In 2006 the AWU and Cleanevent entered into an enterprise bargaining agreement which came into force on 22 December 2006 (the 2006 EBA). The 2006 EBA applied to all employees of

Cleanevent in Australia who fell within the classification structure set out in the 2006 EBA, including permanent and casual employees.

The term of the 2006 EBA nominally expired at the end of 2009.

Had Cleanevent and the AWU not entered into the 2006 EBA, the conditions of employment of Cleanevent employees would have been determined by the application of the Cleaning Industry – AWU/LHMU – Cleanevent Pty Ltd Award 1999 (the 1999 Award) for employees who fell within the classification structure of the 1999 Award.

The 2006 EBA was made under Part 8 of the *Workplace Relations Act* 1996 (Cth). In other words the Workchoices regime was in force. Therefore the 2006 EBA was not required to pass a “no disadvantage” test as between it and the 1999 Award.

In approximately 2010 the AWU and Cleanevent entered into negotiations with respect to a replacement for the 2006 EBA. These negotiations proceeded for some time. Had a replacement EBA been agreed upon, it would have been necessary for that instrument to be approved by the Fair Work Commission. The Fair Work Commission could not have approved a new EBA unless satisfied that it passed the “better off overall” test. For reasons explained further below, that test would not have been satisfied.

That would appear to be the reason that Cleanevent and the AWU did not, ultimately, enter into a replacement EBA. .

Instead, at the conclusion of negotiations, they reached an arrangement comprising two parts:

1. On or about 12 November 2010 AWU and Cleanevent entered into a memorandum of understanding (MOU). Pursuant to the MOU Cleanevent and AWU agreed that the 2006 EBA would continue to apply in relation to all employees covered by the 2006 EBA, except as modified by the MOU (clause 2.1).

The MOU made various adjustments to the rates of pay and penalty rates for Cleanevent’s permanent and casual employees.

Clause 3.1 of the MOU provided that the MOU would operate and have full effect from 1 July 2010 until 1 July 2013.

Clause 2.7 of the MOU provided:

During the period of operation of this MOU it is agreed that the AWU, the employees and/or Cleanevent will not:

- a) Take industrial action as defined in section 19 of the *Fair Work Act 2009*;
- b) Commence or take any step which may result in the commencement of enterprise bargaining under the *Fair Work Act 2009*; or
- c) Seek to terminate (or support or encourage the termination of) the Cleanevent Agreement, the Cleaning Industry – AWU/LHMU – Cleanevent Pty Ltd – Award 1999 or this MOU.

In other words, the MOU purported to bind all Cleanevent employees, although it is doubtful it could have had such an effect in law; and,

2. Separately, at about the same time, Cleanevent agreed by letter to pay the AWU up to \$25,000 per year for what were described as ‘membership fees’.

As part or in performance of this separate agreement Cleanevent supplied lists of names of cleaners to the AWU. In some cases these persons were then entered upon the membership roll of the AWU (Vic). But these persons knew nothing of any of this. They did not know that their names had been supplied to the AWU. They did not know that they had purportedly become “members” of the AWU (Vic). They did not know that their employer had entered into an arrangement with AWU pursuant to which it was paying the AWU \$25,000 per year. They did not know that the MOU had been executed or that the EBA had been purportedly extended by agreement.

Indeed in some cases these persons were already members of the AWU (Vic) or other branches of the AWU, and were regularly paying their union dues by payroll deduction – they did not know that their dues were being paid twice over.

What was the point of this complicated, two-part arrangement?

Take, first, the position from the point of view of Cleanevent. For Cleanevent, the benefits of the arrangement were obvious and substantial.

The great bulk of Cleanevent employees were casuals. Casual cleaners often work after business hours, or on weekends or public holidays. If their pay and penalty rates had been

regulated by the relevant award, namely the Cleaning Services Award 2010, Cleanevent's casual workers would have been much better off, because they would have been paid considerably more for weekend, public holiday and after hours work.

The short point is this: the benefit to Cleanevent from the MOU is that it saved a great deal of money it would otherwise have paid its employees, especially by way of penalty rates.

To take a one concrete example, in 2010 under the 2006 EBA Cleanevent was required to pay a level 1 casual employee working at events \$18.14 per hour. Under the 2010 Award, Cleanevent would have been required to pay at least \$50.17 per hour, about 176% more. Another example is a level 3 casual employee working at events on Sundays. He or she would have received \$19.86 per hour under the 2006 EBA but would have been entitled to at least \$41.44 under the 2010 Award, about 121% more.

Cleanevent also obtained other benefits. As is set out above, the MOU provided that no industrial action could be taken. Nor could any enterprise bargaining be commenced. Cleanevent also enjoyed a close relationship with the AWU (Vic) or some of its officials (*Cleanevent look forward to continuing the many years of positive association with the AWU*).<sup>1</sup>

These benefits to Cleanevent are summed up in an email which the general manager of operations sent to the group general manager on 25 June 2012:

In May 2010 the EBA was reworked, this was a very difficult negotiation and at times looked as though it would not get done. We managed to lock a new arrangement away through an MOU for a further three years.

The \$25k was part of that negotiation and was approved by [*the then General Manager*], the \$25k is an annual cost.

The implication to the business by not having the EBA and employing labour through the modern Award is circa \$2Mill per annum. We are about to enter our third and final year of this agreement to which we will need to start discussing how we can continue this.

In other words, so far as Cleanevent was concerned, keeping the MOU in place saved it some \$2 million per year that it would otherwise have to pay to its employees by way of wages or penalty rates. Unsurprisingly, the author of this email was interested in exploring ways of keeping the arrangement on foot.

---

<sup>1</sup> Steven Webber, MFI-1, page 69

Indeed according to the evidence of another witness, “the beneficial casual pay rates and overall agreement terms were very attractive to Spotless and one of the reasons it acquired the Clean Event business in 2010”.<sup>2</sup>

Next, viewed from the point of view of the AWU – that is from the point of view of the union and its senior officials, as distinct from the members – the benefits are also immediately apparent.

To begin with, the AWU (Vic) received \$25,000 per year plus GST.

Quite apart from this financial benefit, the AWU (Vic) also received a benefit in the sense that it acquired additional purported members – although as noted above these people were only “members” in the sense that their names were entered upon the membership roll of the AWU (Vic), without their knowledge or authorisation

There are many reasons why senior officials at the AWU (Vic) would have regarded it as beneficial to increase its membership numbers in this way.

Increasing membership can be an indicator of a successful union – and for that matter a successful union official. Generally speaking, union membership has been declining in recent years. Someone who can achieve increased membership is bucking the trend. It looks good.

Such increasing numbers can give legitimacy to a union’s industrial objectives in a particular negotiation or across an industry as a whole.

By operation of the union’s rules, increased membership can also increase the influence of a particular branch or division within the union’s national organisation.

Thus membership numbers for each branch of the AWU are used to determine entitlements to representation on the National Executive (rule 24(2)) and the allocation of votes on that executive (rule 24(3)). Membership numbers are also used to determine branch representation (rule 20(2)) and voting entitlements (rule 20(6)) at National Conference.

More specifically, if the union is affiliated to the Australian Labor Party (ALP), inflated membership numbers increase the entitlement of that union to delegates to the ALP conference, which in turn leads to greater influence over ALP policy formation, greater

---

<sup>2</sup> Michael John Robinson, witness statement, 21/5/15, para 17

influence over membership of powerful ALP committees and, in particular, greater influence over the selection of ALP candidates for political office.

In short, the benefits to Cleanevent and the AWU are obvious.

The persons who miss out are the workers. Cleanevent's employees, or at least its casual employees, appear to have been significantly worse off under the MOU than they would have been under the relevant 2010 award.

The hearings over the coming days will consider not just issues of this kind relating to Cleanevent. In a number of other instances the AWU has raised revenue which it has accounted for as membership fees, leading to an apparent increase in membership.

Other examples of this sort of activity which will be investigated during the coming hearings include payments made to the AWU by BMD Constructions Pty Ltd, Winslow Constructors Pty Ltd or its related companies, the Australian Netball Players' Association, the Australian Jockeys' Association and others.

The Commission's terms of reference require it to consider among other things conduct which may amount to a breach of any law, regulation or professional standard by any officer of an employee association.

In the coming hearings the Commission will investigate among other things whether there may have been breaches of section 287 of the *Fair Work (Registered Organisations) Act 2009* (Cth) in that officials at the AWU or the AWU (Vic) seem to have been entering into an arrangement which gained benefits for themselves and Cleanevent, as set out above, but which were detrimental to their own members.

Instead of securing better wages or penalty rates for members, some officials may have preferred to obtain payments which strengthened the union balance sheet and which falsely inflated membership numbers.

If false accounting has been practised in order to conceal the payment of membership numbers then the consequences are serious.

Section 83 of the *Crimes Act 1958* (Vic) provides among other things that where a person dishonestly, with a view to gain for himself or another:

- falsifies any account or any record or document made or acquired for any accounting purposes; or
- produces or makes use of any account or any record or document as aforesaid, which to his knowledge is or may be misleading or deceptive in any material particular

that person may be guilty of an indictable offence.

There may also have been other contraventions of the Fair Work legislation. Section 253 of the *Fair Work (Registered Organisations) Act 2009* (Cth) provides among other things that the financial statements and notes for a financial year must give a true and fair view of the financial position and performance of the reporting unit.

Section 230 of the *Fair Work (Registered Organisations) Act 2009* (Cth) provides that an organisation must keep a register of its members and that the organisation must enter in its register the name and postal address of each person that becomes a member and remove from that register the name and the postal address of each person who ceases to be a member.

Likewise, Rule 39(1)(h) of the AWU rules required the branch secretary to keep a correct register of members.

The Commission has previously investigated issues of this kind. In particular, chapter 10.2 of the Interim Report addresses matters concerning the membership rolls of the Transport Workers' Union of Australia, NSW Branch and the Transport Workers' Union of New South Wales.

On that occasion the Commissioner drew an inference that there was some advantage to be gained from presenting false membership numbers to the ALP and stated:

The relevant advantage was an increase in TWU voting power at the ALP Conference and an advantage to Mr Sheldon as leader of the TWU delegates.

The hearings which will begin today and continue into next week suggest that this problem is not one that is confined to the TWU.

Lastly, on 19 May 2015 the Commission released a Discussion Paper which included discussion of payments of the kind described above by employers to unions.

The Discussion Paper described such payments as 'corrupting payments' and sought views on whether significant penalties should be imposed on employers who make payments of this kind **to unions.**

The hearings over the coming days may reveal evidence relevant to this question.