

ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION

SUBMISSIONS OF COUNSEL ASSISTING

AWU: CHAPTER 3

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1. The Eastlink project was a \$2.5 billion dollar construction of a 39 km roadway connecting Mitcham and Frankston. It opened ahead of schedule and on budget on 28 June 2008.¹
2. The design and construct contract for the road was let to a joint venture between Thiess Pty Ltd (**Thiess**) and John Holland Pty Ltd (**John Holland**), Thiess John Holland (**TJH**), in about November 2004. Construction of the roadway commenced in 2005.²
3. This case study concerns the existence of an arrangement whereby the TJH paid to the AWU the sum of \$100,000 per year plus GST per year for the three year life of the project.

A THE AGREEMENT

4. TJH and the AWU entered into an enterprise bargaining agreement which came into force on 18 March 2005 (**2005 EBA**).³ An enterprise bargaining agreement in identical

¹ Stephen Sasse, witness statement, 9/8/15.

² Julian Rzesniowiecki, 30/6/15, T:4.14-21.

³ Shorten MFI-9, page 1.

terms was reached between TJH and the Victorian Branch of CFMEU which came into force on 18 March 2005.⁴

5. Negotiations on behalf of the joint venture were conducted in the first instance by Stephen Sasse (for John Holland) and Mike Connell (for Thiess) and later, once the contract was awarded and the TJH joint venture incorporated, Julian Rzesniowiecki.⁵
6. For the AWU, initial negotiations were undertaken by Bill Shorten.⁶ Later, Cesar Melhem and Craig Winter undertook the negotiations for the 2005 EBA.⁷ John Cummins and Tom Watson participated in the negotiations on behalf of the CFMEU.
7. Following entry into the 2005 EBA, Cesar Melham was responsible for the day to day administration of the project.⁸ The person with day-to-day management of industrial relations and human resources on the project for TJH was Julian Rzesniowiecki. He reported to Chris Herbert, managing director for the TJH. From about September 2005, Julian Rzesniowiecki reported to Gordon Ralph who replaced Mr Herbert as project director.
8. During the course of the Eastlink project, from early 2005, AWU invoiced TJH and was paid an amount of \$300,818.17 plus GST.⁹ The descriptions on the invoices issued in 2005 and 2006 referred to advertising in the *Australian Worker* magazine, tickets to the AWA Members' Ball, attendance at OH&S training and IR Regulations Seminars, sponsorship for OH&S conferences, and research projects.¹⁰ The details of the various invoices will be outlined further below.
9. It is clear, from correspondence and documentation that emerged during the course of the project, that there was an agreement to pay a sum of \$100,000 per year plus GST,

⁴ Shorten MFI-9, page 63.

⁵ Rzesniowiecki MFI1, 13/10/15, T:5.29-34.

⁶ Bill Shorten, 9/7/2015, T:113.39-42.

⁷ Julian Rzesniowiecki, private hearing, 30 June 2015, T5.34.

⁸ Bill Shorten, 9/7/201, T:114.7-8.

⁹ Shorten MFI-10 is a summary prepared by the solicitors assisting the Commission reconciling the payments recorded in the general ledgers of the Victorian and National branches of the AWU against the invoices issued to TJH.

¹⁰ Shorten MFI-9, pages 168A-233.

and that the payment would be accounted for by the AWU issuing invoices for various services as described above, without many of the services in fact being delivered by the AWU.

10. The first such document is an undated handwritten table apparently prepared by someone at the joint venture which contemplates three years of annual payments yielding a total of \$300,000.¹¹ The payments include three payments for ‘research grants’. The grant for year one is described as ‘attracting employees to civil construction industry’.
11. Because the year one grant is described in these terms it is reasonable to infer that this document was created during 2005 and well before 18 January 2006, the date on which an invoice was issued for ‘research work done on Back Strain in Civil Construction Industry’.¹² By the time this invoice was issued it is reasonable to infer that the initial contemplated ‘research grant’ was no longer under consideration.
12. The next document is another undated handwritten note which appears to have been created in early 2006. The note states:¹³

\$74K already paid ← **Check JR**

\$26K END of June 2006

\$100K 1/7/06 → 30/6/07

\$100 1/7/07 → 30/6/08

13. The handwriting on the note is Cesar Melhem’s, save for the words ‘check JR’ which are in Julian Rzesniowiecki’s handwriting.¹⁴ Julian Rzesniowiecki said that the note was an exercise in which he and Cesar Melhem tried to reconcile what had been paid and what was owing under the arrangement they had entered into. His note referred to his desire to check that \$74,000 was in fact what TJH had paid at the date of the note.¹⁵ This was consistent with a practice he said that he adopted to ensure that TJH was not

¹¹ Shorten MFI-9, page 236.

¹² Shorten MFI-9, page 186.

¹³ Shorten MFI9, page 226.

¹⁴ Julian Rzesniowiecki, 13/10/2015, T193.22-34; Cesar Melhem, 22/10/2015, T905.42-43.

¹⁵ Julian Rzesniowiecki, 13/10/2015, T193.38-45.

paying more than the agreed sum.¹⁶ Mr Melhem, however, denied that the note reflected any agreement.¹⁷

14. On 12 September 2006 Cesar Melhem emailed Julian Rzesniowiecki as follows:¹⁸

Julian

AWU Ball 50 2 @ \$125 = \$6250
Australian Worker 4 @ 7500 = \$30,000
Sponsorship of AWU OH&S Conference 12/08/2006 25,000
OH&S trainig [sic] for HRS reps on eastlink \$38750

Total \$100,000

15. Julian Rzesniowiecki responded on 13 September 2006, as follows:¹⁹

Cesar

4 separate invoices please and also you need to deduct the \$2K I paid for the AWU calendars and \$500 for the Workchoices conference.

1. AWU ball invoice \$6250 – send now
2. Aus Worker \$30,000 – send now
3. OHS Conference \$25,000 – send now
4. OHS training \$38,750 less \$2500 = \$36250 - send in November

16. Cesar Melhem then forwarded that email to Michael Chen, the AWU's financial controller, on 15 September 2009.²⁰ Michael Chen then wrote on the hard copy of the email 'Mei Lin, pls follow this. Mich.'²¹

17. A number of observations may be made in relation to this email chain. *First*, the email from Cesar Melhem contains a breakdown of services, and prices for those services, that add up to precisely \$100,000. One would ordinarily assume, if the email was referring to genuine services to be delivered, the value of those services would not add up to an exact round number, still less the very figure of \$100,000 referred to elsewhere. *Secondly*, Julian Rzesniowiecki's response is suggestive of there being an accounting

¹⁶ Rzesniowiecki MFI1, T15.41-47.

¹⁷ Cesar Melhem, 22/10/2015, T906.22-27.

¹⁸ Shorten MFI9, page 199.

¹⁹ Shorten MFI9, page 199.

²⁰ Shorten MFI9, page 201.

²¹ Michael Chen, 21/10/15, T807.7-22.

exercise that is designed to ensure that a pre-determined amount is paid: in particular, because his email requires Cesar Melhem to deduct certain amounts already paid in respect of one service, and directs that invoices be issued at various times. That is not consistent with the invoices being issued in relation to a service that was in fact delivered.

18. Julian Rzesniowiecki said that he requested the deduction from the amount allocated for HSR training because he did not believe it had been provided.²² Cesar Melhem, on the other hand, insisted that the services described in the emails were delivered. He said that the deduction from the amount attributed to the cost of HSR training was ‘negotiated... to absorb that part of the invoice.’²³
19. On 16 April 2007 Julian Rzesniowiecki sent a letter to Cesar Melhem stating the following:²⁴

Re: Invoices

- a. Instalments 1 & 2 will be paid.
- b. Please ask Michael to withdraw instalment 3. It will be covered by the ads in Australian Worker, attendance at the ball etc.
- c. If we don’t reach the agreed sum we can address at end of year.

20. Cesar Melhem did not write back contesting that an agreement had been reached.
21. Also in evidence is a handwritten note in Julian Rzesniowiecki’s handwriting²⁵ which is undated but appears to have been created in 2007 or 2008.²⁶ The note records the following calculation:

Agreed amount \$100,000 plus GST = revised agreed amount of \$110,000.

For 2007 TJH has paid:

\$37,000 1st

²² Julian Rzesniowiecki, 13/10/2015, T184.31-44.

²³ Cesar Melhem, 22/10/2015, T910.23-27.

²⁴ Shorten MFI9, page 222.

²⁵ Julian Rzesniowiecki, 13/10/2015, T175.44-45.

²⁶ Shorten MFI9, page 237.

\$37,000 2nd
\$5000 AWU Ball
\$5,500 Australian Worker
\$10,083.00 Red Card Training
\$94,583
∴ balance ... \$15,416.5

22. On 31 March 2008 Julian Rzesniowiecki wrote to Cesar Melhem stating:²⁷

On our breakdown the agreed amount is \$110,000 inc GST.

We have paid 2x \$37,000 = \$74,000. We have also paid \$5000 ball tickets, \$5500 Australian Worker and \$10,083 Red card (Red card otherwise would have cost us nothing because John Holland run it).

Therefore we believe that the outstanding amount is \$15,416.50 inc GST.

23. The reference in each of the above documents to ‘instalments’ of \$37,000 is to invoices issued on 28 February 2007 with the description ‘Services – First Instalment – as per Cesar Melhem’ and ‘Services – Second Instalment – as per Cesar Melhem.’²⁸ Further reference will be made to those invoices later in these submissions. For present purposes, the instalments formed part of what Julian Rzesniowiecki refers to as the ‘agreed sum’ being \$110,000 inclusive of GST. Julian Rzesniowiecki said that in the second year of the project, TJH paid an additional sum to account for the GST that had been omitted in the first year of the project.²⁹ In relation to the red card training, Julian Rzesniowiecki said that the training was provided at a facility at Morwell, but that the amount was used to offset the agreed amount because John Holland would otherwise have provided the service.³⁰ Cesar Melhem said that the references to ‘agreed sum’ were references to what Julian Rzesniowiecki had budgeted for the provision of services by the Union.³¹ Faced with these documents, Mr Melhem continued to deny the existence of an agreement, at one point demanding ‘show me a copy of it.’³²

²⁷ Shorten MFI9, page 231.

²⁸ Shorten MFI9, pages 217-218.

²⁹ Julian Rzesniowiecki, 13/10/2015, T176.16-19.

³⁰ Julian Rzesniowiecki, 13/10/2015, T194.14-42, see also Cesar Melhem, 22/10/2015, T899.23-34.

³¹ Cesar Melhem, 22/10/2015, T894.18-31; T898.29-42.

³² Cesar Melhem, 22/10/2015, T895.37-47, T896.1-13.

24. Each of the documents referred to above is consistent with there having been an agreement to pay a fixed sum of money each year and for that money to be accounted for by way of invoices issued by the AWU describing various services, totalling the agreed sum over the course of the year. Cesar Melhem's assertion that there was no agreement should be rejected. It is not consistent with the documentary evidence and it conflicts with the frank evidence of Julian Rzesniowiecki, much of which was against his interest, containing as it did admissions that he caused TJH to pay invoices for services that were not received. The nature of the agreement, when it was reached and between whom, is addressed in the next section.

B WHAT WAS AGREED AND WHEN?

25. Determining the nature and timing of the agreement, and the persons involved in forming the agreement, depends on weighing numerous different accounts of the participants to discussions, largely unsupported by contemporaneous documents. Practically the only contemporaneous documents that have been made available to the Commission are the diaries of Julian Rzesniowiecki. Owing to the time that has passed since 2004-2005, it is unsurprising that recollections differ. There is also a risk that the few written records available assume a significance they would not otherwise have. That occurred at the hearing of this case study in relation to Julian Rzesniowiecki's diary notes, for reasons that will become apparent.
26. The most sensible approach to determining precisely what occurred is to weigh the accounts of each witness and the relative strengths and weaknesses of those accounts.

Early negotiations and the initial proposal

27. The early negotiations took the form of preliminary discussions for the purpose of Thiess and John Holland preparing for tender. The participants in the early negotiations included Stephen Sasse and Bill Shorten, and to a lesser extent, Mike Connell.

Stephen Sasse's account

28. Stephen Sasse told the Commission that the TJH bid for the Eastlink project was undertaken against a background of a number of major construction projects in Melbourne that had suffered serious delays as a result of industrial intervention by the CFMEU and consequent labour productivity problems. Examples included the Spencer Street Station, the Geelong Road, and Federation Square projects.³³
29. Stephen Sasse was given authority to look at alternative labour practices that would create greater flexibility among the workforce. Some of the limitations included removal of lockdown weekends (weekends on which all workers are on set rostered days off), inclement weather practices that stopped work across the labour line, the presence of non-working delegates, and head contractor protections for subcontract labour.³⁴
30. Stephen Sasse says that he prepared a strategy paper which was presented to Leighton Holdings, the parent company for the joint venture participants. The paper set out the process for negotiating an EBA that achieved labour efficiencies by eliminating the limitations identified above:³⁵
- (a) Provoke the CFMEU into taking unlawful industrial action at worksites of Leighton Group companies (which included Thiess and John Holland);
 - (b) Put to the CFMEU representatives that TJH intended to seek an agreement that removed rostered days and non-working delegates, in the expectation that they would refuse to engage in negotiations; and
 - (c) Put to the AWU that entry into an EBA as the principal union would reinstate it as the principal union for civil construction, and also put that unless it agreed to TJH's terms the site would be resourced on Australian Workplace Agreements.
31. Stephen Sasse negotiated with Bill Shorten on behalf of AWU to achieve an EBA that restricted the labour practices identified above, in exchange for high pay rates and the

³³ Stephen Sasse, witness statement, 9/8/2015, page 1.

³⁴ Stephen Sasse, witness statement, 9/8/2015, pages 1-2; Stephen Sasse, 12/10/2015, T39.33-46, T40.10-47.

³⁵ Stephen Sasse, witness statement, 9/8/2015, pages 2-3; Stephen Sasse, 12/10/2015, T41.2-15.

exclusion of the CFMEU from the Eastlink project.³⁶ The initial meetings were undertaken between him and Bill Shorten between September and October.³⁷ Stephen Sasse said that the high level aspects of the agreement were agreed to by Bill Shorten almost immediately.³⁸

32. There is some inconsistency in the accounts Stephen Sasse has given to the Commission in relation to the discussions he had with Mr Shorten in late 2004. In his statement, Stephen Sasse said that there was a proposal in relation to an organiser discussed between him Mr Shorten, but that there was no agreement to that effect:³⁹

There was some limited discussion in relation to how the AWU would ensure that the workforce on EastLink would become members of the AWU. These discussions included the possibility that the project might directly fund the costs of an organiser (salary plus car equating to approximately \$100K per annum) but this was not finalised, and the idea did not form part of the in-principle agreement. Secondly, within days of the in-principle agreement being reached, Shorten had unilaterally 'invited' the CFMEU to become party to the industrial agreement for the project. When I questioned him as to why he had reneged on our agreement, and on such a fundamental component of that agreement, he replied that there were 'political' imperatives which I 'would not understand'.

...

there was a very broad discussion about supporting the AWU in organising the Project through the JV funding or part funding an organiser who would be largely dedicated to the Project. I was deliberately vague in discussing this issue as I felt that the only value that could be extracted from the AWU was the Greenfield EA in the terms discussed.

at no stage was there any claim by Shorten that the JV should 'pay' for the EA.

33. What is said in Mr Sasse's statement is broadly consistent with an earlier informal interview in which Mr Sasse made reference to the idea that the \$100,000 per year was equivalent to the salary of an organiser plus a car.⁴⁰ However, Mr Sasse said that Mr Shorten did not mention a specific number and that this estimate was him putting two and two together in relation to the numbers.⁴¹ He said that 'the payment issue was never, ever agreed at the Shorten level at all.'⁴²

³⁶ Stephen Sasse, 12/10/2015, T39.33-46, T42.15-46.

³⁷ Stephen Sasse, 12/10/2015, T41.34-43.

³⁸ Stephen Sasse, witness statement, 9/8/2015, pages 2-3.

³⁹ Stephen Sasse, witness statement, 9/8/2015, pages 3-4.

⁴⁰ Sasse MFI3, T11.9-22.

⁴¹ Sasse MFI3, T12.15-24.

⁴² Sasse MFI3, T13.46-47.

34. The account given in Mr Sasse's private hearing, which is also in evidence, was different. In that hearing, Mr Sasse gave the following evidence:⁴³

Q. Were these matters that were actually discussed by Bill Shorten and yourself?

A. Yes, they were.

Q. Was there any discussion of the salary that the organiser might receive?

A. Yes. The number that was worked with was, you know, cost of a Union official, plus car, is 100 grand a year.

Q. Over the life of the project?

A. Over the life of the project.

35. Mr Sasse said in his private hearing that there was a high level agreement as to the primary terms of the EBA, but that this did not include the reference to the organiser.⁴⁴

36. In his evidence at the public hearing, Stephen Sasse said that Bill Shorten suggested that an organiser should be appointed full-time to the project and funded by the joint venture.⁴⁵ Of significance is the description of the rationale that Bill Shorten gave for that commitment, according to Stephen Sasse:⁴⁶

From the Union's perspective, their income is, essentially, the Union dues that members pay, so it's an important business imperative, if you like, for unions to attract and retain financial members. ... The unions look for opportunities to capture that workforce as members, so they might want to - they have the right to present at an induction, for example, to sell their wares to prospective members who are employees of the company. One of the discussions that came out of the negotiation I had with Mr Shorten was that if the AWU a dedicated organiser on the project then that would enhance the Union's ability to maximise the proportion of employees who were members of the Union.

37. That rationale is very similar to Mr Melhem's evidence of the services that he told Julian Rzesniowiecki the union could provide in exchange for payment, namely, attending inductions.⁴⁷

38. Stephen Sasse said that he was deliberately non-committal about the proposal of Mr Shorten.⁴⁸ He also said that a figure was mentioned during the course of the

⁴³ Sasse MFI4, T27.1-12.

⁴⁴ Sasse MFI4, T28.28-37.

⁴⁵ Stephen Sasse, 12/10/2015, T45.26-36.

⁴⁶ Stephen Sasse, 12/10/2015, T45.7-24.

⁴⁷ Cesar Melhem, 22/10/2015, T904.1-8; T937.28-42.

negotiations, being \$75,000 a year plus a car.⁴⁹ Faced with the content of his interview, Mr Sasse maintained that there was a discussion regarding a figure. He said that he could not remember who raised the figure but he was sure that it was discussed.⁵⁰ He said that he left the meeting with Mr Shorten with a specific figure in mind, and said that he must have had some information from Mr Shorten in order to reach that figure.⁵¹

39. Following the entry of the CFMEU into the negotiations, the parties engaged in conciliation in the Australian Industrial Relations Commission (**AIRC**). Stephen Sasse said that, shortly after the conciliation process commenced, he handed over primary responsibilities for the EBA negotiations to Julian Rzesniowiecki. As he understood it, Bill Shorten also handed over responsibility for the project to Cesar Melhem.⁵²
40. Stephen Sasse's evidence is that he told Julian Rzesniowiecki about the arrangement at the time he was recruiting him for the project, including the proposal in relation to funding of an organiser.⁵³ Significantly, Stephen Sasse also said that the discussion regarding an organiser 'may have come up in a handover meeting at some stage' which Cesar Melhem and Mike Connell also attended.⁵⁴
41. Stephen Sasse was tested on his differing versions. He said that, at the time of his interview, he did not have any documents available to him and gave the best recollection he had at the time.⁵⁵ Mr Sasse said that, prior to his interview, he assumed that documentation might be available to assist his memory.⁵⁶ Following the interview, Mr Sasse sat down and prepared a statement after carefully considering his memory of events.⁵⁷ Ultimately, Mr Sasse repeated his evidence that the proposal for payment in relation to an organiser was not agreed with Mr Shorten.⁵⁸ He accepted that the figure

⁴⁸ Stephen Sasse, 12/10/2015, T47.6-7.

⁴⁹ Stephen Sasse, 12/10/2015, T47.33-42.

⁵⁰ Stephen Sasse, 12/10/2015, T49.10-14.

⁵¹ Stephen Sasse, 12/10/2015, T50.43-47, T51.1-2.

⁵² Stephen Sasse, witness statement, 9/8/2015, page 3; Stephen Sasse, 12/10/2015, T44.1-9.

⁵³ Sasse MFI4, T33.34-47, T34.1-13.

⁵⁴ Stephen Sasse, 12/10/2015, T44.41-45.

⁵⁵ Stephen Sasse, 12/10/2015, T82.22-24, T97.25-35.

⁵⁶ Stephen Sasse, 12/10/2015, T79.17-24.

⁵⁷ Stephen Sasse, 12/10/2015, T82.15-19.

⁵⁸ Stephen Sasse, 12/10/2015, T89.20-25, 27-43.

of \$100,000 per year was possibly a figure that he had surmised himself.⁵⁹ It was not put to him in cross-examination that he gave false evidence or a false answer in relation to any of the evidence that he gave.

42. Some of the difficulties with Mr Sasse's competing accounts are explained by the fact that Mr Sasse does not have access to the notes and records of his negotiations. His evidence is that he maintained extensive notes of meetings in notebooks, and that there was significant email traffic and correspondence documenting the negotiations as they proceeded. None of that documentation has been produced by John Holland despite detailed information being provided by Mr Sasse and his former assistant as to where the documentation was stored and how it was archived.⁶⁰ As at the time of writing these submissions, the Commission has been advised that searches by John Holland are continuing. Clearly, in the event that those records come to light, these submissions may need to be revisited.

Bill Shorten's account

43. Bill Shorten said that he does not recall discussing an arrangement pursuant to which TJH would pay three instalments of \$100,000 a year plus GST for the life of the Eastlink project with Stephen Sasse.⁶¹ Bill Shorten gave evidence that he did not believe that there was any such agreement.⁶²
44. Bill Shorten stated that in his negotiations with Stephen Sasse the latter drove "a hard bargain" and threatened, in response to Bill Shorten's bargaining position, to engage with the CFMEU. Bill Shorten said that he was open to exchanges about improvements in productivity, and stated that in exchange he would have committed to active organisation of the work site:⁶³

⁵⁹ Stephen Sasse, 12/10/2015, T91.32-47.

⁶⁰ Stephen Sasse, 12/10/2015, T51-52, Sasse MF15.

⁶¹ Bill Shorten, 9/7/ 2015, T116.31-36; T118.20-28; T133.46-47.

⁶² Bill Shorten, 9/7/ 2015, T118.14; T133.46-47.

⁶³ Bill Shorten, 9/7/ 2015, T134.40-46.

I would have made it clear that the Union will take an active role in organising this and that will involve training and the other work which unions legitimately do every day.’⁶⁴

45. Following questioning about whether he discussed payments being made by TJH on an annual basis, Bill Shorten said the following:⁶⁵

I would had discussions about the EBA and how the AWU would organise, after the EBA, to make sure we had an active presence. That would and could have involved services being delivered by the AWU to make sure we had an engaged membership of the site.

46. To Mr Shorten’s knowledge, those discussions were not recorded in writing. Bill Shorten stated that it was standard practice for unions to seek for employers to pay for services that unions provide to members.⁶⁶ He said in relation to the Eastlink site in particular:⁶⁷

I am very confident that in my time as leader of the AWU in Victoria, that if we were sending out invoices for services, it's my expectation that work would be done consistent with what would be the invoices rendered and employers wanted – this employer wanted the AWU engaged. There had been rocky industrial relations with a range of more militant unions. This project, I have to say, was different and there was more cooperation than there had previously been, and I do think - I do think - that the company saw a value to having the AWU as signatory to this civil construction project and that we were servicing our members regularly.

47. Mr Shorten stated in response to a question of whether the services agreed amounted to \$110,000 per year:⁶⁸

Well, I don't recall and I don't believe I would have said a specific amount and also it would have been for services, so - you know, I believe in user pays.

48. A few observations may be made in relation to this evidence:

49. *First*, Mr Shorten does not deny discussions regarding the arrangement, he says that he does not recall any such discussion.

50. *Secondly*, Mr Shorten says that there were discussions during the course of negotiations with Mr Sasse about dedicating organisers to the site and providing various services.

⁶⁴ Bill Shorten, 9/7/ 2015, T128.45-47, T129.1-10.

⁶⁵ Bill Shorten, 9/7/ 2015, T137.40-45.

⁶⁶ Bill Shorten, 9/7/ 2015, T138.14-17.

⁶⁷ Bill Shorten, 9/7/ 2015, T127.35-46.

⁶⁸ Bill Shorten, 9/7/ 2015, T138.20-22.

51. *Thirdly*, Mr Shorten's understanding of the benefits of the above exercise was that it would play a role in achieving industrial stability on a site that might otherwise be at risk of problems caused by more militant unions.

Julian Rzesniowiecki's account

52. Julian Rzesniowiecki also gave different accounts of the genesis of the agreement.
53. In his private hearing he gave the following account. Before he joined the Eastlink Project, he understood from conversations with Mr Sasse that there had been some preliminary industrial relations discussions between the AWU and the representatives for Thiess and John Holland, respectively Mike Connell and Stephen Sasse, General Manager for Human Resources, Industrial Relations and Safety.⁶⁹ Upon joining the project Julian Rzesniowiecki initially attended meetings with the AWU together with Stephen Sasse, and subsequently undertook the negotiations with Don Johnson, reporting to Stephen Sasse and Mike Connell.⁷⁰
54. Julian Rzesniowiecki's evidence was that TJH proceeded with union negotiations on the basis that AWU was the preferred union. At some point in the negotiations, Bill Shorten expressed discomfort at an approach that excluded the CFMEU. Bill Shorten then invited the CFMEU to join the negotiations. TJH was not able to reach an agreement acceptable to both AWU and CFMEU, so a dispute was notified to the AIRC and resolved by conciliation.⁷¹
55. Julian Rzesniowiecki gave evidence at his private hearing that, before he joined the Eastlink project, TJH reached agreement with the AWU to provide full time organisers to the Eastlink project.⁷² The agreement was to provide a nominal \$100,000 per year plus GST to cover the annual salary of an organiser plus provision of a vehicle, over the 3 years for which the 2005 EBA was in force in relation to the Eastlink project.⁷³

⁶⁹ Julian Rzesniowiecki, 30/6/2015, T5.4-8, 39-42; Stephen Sasse, interview, 29 June 2015, T8.32-34.

⁷⁰ Julian Rzesniowiecki, 30/6/2015, T6.1-15.

⁷¹ Julian Rzesniowiecki, 30/6/2015, T7.1-30; Stephen Sasse, interview, 29 June 2015, T6.42-47.

⁷² Julian Rzesniowiecki, 30/6/2015, T8.20-30.

⁷³ Julian Rzesniowiecki, 30/6/2015, T9.29-34; T11/22-36.

56. Julian Rzesniowiecki says that he was informed of the details of this agreement by Mr Sasse or Mr Connell.⁷⁴ His understanding was that an agreement had been reached to this effect.⁷⁵ He believed that the agreement was reached prior to December 2004 between Bill Shorten, Cesar Melham and Stephen Sasse. He is not sure whether Mike Connell was also involved.⁷⁶

57. On about 13 October 2015 Julian Rzesniowiecki put forward a statement that changed his account in some respects, based on his review of diary notes not previously available to him, and the AWU invoices that had been produced in relation to TJH.⁷⁷ He said after reviewing the diaries:⁷⁸

It appears from a review of my diaries that although by December 2004 there was an understanding with the AWU regarding the provision of support for the Project, the dollar value of the support was not settled at that time. The level of support that was to be provided to the AWU to assist in the provision of organisers to the Project, and the composition of the organiser team, was the subject of discussions within the JV and between the JV and the AWU during the period from early December 2004 to March 2005 when the Greenfields Agreement was finalised. The agreed composition of the organiser team is not recorded in my Project diaries.

58. It is apparent that while there are some departures in Mr Rzesniowiecki's statement from the version he gave during his private hearing, he did not depart from his understanding that there was, at least, an arrangement pursuant to which financial support would be given by TJH to support an organiser or organisers. Where he departs from his previous evidence is in relation to whether a figure, and the nature of the support provided, was agreed at the time that he joined TJH.

59. In his evidence at the public hearing Julian Rzesniowiecki said the following by way of explanation:⁷⁹

...my understanding or recollection about the events was informed by those diaries and I believe that there was an agreement in principle around providing some sort of support or dealing with that issue of organiser representation on the project, and then during the negotiations and the discussions, before the agreement was developed or finalised, then that arrangement firmed up.

⁷⁴ Julian Rzesniowiecki, 30/6/2015, T8.39-41.

⁷⁵ Julian Rzesniowiecki, 30/6/2015, T9.2-5.

⁷⁶ Julian Rzesniowiecki, 30/6/2015, T9.12-16.

⁷⁷ Julian Rzesniowiecki, witness statement, 13/10/2015, [12]-[13].

⁷⁸ Julian Rzesniowiecki, witness statement, 13/10/2015, [12]-[13].

⁷⁹ Julian Rzesniowiecki, 13/10/2015, T153.14-20.

60. In response to Stephen Sasse's version of events, Julian Rzesniowiecki said that he recalled a discussion about the concept of providing support to the AWU to commit officials to the job, but he did not believe the number of \$100,000 was settled at that time. He understood that there was no firm value for the financial support that would be committed at that time.⁸⁰ He characterised the position as there being agreement around providing assistance, but the terms of the agreement and the level of support were yet to be finalised.⁸¹

Mike Connell's account

61. Mike Connell was the Executive General Manager for Health and Safety at Thiess. He was involved in formulating the strategy for industrial relations for the Eastlink project and was involved in negotiations, effectively at the same level as Stephen Sasse.⁸²

62. Mr Connell has no memory of a discussion about a proposal pursuant to which TJH would make a payment to the AWU each year.⁸³ He did not have any discussions about the possibility of TJH defraying the cost of an organiser.⁸⁴ He says that concept is surprising to him, because it was not consistent with the joint venture's industrial relations strategy and commitment not to take non-working delegates on the project.⁸⁵ Mike Connell said that such a concept would create a conflict of interest between the project, the organiser and the Union.⁸⁶ No such proposal was brought to Thiess or to the joint venture for agreement.⁸⁷

63. He says that it wouldn't surprise him if payments were made to the AWU at the time the project commenced recruitment of employees as significant resources were dedicated to that task.⁸⁸

⁸⁰ Julian Rzesniowiecki, 13/10/2015, T165.17-35.

⁸¹ Julian Rzesniowiecki, 13/10/2015, T166.30-34.

⁸² Mike Connell, 13/10/2015, T136.1-14.

⁸³ Mike Connell, 13/10/2015, T136.35-46.

⁸⁴ Mike Connell, 13/10/2015, T137.39-42.

⁸⁵ Mike Connell, 13/10/2015, T138.2-28.

⁸⁶ Mike Connell, 13/10/2015, T139.17-21.

⁸⁷ Mike Connell, 13/10/2015, T144.15-24.

⁸⁸ Mike Connell, 13/10/2015, T137.4-25.

Conclusions

64. What, if anything, was proposed and agreed to by December 2004?
65. According to Stephen Sasse, there was no agreement as to financial support for an organiser but a proposal to that effect had been made by Mr Shorten. Stephen Sasse could not state with certainty whether a dollar figure was suggested by Mr Shorten but he maintained that it was a feature of the discussions. Bill Shorten did not recollect discussing such a proposal with Mr Sasse. What he did recall, however, is of significance. His acceptance that there were discussions regarding an organiser and having a presence on the site, and his explanation that the purpose of this was to increase the union presence and maintain industrial peace on the project, are sufficiently close to the versions described by both Stephen Sasse and Julian Rzesniowiecki as to support an inference that the concept of providing support for an organiser was discussed. Logically, a suggestion to this effect would have come from Mr Shorten.
66. Moreover consideration of the objective logic of events supports the proposition that at least a general discussion concerning the provision of financial support by TJH to the AWU would have taken place involving Mr Shorten and Mr Sasse. Each was the senior person in the negotiation. Each in due course handed over the negotiations to another, Mr Shorten to Mr Melhem and Mr Sasse to Mr Rzesniowiecki. Mr Melhem and Mr Rzesniowiecki in due course negotiated and reached agreement on a specific amount, as set out further below. It seems unlikely that this agreement would have sprung into existence on the sole initiative of Mr Melhem and Mr Rzesniowiecki; it is more likely that such an agreement put into effect a proposal that had already been canvassed between their respective superiors.
67. For the foregoing reasons it is submitted that the Commission should find that Mr Shorten in late 2004 made a proposal to Mr Sasse that the joint venture fund an organiser or organisers for the project and that this was discussed in the course of early negotiations in relation to the EBA.
68. However, while a proposal was discussed the evidence does not support a finding that a concluded agreement was reached in 2004. Rather it is submitted that the proposal that was initially made in late 2004 ultimately formed the basis of an agreement reached

between Mr Melhem and Mr Rzesniowiecki and referred to in the documents addressed in section A.

EBA negotiations

69. The persons involved in the negotiation and conciliation process from December 2004 were more numerous than were involved in the initial investigations. Additionally, there is some documentation of these discussions, in the form of Julian Rzesniowiecki's diary notes.⁸⁹ During the hearing the whole of his diaries were produced and those referred to in the evidence were tendered to the Commission.⁹⁰

Julian Rzesniowiecki's account

70. Julian Rzesniowiecki's statement addressed a number of notes of meetings held between 10 December 2004 and 15 March 2015. A number of people are listed as having attended those meetings, including on the joint venture side Stephen Sasse, Don Johnson, Mike Connell, Chris Herbert, and Greg Sparkman, and on the AWU side, Bill Shorten, Cesar Melhem and Craig Winter.⁹¹

71. The substance of the statement is that, having reviewed his notes, Julian Rzesniowiecki has interpreted some references to organisers and other union officers to be notes of discussions concerning the number of AWU officers to be dedicated to the project, and the cost of providing financial support for that dedication. Julian Rzesniowiecki says that the discussions therefore related to the agreement he had referred to in his previous evidence.⁹² The substance of the evidence can be best summarised by the following exchange:⁹³

Q. ... There were discussions between, as you understood it back then, Mr Sasse, Mr Shorten?

A. Correct.

⁸⁹ Sasse MFI2.

⁹⁰ Rzesniowiecki MFI3.

⁹¹ Julian Rzesniowiecki, witness statement, 13/10/2015, [6].

⁹² Julian Rzesniowiecki, witness statement, 13/10/2015, [7]-[11].

⁹³ Julian Rzesniowiecki, 13/10/2015, T166.13-46, T167.1-12.

Q. And on page 9 you say "probably Mr Melhem" but, anyway, there were discussions between at least the first two gentlemen I have mentioned and possibly also Mr Melhem. It was about providing resources to the AWU to assist them to provide organisers to the project?

A. That's correct.

Q. But you think now from having read your diary notes that there was no certainty around the number of positions at that stage?

A. Yes, I'd say that there was an agreement around providing assistance, but the terms of that agreement, the level of support, you know, the way in which the arrangement was going to be delivered, had not been settled between them.

Q. And then in these discussions it was put to you that the support should, in fact, be in respect of four positions?

A. That's correct.

Q. And then you negotiated that down to one?

A. Yes, that's probably - that's correct.

Q. How do you say that that process was gone through, that it went from the four down to the one?

A. Well –

Q. Who was involved? Was it you?

A. I think it was myself and Cesar Melhem. I think during all these negotiations there were discussions about, you know, who the people might be, how many, and so forth, and then in the conciliation process before Ian Ross, Ian Ross indicated to me at that stage that Cesar Melhem was looking for six organisers and I indicated to Ian Ross that that would have to be dealt with outside the AIRC process, we weren't in a position to deal with it here, and that we'd come to an understanding with Mr Melhem and my recollection is that Mr Melhem and I had a discussion at some point where we settled on the deal.

72. Mr Rzesniowiecki was an impressive witness. He was unshaken in cross-examination. There is no suggestion that he was doing anything other than giving his best and honest recollection of events. Nevertheless, there are problems with acceptance of some of the evidence he now puts forward.

73. *First*, the content of the notes themselves provides minimal support for the discussions to which he refers. For example, the notes of a meeting dated 10 December 2004 refer to '2 convenors employed by MFP,'⁹⁴ which is said to relate to a proposal for employment of two organisers by the joint venture. However, that arrangement (direct employment, rather than funding of an organiser employed by the AWU) is not the term of the agreement that Julian Rzesniowiecki says was reached at this time. That is

⁹⁴ Sasse MFI2, page 23. The MFP refers to the Mitcham-Frankston Project.

inconsistent with the evidence of Stephen Sasse and Mike Connell that non-working delegates were unacceptable to the project.

74. A diary note of 14 December 2004 refers to Bill Shorten stating among other things: “1 Industrial officer & 3 orgs (1 OHS)”.⁹⁵ Mr Rzesniowiecki’s evidence was to the effect that this was a proposal that the joint venture fund four organisers, rather than one organiser as originally contemplated. But the note itself does not say this; it would have been simple enough for the author of the note to have made this clear at the time, by adding “JV to pay” or similar, for example. Indeed had a proposal of this kind been canvassed one might have expected just such a notation to have been made.
75. After all, in its terms the note could equally well be recording what resources the AWU was able to make available to the joint venture.
76. Similar comments apply to the reference to “6 organisers” in the diary note of 16 March 2005.⁹⁶
77. *Secondly*, many of the witnesses did not agree with Julian Rzesniowiecki’s interpretation of the notes. If his account of the notes is to be accepted, then Don Johnson and Mike Connell were present for discussions in relation to the funding of an organiser that they claim to know nothing about.⁹⁷
78. *Thirdly*, the notion that there was a negotiation that commenced with the idea of committing to a single organiser with a salary and benefits of \$100,000, and proceeded with proposals of four and as many as six organisers with a corresponding escalation in price, which proposal then reduced back to one organiser again, seems objectively unlikely .
79. For the above reasons counsel assisting submits that a finding should be that Mr Rzesniowiecki is mistaken in his recollection that the proposal increased from one, to four, then to six organisers.

⁹⁵ Rzesniowiecki MFI-3, p45

⁹⁶ Rzesniowiecki MFI-3, p320.

⁹⁷ Don Johnson, 13/10/2015, T234.17-46.

80. At the same time, and in any event, even if (contrary to the points made above) such proposals were canvassed during the negotiations, they did not go anywhere – they were merely possibilities which were floated, but did not proceed.

81. Julian Rzesniowiecki said that the ultimate agreement that was reached occurred during a discussion he had with Cesar Melhem:⁹⁸

The gist of what was said was that, you know, the AWU had worked with us to deliver on all the aspects of the agreement that we were looking for, such as the flexible working calendar, drug and alcohol testing, sensible demark with the CFMEU, congruent subcontractor arrangements and the like, and that there was also this understanding about providing assistance and that we should deliver on that and we haggled over it and we came to an understanding.

82. The figure ultimately settled on was \$100,000 being referable to an organiser plus vehicle plus on-costs.⁹⁹

83. Julian Rzesniowiecki gave evidence that:

(a) The arrangement was set up to ensure that the Eastlink project was delivered successfully. The view within TJH was that if AWU were not proactive in managing the worksite, the CFMEU would come in and fill the gap and cause problems.¹⁰⁰

(b) The existence and terms of the agreement were not common knowledge within TJH. The project director for the Eastlink project was Chris Herbert and he was told of the agreement by Julian Rzesniowiecki.¹⁰¹ Mr Herbert said that he had no recollection of being told of the arrangement¹⁰², or of a proposal that the joint venture fund an organiser¹⁰³. Chris Herbert's successor to that position, Gordon Ralph, was also told of the agreement by Julian Rzesniowiecki.¹⁰⁴

⁹⁸ Julian Rzesniowiecki, 13/10/2015, T167.45-47, T168.1-5.

⁹⁹ Julian Rzesniowiecki, 13/10/2015, T168.1-5.

¹⁰⁰ Julian Rzesniowiecki, 30/6/2015, T14.2-13.

¹⁰¹ Julian Rzesniowiecki, 30/6/2015, T10.15-18.

¹⁰² Chris Herbert, 12/10/2015, T129.33-45

¹⁰³ Chris Herbert, 12/10/2015, T130.20-26

¹⁰⁴ Julian Rzesniowiecki, 30/6/2015, T23.20-23.

Julian Rzesniowiecki does not recall the agreement being discussed openly with the board of TJH.¹⁰⁵

- (c) In particular, the arrangement that had been reached regarding the provision of support to the AWU for provision of organisers was not disclosed by Julian Rzesniowiecki to Don Johnson¹⁰⁶ or Mike Connell,¹⁰⁷ because he understood that Thiess employees took a different view of such arrangements.¹⁰⁸ However, Julian Rzesniowiecki says that he did inform Stephen Sasse of the arrangement.¹⁰⁹

Don Johnson's account

84. Don Johnson said that he did not attend many meetings with Stephen Sasse and that he was involved in the negotiations with Julian Rzesniowiecki, Bill Shorten, Cesar Melhem and Craig Winter.¹¹⁰
85. Don Johnson had no recollection of a proposal for TJH to pay to the AWU \$100,000 plus GST per year,¹¹¹ or to make a payment to defray the cost of an organiser.¹¹² He had some recollection of there being a discussion between Julian Rzesniowiecki, Bill Shorten and Cesar Melhem in relation to organisers.¹¹³ That included discussions as to how the AWU would manage the site as the principal construction union.¹¹⁴ He had no knowledge that the arrangement was implemented by the joint venture.¹¹⁵

Mike Connell's account

¹⁰⁵ Julian Rzesniowiecki, 30/6/2015, T23.11-12.

¹⁰⁶ Julian Rzesniowiecki, 14/10/2015, T267.10-16.

¹⁰⁷ Julian Rzesniowiecki, 14/10/2015, T268.1.

¹⁰⁸ Julian Rzesniowiecki, 14/10/2015, T267.30-34.

¹⁰⁹ Julian Rzesniowiecki, 14/10/2015, T269.20-24.

¹¹⁰ Don Johnson, 13/10/2015, T231.21-32.

¹¹¹ Don Johnson, 13/10/2015, T231.41-44.

¹¹² Don Johnson, 13/10/2015, T232.1-2.

¹¹³ Don Johnson, 13/10/2015, T232.21-47.

¹¹⁴ Don Johnson, 13/10/2015, T251.37-41.

¹¹⁵ Don Johnson, 13/10/2015, T233.44-47, T234.3-7.

86. Mike Connell's account of the references to organisers and representatives in Julian Rzesniowiecki's notes¹¹⁶ was that they related to discussions with the AWU as to how it was going to represent members on the project, to ensure that the AWU would maintain an adequate presence on a large-scale project.¹¹⁷ He described the suggestion that the notes referred to the arrangements to defray the costs of an organiser as 'a piece of fiction.'¹¹⁸

Cesar Melhem's account

87. Cesar Melhem says that he had very little contact with Stephen Sasse during the course of negotiations for the 2005 EBA. He says that Bill Shorten took the lead in those negotiations and told Cesar Melhem about those discussions from time to time.¹¹⁹ He denies being told by Mr Shorten about discussions regarding the possibility of the joint venture providing funds to the AWU, or paying for an organiser.¹²⁰ Cesar Melhem confirmed that, during the discussions in which he participated, there was discussion about the organiser resources that the AWU could dedicate to the site.¹²¹ He said the nature of the discussions recorded in Mr Rzesniowiecki's note related to convincing the joint venture that the AWU could service the job.¹²² He describes the suggestion that the notes refer to proposals that the AWU pay for 4 or 6 organisers as 'laughable.'¹²³
88. As referred to above, Cesar Melhem denies that there was any agreement. He says that the genesis of the payments was as follows:¹²⁴

There was a discussion after the EBA, as I recall, with Julian in relation to the AWU providing services and the joint venture to support and sponsor various AWU activities during the life of the project and later on, part of their internal budgeting, the 100,000 issue came up. That was after the EBA was done and about providing services. What I've heard in this Commission in the last week or so about an agreement about an organiser, 100,000 during the negotiations, I don't recall any of that.

¹¹⁶ See Sasse MFI2, pages 24-25.

¹¹⁷ Mike Connell, 13/10/2015, T146.1-38; T147.9-19.

¹¹⁸ Mike Connell, 13/10/2015, T146.25-26.

¹¹⁹ Cesar Melhem, 22/10/2015, T941.8-15.

¹²⁰ Cesar Melhem, 22/10/2015, T941.17-24.

¹²¹ Cesar Melhem, 22/10/2015, T942.1-20.

¹²² Cesar Melhem, 22/10/2015, T947.1-9.

¹²³ Cesar Melhem, 22/10/2015, T947.28-39.

¹²⁴ Cesar Melhem, 22/10/2015, T894.3-12.

89. Cesar Melhem says that the abovementioned discussion took place in about May 2005.¹²⁵ He denies that the arrangement had anything to do with the provision of an organiser.¹²⁶ Mr Melhem's evidence is that in the discussion in May 2005, he and Julian Rzesniowiecki discussed the services that the AWU could provide and sponsorship that TJH could make, however he says that at that time, no fixed amount was agreed.¹²⁷

Craig Winter's account

90. Craig Winter was an industrial officer at the AWU and participated in the negotiations for the 2005 EBA.¹²⁸ He remembers participating in discussions about who was going to work on the project and look after the project, but he did not recall the particular discussion referred to in Julian Rzesniowiecki's note of a meeting on 14 December 2014.¹²⁹

91. Craig Winter stated that an arrangement for the joint venture to pay to the AWU a sum of money for the purpose of funding organisers was never discussed at a meeting he attended, and he had no knowledge of such an arrangement.¹³⁰ He stated that there were discussions about the resources that the AWU was going to put on the project, and he recalls putting forward names of organisers, but he otherwise stated emphatically that there was never a discussion about payment.¹³¹ Craig Winter says that he never had a discussion with Cesar Melhem about that matter.¹³²

Resolving the differing accounts

92. For the reasons stated above, it is submitted that the Commission would not accept the evidence of Mr Rzesniowiecki in relation to the meaning he seeks to place on the meeting notes. Having regard to the passage of time and the differing accounts of the

¹²⁵ Cesar Melhem, 22/10/2015, T894.28-29.

¹²⁶ Cesar Melhem, 22/10/2015, T898.1-5.

¹²⁷ Cesar Melhem, 22/10/2015, T900.19-32.

¹²⁸ Craig Winter, 20/10/2015, T711.10-11.

¹²⁹ Rzesniowiecki MFI3, page 45, Craig Winter, 20/10/2015, T712.12-14.

¹³⁰ Craig Winter, 20/10/2015, T712.16-34.

¹³¹ Craig Winter, 20/10/2015, T713.7-13.

¹³² Craig Winter, 20/10/2015, T715.27-34.

witnesses, the notes are of little utility other than as an objective record of the dates of meetings and the persons in attendance at those meetings.

93. Nonetheless, the Commission would otherwise accept the evidence of Julian Rzesniowiecki as to the discussion with Cesar Melhem at which the agreement was struck. Cesar Melhem accepts that there was an agreement to pay the AWU money from early in 2005, but he disputes the nature of the agreement.
94. The admission that he reached an agreement in the terms he identifies is against Mr Rzesniowiecki's interests, particularly when taken with the conduct addressed in the following section. There is no reason for Julian Rzesniowiecki to make such statements unless they were the truth. In contrast, there is no reason for Mr Melhem to have participated in the falsification of invoices if the agreement was simply to provide services that were in fact delivered.
95. The evidence of Mr Johnson and Mr Connell to the effect that they had no knowledge of the agreement is explained by Julian Rzesniowiecki's admission that he sought to conceal the agreement from them.
96. In all other respects, the account of Julian Rzesniowiecki as to the ultimate agreement that was reached is consistent with the logic of events. It is consistent with there having been an earlier proposal in 2004 which Julian Rzesniowiecki negotiated to conclusion in 2005. It is consistent with the pattern of invoicing that follows. And in particular, having regard to the general agreement by all witnesses that the AWU's capacity to service the project (including by dedicated organisers and attendance at inductions) was discussed during negotiations for the EBA, it stands to reason that it would not be TJH that would suggest paying for that to occur.

C IMPLEMENTATION OF THE AGREEMENT

97. Julian Rzesniowiecki's evidence is that no dedicated organiser was supplied by AWU to the Eastlink project.¹³³ Rather, a range of organisers worked on the project at various

¹³³ See also Gordon Ralph, 12/10/2015, T104.37-46.

stages of the construction, including an organiser who regularly attended at the pre-cast concrete facility servicing the Eastlink project at Morwell.¹³⁴

98. Julian Rzesniowiecki said that his understanding of the initial arrangement was that the invoices would be sent to John Holland. However, at some point the invoices were redirected from John Holland to the joint venture, at which time he and Cesar Melhem reached an arrangement as to how the invoices would be described so that they could be processed through the joint venture,¹³⁵ by describing the services as matters such as advertising, sponsorship, and other matters that would be approved by the joint venture.¹³⁶ Julian Rzesniowiecki said that the reason why the invoices were not described as being for the provision of an organiser to the project was because the AWU, and TJH, did not wish for that to become public information,¹³⁷ because it might have an impact on the other unions involved in the project.¹³⁸

Joint venture accounting practices

99. Mike Minotti gave evidence as to the proper procedure for raising expenditures and approving payment on the project. In summary, his evidence was as follows:
- (a) Following the award of the contract for the project TJH developed a delegation of authority matrix for expense approval and a detailed budget based on cost analysis of the project as it progressed;¹³⁹
 - (b) On a monthly basis, the general manager commercial (a Rob Johnson) and the finance manager (Mr Minotti) prepared a transaction ledger of the costs for each cost centre and met with the head of that centre to undertake a costs and budgeting review. Julian Rzesniowiecki was one of the managers that

¹³⁴ Rzesniowiecki MF11, T11.42-47.

¹³⁵ Julian Rzesniowiecki, 13/10/2015, T168.37-44.

¹³⁶ Julian Rzesniowiecki, 13/10/2015, T169.1-5.

¹³⁷ Julian Rzesniowiecki, 13/10/2015, T169.34-38.

¹³⁸ Julian Rzesniowiecki, 13/10/2015, T169.40-45.

¹³⁹ Mike Minotti, 19/10/2015, T575.7-33.

participated in the costs review for the HR/IR department, which had its own costs centre and budget;¹⁴⁰

- (c) The transaction ledger for each costs centre was provided to the Project Director (first Mr Herbert, then Mr Ralph¹⁴¹) for review on a monthly basis;¹⁴²
- (d) The project used JD Edwards enterprise accounting software (**JDE**);¹⁴³
- (e) The JDE system included approval authorities that allowed expense approval to be automated. The payment approval process was that Julian Rzesniowiecki could authorise invoices for an amount that was within his delegation limit, and anything above that limit would be escalated to the project director.¹⁴⁴ Mr Minotti guesses that Julian Rzesniowiecki's approval limit would be \$50,000 to \$75,000;¹⁴⁵
- (f) While the usual practice was for invoices to be raised against a commitment, such as a contract or purchase order which was raised before the service was provided and the invoice issued,¹⁴⁶ it was possible to raise an invoice without such a commitment in the JDE system;¹⁴⁷
- (g) Where a purchase order had been raised and approved, there was no need for payment approval of the invoice, however Mr Minotti and other personnel in his department would approve payment of the invoice through the JDE system, including by verifying that the work to which the invoice referred was done;¹⁴⁸

¹⁴⁰ Mike Minotti, 19/10/2015, T574.17-29; T576.34-41.

¹⁴¹ Gordon Ralph, 12/10/2015, T105.21-27.

¹⁴² Mike Minotti, 19/10/2015, T575.1-5.

¹⁴³ Mike Minotti, 19/10/2015, T575.35-39.

¹⁴⁴ Julian Rzesniowiecki, 30 June 2015, T15.8-22.

¹⁴⁵ Mike Minotti, 19/10/15, T576.11-14.

¹⁴⁶ Mike Minotti, 19/10/2015, T577.32-40.

¹⁴⁷ Mike Minotti, 19/10/2015, T577.1-13.

¹⁴⁸ Mike Minotti, 19/10/2015, T578.2-12; T581.45-T582.26.

- (h) Where the invoice did not refer to a purchase order or other reference to a pre-approved payment, supporting material such as a scope of work or evidence of delivery of the service would be required.¹⁴⁹
100. Deborah Swinley was Human Resources Administrator on the project from about April 2005.¹⁵⁰ Her role included processing Human Resources-related invoices for payment. The usual practice was for those invoices to be authorised by Julian Rzesniowiecki.¹⁵¹ His practice was to hand her an invoice or to give a verbal or written instruction as to what he wanted done with them. Julian Rzesniowiecki indicated approval of invoices for payment by signing them. Ms Swinley processed the invoice by entering the details of it into the JDE system, including the invoice number, amount and the party issuing the invoice. Her practice was to enter a series of accounting codes on the face of the invoice to correspond to the account codes within the JDE system.¹⁵² Deborah Swinley then delivered the invoice to the accounting department and on occasion attached other supporting documentation to the invoice.¹⁵³ Ms Swinley processed a number of the invoices that are considered in these submissions. She does not have a particular memory of any of them.¹⁵⁴ The invoices that she processed are identified in extracts from the JDE system showing the electronic approval of payment by members of the accounts department.¹⁵⁵
101. A number of preliminary observations may be made about the accounting processes adopted by TJH.
102. *First*, the Human Resources department had a budgetary allocation that should have placed limits on unauthorised expenditure. Mr Minotti said that if there had been an arrangement for employment of an organiser or the commitment of costs to defray the costs of an organiser, he would expect that there would be approval at JV Board level,

¹⁴⁹ Mike Minotti, 19/10/2015, T582.1-22.

¹⁵⁰ Deborah Swinley, witness statement, 28 September 2015, [6].

¹⁵¹ Deborah Swinley, witness statement, 28 September 2015, [8].

¹⁵² Deborah Swinley, witness statement, 28 September 2015, [9]-[10].

¹⁵³ Deborah Swinley, witness statement, 28 September 2015, [11].

¹⁵⁴ Deborah Swinley, witness statement, 28 September 2015, [13]-[14].

¹⁵⁵ Deborah Swinley, witness statement, 28 September 2015, Annexure A.

and a direction to allow for the expenditure within the forecasts for the project.¹⁵⁶ There is no evidence of a resolution for this expenditure by the JV Board or any direction to make an allowance for it.

103. *Second*, Mr Minotti says that he recalls a discussion with Julian Rzesniowiecki and Rob Johnson at the commencement of the project in which he raised the possibility of technical training or recruitment services being obtained from the AWU, and requested that an allowance be made for the expenditure in his forecasting.¹⁵⁷ Mr Minotti says that this request was not followed up in writing, but that the ordinary practice would be that the budget would have been developed on the basis of the discussion.¹⁵⁸ He said that the discussion took place in about the middle of 2005 when cost forecasting was commencing.¹⁵⁹ Julian Rzesniowiecki gave evidence that he had a discussion with Gordon Ralph, and possibly Mike Minotti and Rob Johnston in which he ‘explained the arrangement’ and the budgetary allocation for it.¹⁶⁰ Mr Minotti’s description of what he had been told differs from that of Mr Rzesniowiecki, but the similarity in their accounts is sufficient to support a finding that there was a budgetary allocation for the expenditure. The fact that the invoices that were issued pursuant to the agreement did not describe the services as ‘providing support for an organiser’ suggests that Mr Minotti’s account of what he was told should be preferred. Moreover, the timing of the conversation also suggests that it occurred as described by Mr Minotti: Gordon Ralph did not join the project until September 2005 when the project was underway and budget allocations were presumably set.
104. For his part, Gordon Ralph says that he became aware of the arrangement when he was reviewing the cost ledgers for the Human Resources department and observed a large expenditure (he recalls in the amount of \$100,000, about 3-5 months into the project) which caused him to enquire about what the payment involved.¹⁶¹ Gordon Ralph said that Julian Rzesniowiecki explained to him that the costs related to an amount of money being paid to the AWU in consideration for the EBA that had been reached with the

¹⁵⁶ Mike Minotti, 19/10/2015, T663-664.

¹⁵⁷ Mike Minotti, 19/10/2015, T579.1-18.

¹⁵⁸ Mike Minotti, 19/10/2015, T581.1-14.

¹⁵⁹ Mike Minotti, 19/10/2015, T659.43-47.

¹⁶⁰ Julian Rzesniowiecki, 13/10/2015, T185.23-41.

¹⁶¹ Gordon Ralph, 12/10/2015, T105.1-35.

AWU.¹⁶² Gordon Ralph said that he considered that he had no option but to honour the agreement that had been made.¹⁶³ He thought that the arrangement was consistent with other arrangements he had heard about pursuant to which a sum of money was paid to a union in exchange for settling negotiation, and understood that such arrangements were not typically found in writing.¹⁶⁴ He assented to the arrangement, despite considering it to be inappropriate, because he wished to maintain industrial peace on the project:¹⁶⁵

I wanted to ensure that industrial peace was maintained and the same lack of industrial disputation that had been, you know, the case on the project for the preceding 12 months remained in place and for, you know, the next - for the duration of the project. Now, if that was - if that was all consequent of the payments that had been made, or the payment that was being made, and that agreement had previously been made, then I was happy to go along with that agreement, or willing to go along with that agreement.

105. *Third*, and as per the above, there were processes in place for monitoring the costs of the project as it progressed. There were monthly costs reviews by the accounts department and, additionally, the project director. That process enabled the project director to detect the arrangement, but it does not appear that the accounts department did. That may be explained by the fact that the costs records, reflecting the invoices that were issued, did not on their face give cause for concern.
106. *Fourth*, there were two mechanisms for expenditure approval within the JDE system: the first was at the time the expenditure was raised, by way of purchase order and the like, and the second was at the time of payment. That would ordinarily provide sufficient controls to enable unusual or unjustifiable expenses to be detected. However, in the present case the approval of invoices for the HR department was under the control of Julian Rzesniowiecki. There was no independent review of the expenditures that he approved at the time he approved them, and it was possible to obtain payment of an invoice without raising a purchase order prior to the services described in the invoices being delivered. That increased the likelihood of invoices being approved for payment without close scrutiny.

¹⁶² Gordon Ralph, 12/10/2015, T106.1-7.

¹⁶³ Gordon Ralph, 12/10/2015, T106.31-36.

¹⁶⁴ Gordon Ralph, 12/10/2015, T107.4-23.

¹⁶⁵ Gordon Ralph, 12/10/2015, T108.28-37.

The 2005 payments

107. The following invoices were issued by the AWU in 2005.¹⁶⁶
108. The first invoice numbered 009304 was issued by AWU National Office on 15 February 2005, in the amount of \$5000.00 exclusive of GST.¹⁶⁷ The invoice description was ‘Advertising in the summer edition of The Australian Worker Magazine.’ The General Ledger for the AWU National Office records this income as ‘Advertising Income_AWU Journals.’¹⁶⁸ The amounts recorded in this account for the financial years between 2005 and 2008 are between \$2500.00 and \$6000.00.
109. The second invoice numbered 010249 was issued by AWU Victorian Branch on 27 May 2005, in the amount of \$750.00 exclusive of GST.¹⁶⁹ The invoice description was ‘AWU OH&S 5 Day Representatives Training Course from Monday 23rd to Friday 27th May 2005. Attendee: Jason Morgan.’ It is stamped as having been paid in July 2005, by EFT to State Funds.

AWU Population Forum

110. The third invoice numbered 010410 was issued by AWU Victorian Branch on 9 June 2005, in the amount of \$9000.00 exclusive of GST.¹⁷⁰ The invoice description was ‘booking for twenty tickets to the 2005 AWU POPULATION FORUM: “Growing Australia – Population Challenges for the future.”’ It is stamped as having been paid in August 2005, by EFT to State Funds. A booking form for the conference, signed by Julian Rzesniowiecki, is in evidence.¹⁷¹ The General Ledger for the AWU Victorian Branch records this income as ‘seminar income.’¹⁷² The most commonly recorded amount for this income code is \$450.00. The amount for this invoice is one of the

¹⁶⁶ Omitting invoices for which credit notes were subsequently issued.

¹⁶⁷ Shorten MFI9, page 168A.

¹⁶⁸ Shorten MFI9, page 242.

¹⁶⁹ Shorten MFI9, page 168A.

¹⁷⁰ Shorten MFI9, page 170.

¹⁷¹ Shorten MFI9, page 171.

¹⁷² Shorten MFI9, page 242.

highest credited to the seminar income account of the general ledger for May and June 2006.

111. Julian Rzesniowiecki does not recall attending the forum.¹⁷³ He does not know whether other employees of TJH attended the forum. He said that TJH did not supply 20 people to attend the forum, it simply bought 20 tickets.¹⁷⁴ He said that ‘the basis of the agreement was to provide funds to the Union to support the project and I guess that would be fair to say that we weren’t particularly troubled by what was described in the invoice.’¹⁷⁵ He accepted that he was happy to make payment on the invoices, consistently with the agreement, regardless of whether TJH had received the services described in the invoice,¹⁷⁶ provided that the invoices did not make plain that they were for the provision of an organiser.¹⁷⁷ Later, in his evidence before the Commission, Julian Rzesniowiecki described the payment as making a ‘donation’ of 20 places for the forum.¹⁷⁸
112. A number of other TJH personnel agreed that it was unlikely to have been of any benefit for the employees of TJH working on the project to take a day from work to attend a forum on population growth.¹⁷⁹ Mr Ralph, the Project Director, said that the forum had ‘no relevance to the project at all.’¹⁸⁰ It is submitted that the invoice numbered 010410 dated 9 June 2005 was a false invoice in that it described services that were not in fact received by TJH, and was created with the intention of concealing the true purpose of the payment it sought.

¹⁷³ Rzesniowiecki MF11, T14.34-43.

¹⁷⁴ Julian Rzesniowiecki, 13/10/2015, T171.24-26.

¹⁷⁵ Rzesniowiecki MF11, T15.1-3, T15.24-33.

¹⁷⁶ Rzesniowiecki MF11, T15.35-38.

¹⁷⁷ Julian Rzesniowiecki, 13/10/2015, T170.39-47.

¹⁷⁸ Julian Rzesniowiecki, 13/10/2015, T170.22-31.

¹⁷⁹ Stephen Sasse, 12/10/2015, T58.43-47, T59.6-14; Gordon Ralph, 12/10/2015, T112.20-24.

¹⁸⁰ Gordon Ralph, 12/10/2015, T113.1-5.

113. The fourth invoice numbered 011235 was issued by the AWU National Office on 1 July 2005, in the amount of \$5000.00 exclusive of GST.¹⁸¹ The invoice description was 'Full page advertisement in The Australian Worker Issue 6, Winter 05.'
114. The fifth invoice numbered 011173 was issued by AWU Victorian Branch on 5 August 2005, in the amount of \$750.00 exclusive of GST.¹⁸² The invoice description was 'AWU OH&S 5 Day Representatives Training in HASTINGS from Monday 1st to Friday 5th August 2005. Attendee: Robert Johnston.' It is stamped as having been paid on 9 September 2005, by EFT to State Funds.
115. The sixth invoice numbered 011505 was issued by AWU Victorian Branch on 9 September 2005, in the amount of \$750.00 exclusive of GST.¹⁸³ The invoice description was 'AWU OH&S 5 Day Representatives Training from Monday 5th to Friday 9th September 2005. Attendee: Mark Brennan.' It is stamped as having been paid in October 2005, by EFT to State Funds.
116. The seventh invoice numbered 011908 was issued by AWU Victorian Branch on 11 October 2005, in the amount of \$954.55 exclusive of GST.¹⁸⁴ The invoice description was 'Booking for ONE Table to the 7th ANNUAL AWA MEMBERS' BALL on Saturday 22 October 2005.' It is stamped as having been paid by EFT to State Funds.
117. The eighth invoice numbered 012438 was issued by the AWU National Office on 16 November 2005, in the amount of \$5000.00 exclusive of GST.¹⁸⁵ The invoice description was 'Full Page advertisement in The Australian Worker Issue 7, Spring 05 Edition.'
118. The majority of the invoices issued in 2005 were in relation to the placing of advertising in the Australian Worker magazine, and the provision of training to named employees of the joint venture. There is evidence that advertisements relating to the Eastlink project were placed in the corresponding issues of the Australian Worker described in the above

¹⁸¹ Shorten MFI9, page 171A.

¹⁸² Shorten MFI9, page 174.

¹⁸³ Shorten MFI9, page 176.

¹⁸⁴ Shorten MFI9, page 177.

¹⁸⁵ Shorten MFI9, page 180A.

invoices, and that the amounts charged for advertising, and for training, were in the range of what the AWU typically charged for such services as recorded in the general ledgers of the AWU Vic Branch and National Office.¹⁸⁶

The 2006 payments

119. The following invoices were issued by the AWU in 2006.

The Australian Worker \$10,000 invoice

120. The first invoice numbered 013511 was issued by the AWU National Office on 18 January 2006, in the amount of \$10,000.00 exclusive of GST.¹⁸⁷ The invoice description was 'Advertising in The Australian Worker Magazine, Summer 05 and Autumn 05 edition.' This invoice is not a genuine invoice. The reasons for that conclusion are that (a) the invoice was issued by the Victorian Branch and paid into Victorian State Funds account, whereas advertising in the Australian Worker is invoiced by and paid to the National Office;¹⁸⁸ (b) in respect of advertising for the Summer 2005 edition, one advertisement was placed that was invoiced and paid for in February 2005;¹⁸⁹ and (c) there was no advertisement for the Eastlink project in the Autumn 2005 edition of the Australian Worker.¹⁹⁰

Back Strain Research

121. The second invoice numbered 013042 was issued by the AWU Victorian Branch on 18 January 2006 (the same day as the preceding invoice), in the amount of \$30,000.00 exclusive of GST.¹⁹¹ The invoice description was 'Research work done on Back Strain

¹⁸⁶ Shorten MFI9, pages 241, 244-245, 263-264.

¹⁸⁷ Shorten MFI9, page 184A.

¹⁸⁸ Bill Shorten, 9/7/2015, T121.5-12.

¹⁸⁹ Shorten MFI9, page 168A (see above).

¹⁹⁰ Melhem MFI1 of 22/10/2015, comparative table, Autumn 2005 issue. However, there was an invoice placed in issue 8 of the Australian Worker with no corresponding invoice, so the invoice may partially cover a service that was performed by the AWU.

¹⁹¹ Shorten MFI9, page 186.

in Civil Construction Industry.’ The item code for the invoice is ‘VIC OTHER.’ It is stamped as having been paid by EFT to State Funds on 2 March 2006.

122. The invoice requisition form for this payment was completed by Michael Chen on 18 January 2006, with the annotation ‘per Cesar’s instruction.’¹⁹² Michael Chen confirmed that this annotation confirmed that he had raised the invoice on the instructions of Cesar Melhem. There were no supporting documents attached to the requisition form.¹⁹³
123. The General Ledger for the AWU Victorian Branch records this income as ‘other income.’¹⁹⁴ No additional description is entered into the journal to describe the payment. The amount for this invoice is the highest credited to the ‘other income’ account for 2006 by a significant margin. It is also one of the only credits that is recorded in the ‘other income’ account in a round figure.
124. There is no evidence that research was undertaken in relation to back strain by AWU for the purposes of the Eastlink project. None of the TJH personnel recall such a report being commissioned, and none of them recall receiving a report concerning back strain during the project.¹⁹⁵ Steven Sasse described the notion that the AWU would be commissioned by TJH to undertake health and safety research as ‘unorthodox.’¹⁹⁶
125. Stephen Sasse and Michael Minotti agreed that, if the research was to be commissioned by the joint venture, a detailed scope of works and tender would be required before the expenditure was authorised.¹⁹⁷
126. Julian Rzesniowiecki treated the payment as an instalment on the \$100,000 payable pursuant to the agreement with the AWU.¹⁹⁸ He said that he had some discussion with Cesar Melhem in relation to research that was being done with one of the Universities

¹⁹² Shorten MFI9, page 187.

¹⁹³ Michael Chen, 21/10/2015, T814.5-13.

¹⁹⁴ Shorten MFI9, page 242.

¹⁹⁵ Julian Rzesniowiecki, 13/10/2015, T173.38-44; Stephen Sasse, 12/10/2015, T61.27-32; Gordon Ralph, 12/10/2015, T127.8-15, Mike Minotti, 19/10/2015, T587.9-12; Sparkman MFI1, T14.10-18, Johnson MFI1, T14.38-40.

¹⁹⁶ Stephen Sasse, 12/10/2015, T59.25-31.

¹⁹⁷ Stephen Sasse, 12/10/2015, T60.30-45, T61.1-31; Mike Minotti, 19/10/2015, T586.16-46, T587.1-12; Minotti MFI1, T24.22-47, T28.22-46.

¹⁹⁸ Julian Rzesniowiecki, 13/10/2015, T173.46-47, T174.1-9.

but he has no memory of the detail of it.¹⁹⁹ Julian Rzesniowiecki accepted in his evidence that the invoice for back strain research was a false invoice.²⁰⁰

127. Cesar Melhem confirmed that he had given the instruction to Mr Chen to raise the invoice with the description that it bore.²⁰¹ It was suggested by counsel for Mr Melhem to Julian Rzesniowiecki that the relevant research consisted of a study undertaken in collaboration with the Victorian Workcover Authority with an apparent title 'Flips and Flops in Manual Handling in the Civil Construction Industry.'²⁰² The Commission had issued a notice to produce addressed to the AWU seeking copies of the research relating to the invoice for back strain research and no documents had been produced in response to the Notice.²⁰³ Following the questioning of Mr Rzesniowiecki on this issue, the AWU produced a copy of a report dated May 2005 and entitled 'Sprains, strains and fatalities in the civil construction industry,'²⁰⁴ and later further documentation relating to its communications with third parties in relation to the research detailed in the report.²⁰⁵ The author of the report is noted to be Gavin Merriman of the Australian Workers' Union.

128. The report has nothing to do with the Eastlink project. It was completed in May of 2005, some seven months before the invoice was issued. The report is noted to be a 'Worksafe (Vic) Safety Development Fund Project,' pursuant to a Safety Development Funding Agreement between Worksafe Victoria and the AWU.²⁰⁶ That is a funding initiative undertaken by the State Authority, which on 18 April 2002 agreed to fund the report in the amount of \$300,000.²⁰⁷ The invoices issued to the Workcover Authority to recover funding are coded 'OHS' and describe the project by the name of the report.²⁰⁸ On page 4 of the report a number of companies are thanked for the time and resources dedicated to the project, the list does not include Thiess, John Holland or TJH. The

¹⁹⁹ Rzesniowiecki MFI1, T16.36-44.

²⁰⁰ Julian Rzesniowiecki, 13/10/2015, T190.15-20.

²⁰¹ Cesar Melhem, 22/10/2015, T924.28-33.

²⁰² Julian Rzesniowiecki, 13/10/2015, 221.18-30.

²⁰³ Melhem MFI2, 22/10/2015.

²⁰⁴ Melhem MFI2, 22/10/2015, page 1.

²⁰⁵ Melhem MFI2, 22/10/2015.

²⁰⁶ Melhem MFI2, 22/10/2015, page 2.

²⁰⁷ Melhem MFI2, 22/10/2015.

²⁰⁸ Melhem MFI2, 22/10/2015 (invoice dated 5 may 2005, numbered 010023).

report was a fully funded project that was completed with the input of a number of companies, but not TJH. Finally, a review of the report reveals a single reference to back injury.²⁰⁹ It is apparent that the research undertaken in relation to the report was not focused on back strain.

129. Cesar Melhem contended that the research project continued beyond the publication date of the report in 2005, implementing the recommendations in the report.²¹⁰ He claims that Mr Merriman had a number of meetings with the health and safety department of TJH and Cesar Melhem agreed with Julian Rzesniowiecki to support the project.²¹¹
130. Mr Melhem's explanation should be rejected. It is inconsistent with the documents that have been produced and the evidence of the personnel of TJH, none of whom are aware of the research referred to in the invoice, despite evidence that, as a matter of process they would be. Moreover, Julian Rzesniowiecki under cross-examination affirmed that he had no knowledge of the arrangements concerning the research project.²¹² No records have been produced by the AWU suggesting that the research project continued beyond May 2005, or that TJH was in any way involved.
131. The Commission should instead conclude that the invoice was a false invoice in that it described a research project that did not exist and was not in fact commissioned by TJH, and was created with the intention of concealing or disguising the true purpose of the payment it sought.
132. On 18 January 2006, that is, the day on which the invoices referred to at [120] and [121] above were issued, Julian Rzesniowiecki emailed Matt Fuller asking for a report of 'all the payments that were made from my cost codes to the AWU.'²¹³ Matt Fuller responded on 24 January 2006 and later on 2 February 2006 confirming payments of

²⁰⁹ Melhem MFI2, 22/10/2015, page 37.

²¹⁰ Cesar Melhem, 22/10/2015, T928.27-31.

²¹¹ Cesar Melhem, 22/10/2015, T930.12-16..

²¹² Julian Rzesniowiecki, 13/10/2015, T221-222.

²¹³ Shorten MFI9, page 188.

\$5000 coded as external relations, publications and recruitment (being the payments detailed in paragraphs [107], [111] and [116] above).²¹⁴

133. The third invoice numbered 013387 was issued by the AWU Victorian Branch on 16 February 2006, in the amount of \$750 exclusive of GST.²¹⁵ The invoice description was ‘AWU OH&S 5 Day Representatives Training from Monday 12th-Friday 16th February 2006. Attendee: Heath Fletcher.’ It is stamped as having been paid by EFT.

IR Regulations Seminar

134. The fourth invoice numbered 013882 was issued by the AWU Victorian Branch on 17 May 2006, in the amount of \$25,250.00 inclusive of GST.²¹⁶ The invoice description was ‘Purchase of tickets to the 2006 IR REGULATIONS SEMINAR: ... Wednesday 17th May 2006.’ The quantity described in the invoice is 1. It is stamped as having been paid by EFT to State Funds. The General Ledger for the AWU Victorian Branch records this income as ‘seminar income.’²¹⁷ The most commonly recorded amount for this income code is \$450.00. The amount for this invoice is the highest credited to the seminar income account for May and June 2006 by a significant margin.
135. A handwritten note in Cesar Melhem’s handwriting²¹⁸ directs an amount of \$25,250 to be drawn, attention to Julian, with the description ‘Seminar 17 May 2006 re: Workchoices.’²¹⁹ Cesar Melhem does not remember how many people attended the seminar.²²⁰ Steven Sasse, Gordon Ralph and Julian Rzesniowiecki agreed that TJH would not have used the AWU to obtain information on the operation of the new industrial relations laws, it would have had recourse to its lawyers.²²¹ Julian Rzesniowiecki said that he attended the seminar but he could not recall whether anyone

²¹⁴ Shorten MFI9, page 188-190.

²¹⁵ Shorten MFI9, page 191.

²¹⁶ Shorten MFI9, page 196.

²¹⁷ Shorten MFI9, page 243.

²¹⁸ Michael Chen, 21/10/2015, T814.23; Cesar Melhem, 22/10/2015, T935.17-26.

²¹⁹ Shorten MFI9, page 195.

²²⁰ Cesar Melhem, 22/10/2015, T936.1-3.

²²¹ Julian Rzesniowiecki, 13/10/2015, T183.18-22; Stephen Sasse, T61.34-46, Gordon Ralph, T116.1-3.

else did. It was possible that he was the only person in attendance.²²² The invoice was for the purpose of finding ways to provide money in accordance with the agreement with the AWU.²²³

136. An invitation to the IR Regulations Seminar is in evidence.²²⁴ The seminar took place on 17 May 2006, the date of the invoice. The invitation discloses that a single ticket is \$450.00 inclusive of GST. The sum of \$25,250.00 cannot be divided so as to account for a set number of tickets, but the sum is closest to 56 tickets. Moreover, in his email dated 13 September 2013, Julian Rzesniowiecki refers to the need to deduct \$500 paid for attendance at the Workchoices conference.²²⁵ That suggests that (a) Julian Rzesniowiecki paid separately for the ticket to the conference and was seeking to offset that amount against future payments; and (b) the invoice of 17 May 2006 was a false invoice, issued in relation to services not received by TJH and of no benefit to the Eastlink project, and created with the intention of concealing the true purpose of the payment it sought.
137. The fifth invoice numbered 014860 was issued by the AWU Victorian Branch on 23 June 2006, in the amount of \$750.00 exclusive of GST.²²⁶ The invoice description was 'AWU OH&S 5 Day Representatives Training from Monday 19th-Friday 23rd June 2006. Attendee: Barry Howlett.' It is stamped as having been paid by EFT to State Funds.
138. The sixth invoice numbered 015169 was issued by the AWU Victorian Branch on 28 July 2006, in the amount of \$750.00 exclusive of GST.²²⁷ The invoice description was 'AWU OH&S 5 Day Representatives Training from Monday 24th-Friday 28th July 2006. Attendee: Joel Hurst.' It is stamped as having been paid by EFT to State Funds.

²²² Julian Rzesniowiecki, 13/10/2015, T184.6-9.

²²³ Julian Rzesniowiecki, 13/10/2015, T183.31-47.

²²⁴ Shorten MFI12 page 58.

²²⁵ Shorten MFI9, page 199.

²²⁶ Shorten MFI9, page 197.

²²⁷ Shorten MFI9, page 198.

139. The seventh invoice numbered 015624 was issued by the AWU National Branch on 31 July 2006, in the amount of \$5000.00 exclusive of GST.²²⁸ The invoice description was 'Full Page Advertisement in 'The Australian Worker' Issue 9, Autumn 06 edition.'
140. As referred to above, the email exchange between Julian Rzesniowiecki and Cesar Melhem was forwarded by Michael Chen to Mei Lin with the direction to 'follow this.'²²⁹ Michael Chen does not recall any discussions in relation to the amounts nominated by Julian Rzesniowiecki in the email.²³⁰
141. On 18 September 2006, the AWU Vic Branch issued three invoices to TJH, in accordance with Julian Rzesniowiecki's email of 13 September 2006. Cesar Melhem agreed that the invoices were sent on his instructions.²³¹

AWU Members' Ball

142. The eighth invoice numbered 015701 was issued by the AWU Victorian Branch on 18 September 2006, in the amount of \$6250.00 exclusive of GST.²³² The invoice description was 'Places to the 8TH ANNUAL AWU MEMBERS' BALL on Saturday 28 October 2006.' The quantity in the invoice is 1. The invoice is stamped as having been paid by EFT to State Funds.
143. The previous year, TJH made a booking for one table to the AWU members' ball, at a cost of \$1,050.00.²³³ Julian Rzesniowiecki gave evidence that he attended the AWU balls for each year of the project.²³⁴ Gordon Ralph said that TJH may have paid for a booking for one table, as a 'contribution' to the AWU.²³⁵ He did not know whether

²²⁸ Shorten MFI9, page 198A.

²²⁹ Shorten MFI9, page 201.

²³⁰ Michael Chen, 21/10/2015, T808.19-21, 33-40.

²³¹ Cesar Melhem, T923.9-11.

²³² Shorten MFI9, page 204.

²³³ Shorten MFI9, page

²³⁴ Julian Rzesniowiecki, 13/10/2015, T215.19-25.

²³⁵ Gordon Ralph, 12/10/2015, T113.45-47, T116.1.

anyone at TJH in fact attended the ball.²³⁶ It is unlikely in the extreme that 70 employees of TJH attended the AWU ball that year.

Sponsorship for OHS conference

144. The ninth invoice numbered 015703 was issued by the AWU Victorian Branch on 18 September 2006, in the amount of \$25,000.00 exclusive of GST.²³⁷ The invoice description was 'Sponsorship for OH&S conference – As per agreement with Cesar Melhem.' The date of the conference is not specified. There is no evidence of what the conference related to and when and where it was held. The invoice is stamped as having been paid by EFT to State Funds.
145. The description the invoice 'as per agreement with Cesar Melhem' was understood by Julian Rzesniowiecki to be a reference to the agreement to pay \$100,000 plus GST per year, so that Julian Rzesniowiecki would understand that the invoice was for the purposes of that arrangement.²³⁸ Mr Minnotti gave evidence as to the process for approval of sponsorship, namely that it was in the nature of a donation and required approval from the project director.²³⁹ Gordon Ralph said that the project would not have paid out \$25,000 for sponsorship of an AWU conference. He said that he cannot recall Julian Rzesniowiecki asking him for approval to donate \$25,000 which he would have been required to do.²⁴⁰
146. Julian Rzesniowiecki said that he cannot recall whether he obtained approval from Mr Ralph to pay for the sponsorship. His evidence is that:²⁴¹

What I did do with Mr Ralph, when he arrived is I explained the arrangement we had and explained what funds would need to be remitted over the life of the project, and we've got a process within the joint venture, or on a lot of projects, called the "cost to complete" where we calculate what expenditure we anticipate to spend between, you know, the current time and the end of the project. All of the commitments that we'd made to the AWU, and all the other budget items that were under my control were included in that and he would have been aware of that.

²³⁶ Gordon Ralph, 12/10/2015, T118.26-44.

²³⁷ Shorten MFI9, page 206.

²³⁸ Julian Rzesniowiecki, 30 June 2015, T18.23-28.

²³⁹ Minotti MFI1, T31.32-40.

²⁴⁰ Gordon Ralph, T119.11-21.

²⁴¹ Julian Rzesniowiecki, 13/10/2015, T185.23-32.

147. Julian Rzesniowiecki said that the invoice was a method of providing funds to the AWU pursuant to the agreement.²⁴²

Advertising in the Australian Worker

148. The tenth invoice numbered 016248 was issued by the AWU Victorian Branch on 18 September 2006, in the amount of \$30,000.00 exclusive of GST.²⁴³ The invoice description was ‘Advertising in “The Australian Worker” Magazine. Invoiced mistakenly by National Office before.’ The description makes no reference to the issues for which advertising was placed. The invoice bears the item code ‘VIC OTHER.’ It is stamped as having been paid by EFT to State Funds. That reference is to an earlier invoice, also dated 18 September 2006 and numbered 015702.²⁴⁴ That invoice was issued from the National Office, the publisher of the Australian Worker and the proper accounting centre for advertising income, bearing the item code ‘ADVERTISE.’ The copy of the invoice in evidence contains handwritten notes, stating:

Mei Lin, I need to have a look at the supporting documents for this invoice. It may belong to Vic Branch. Thanks, Mich.

It is for Vic not Nat. Need to trf fund internally when receiving payment.

149. Invoice 015702 was then reversed by credit note²⁴⁵ and reissued from the AWU Vic Branch. The first note was in Michael Chen’s handwriting.²⁴⁶ Michael Chen did not have a memory of his reasons for making the note. He does not recall examining any supporting documents.²⁴⁷
150. The invoice demonstrably does not relate to any advertising placed in the Australian Worker. A reconciliation of the issues of the Australian Worker containing advertising placed by TJH over the course of the project, and the invoices issued by the National Office, shows that all of the advertising that was placed was paid for pursuant to those

²⁴² Julian Rzesniowiecki, 13/10/2015, T186.6-11.

²⁴³ Shorten MFI9, page 207.

²⁴⁴ Shorten MFI9, page 205.

²⁴⁵ Shorten MFI9, page 206A.

²⁴⁶ Michael Chen, 21/10/2015, T808.47.

²⁴⁷ Michael Chen, 21/10/2015, T809.18-36.

invoices.²⁴⁸ Further discussion of this invoice is contained in the introductory chapter to these submissions.

151. Julian Rzesniowiecki described the invoice as, at best, an inflated price.²⁴⁹ He agreed that the purpose of describing the invoice as ‘advertising’ was to disguise what it was for.²⁵⁰ In truth, it was a false invoice, issued in relation to services not received by TJH, and created with the intention of concealing the true purpose of the payment it sought.

OH&S Training

152. The eleventh invoice numbered 016425 was issued by the AWU Victorian Branch on 6 November 2006, in the amount of \$36,250.00 inclusive of GST.²⁵¹ The invoice description was ‘Occupation Health & Safety training course for HRS reps on eastlink – As per Cesar Melhem.’ It is stamped as having been paid by EFT to State Funds.
153. The date of the invoice is consistent with the instruction in Julian Rzesniowiecki’s email of 13 September 2015 to ‘send in November’ an invoice for HSR training in the amount of \$36,250.00.²⁵² Typically, invoices for OH&S training issued in respect of the project are in respect of training provided to a named participant and describe the dates and period of the training courses paid for.²⁵³ This practice is consistent with Mr Minotti’s account of the detailed reporting and accounting requirements that the joint venture had in place in respect of training.²⁵⁴
154. The General Ledger for the AWU Victorian Branch records this income as ‘OH&S Training income.’²⁵⁵ The most commonly recorded amount for this income code is \$750.00 or multiples thereof. The amount for this invoice is the highest credited to the account for 2006-2007 by a significant margin.

²⁴⁸ Melhem MFI1, 22/10/2015.

²⁴⁹ Julian Rzesniowiecki, 13/10/2015, T186.13-30.

²⁵⁰ Rzesniowiecki MFI1, T20.8-15.

²⁵¹ Shorten MFI9, page 210.

²⁵² Shorten MFI9, page 199.

²⁵³ See, for example, Shorten MFI9, pages 169, 174, 176, 191, 197, 198.

²⁵⁴ Mike Minotti, 19/10/2015, T588.2-12.

²⁵⁵ Shorten MFI9, page 254.

155. The twelfth invoice numbered 016485 was issued by the AWU Victorian Branch on 13 November 2006, in the amount of \$3295.45 exclusive of GST.²⁵⁶ The invoice description was ‘Occupation Health & Safety training course for HRS reps on eastlink – As per Cesar Melhem – Additional to the inv 016425, bring the total amount of HSR training up to \$36,250 plus GST.’ It is stamped as having been paid by EFT to State Funds. Again, the invoice appears to relate to Julian Rzesniowiecki’s direction of 13 September 2006, with the purpose of this invoice to account for the fact that the \$36,250 agreed on at that time was invoiced exclusive of GST.
156. Julian Rzesniowiecki says that the invoices were false invoices in that training was not provided in respect of those invoices.²⁵⁷ Gordon Ralph also stated with certainty that the project would not have provided training to the extent of invoicing \$33,000.00, as training of that scale would have been sourced from an external provider.²⁵⁸ Cesar Melhem disagreed, stating that the services were provided, but without access to the records he could not verify that this was the case.²⁵⁹ The Commission has issued notices to the AWU seeking production of records relating to training provided by the AWU to Thiess John Holland, including in respect of the above invoices.²⁶⁰ No records have been produced that would enable the Commission to conclude that training was provided as referred to in this invoice. In the absence of any documentary evidence supporting Mr Melhem’s claim, and in light of the admissions of Julian Rzesniowiecki and the evidence of Gordon Ralph, the Commission should find that these invoices were false invoices.
157. The thirteenth invoice numbered 016838 was issued by the AWU National Office on 30 November 2006, in the amount of \$5000.00 exclusive of GST.²⁶¹ The invoice description was ‘Full Page advertisement in ‘The Australian Worker Issue 10, Summer 06 Edition.’ It is stamped as having been paid by EFT to State Funds.

²⁵⁶ Shorten MFI9, page 211.

²⁵⁷ Julian Rzesniowiecki, 13/10/2015, T189.18-40, T190.30-33.

²⁵⁸ Gordon Ralph, 12/10/2015, T120.14-46; T122.10-18.

²⁵⁹ Cesar Melhem, 22/10/2015, T936.10-23.

²⁶⁰ AWU MFI2, pages 175-187.

²⁶¹ Shorten MFI9, page 212A.

The 2007 Payments

158. The pattern of invoicing for 2007 was different. It proceeded as follows:

The services invoices

159. An invoice requisition was raised on 27 February 2007 for \$100,000.00 plus GST with the description 'services.'²⁶² The requisition was requested by Michael Chen and authorised by Cesar Melhem. The description 'services' was written in my Cesar Melhem.²⁶³
160. An invoice 017606 was issued by the AWU Vic Branch on 28 February 2007, in the amount of \$100,000.00 exclusive of GST.²⁶⁴ The invoice description was 'Services – As per Cesar Melhem.'
161. Also 28 February 2007 the invoice was reversed by a credit note numbered 017711, with the description 'Services – As per Cesar Melhem – REVERSE THIS AS THIESS JOHN HOLLAND WOULD LIKE TO PAY IN INSTALMENTS.'²⁶⁵
162. Two invoices were then issued by the Victorian Branch on 28 February 2007, numbered 017713 and 017714, both for \$37,000 inclusive of GST and described respectively as 'Services – First Instalment – As per Cesar Melhem' and 'Services – Second Instalment – As per Cesar Melhem.' Both invoices were stamped as being paid on the same day, 18 April 2007, by EFT to State Funds.²⁶⁶
163. A further invoice was issued by the AWU Vic Branch on 22 March 2007, numbered 017715, in the amount of \$36,000 inclusive of GST and described as 'Services – Third Instalment – As par Cesar Melhem.'²⁶⁷

²⁶² Shorten MFI9, page 215.

²⁶³ Michael Chen, T812.12-20.

²⁶⁴ Shorten MFI9, page 215A.

²⁶⁵ Shorten MFI9, page 215B.

²⁶⁶ Shorten MFI9, page 217-218.

²⁶⁷ Rzesniowiecki MFI2, page 135.

164. The day before payment of the first two invoices, on 17 April 2007, Julian Rzesniowiecki wrote to Cesar Melhem stating ‘Instalments 1 & 2 will be paid. Please ask Michael to withdraw instalment 3. It will be covered by the ads in Australian Worker, attendance at the ball etc. If we don’t reach the agreed sum we can address at end of year.’²⁶⁸
165. Each of the above invoices was recorded in the General Ledger for the AWU Victorian Branch as ‘other income,’ without any description in the journal of the nature of the transactions to which the invoices related.²⁶⁹
166. Stephen Sasse provided an explanation of the circumstances in which an invoice of such opacity would be paid:²⁷⁰

The invoice should relate to a purchase order or to a contract or to some other document that creates the commercial relationship between the party invoicing and the party paying the invoice. There are very, very rare occasions where you might specifically request an invoice that's not specific or clear about what it's for, in which case most companies and most audit functions require a two-up sign-off process to make sure that everything is above board.

167. There is no evidence of such a process having been adopted in the present case. Michael Minotti described the invoice for \$110,000 as an unacceptable invoice. He said it should not be approved for payment without an understanding of what the scope of the services were and who authorised the services.²⁷¹ The invoices for the First and Second instalments retained in TJH’s records are in evidence.²⁷² Each appear to have been approved for payment by Julian Rzesniowiecki.²⁷³
168. Julian Rzesniowiecki said that he assumed that he asked Cesar Melhem to break the invoice into instalments for cash flow purposes.²⁷⁴ Julian Rzesniowiecki said that he considered that the services that were described in these invoices were provided: namely, that ‘services’ described the commitment of organisers to the project.

²⁶⁸ Shorten MFI9, page 222.

²⁶⁹ Shorten MFI9, page 259.

²⁷⁰ Stephen Sasse, 12/10/2015, T64.19-27.

²⁷¹ Mike Minotti, 19/10/2015, T589.13-25.

²⁷² Shorten MFI9, pages 216-219.

²⁷³ Compare the signature at Shorten MFI9, page 222.

²⁷⁴ Julian Rzesniowiecki, 13/10/015, T191.10-21.

Accepting that he never saw any supporting materials that confirmed what organising services were performed, Mr Rzesniowiecki said:²⁷⁵

I mean, you may not agree with the arrangement we entered into, but that was the agreement that was entered into and we weren't concerned to have organisers filling out time sheets and spending a particular time at the project. That wasn't - that wasn't the purpose of what was agreed and it wasn't - it's not reality on an industrial project either, no.

...

...we made an agreement that we would provide funding to assist the AWU to provide organisers to the project. That was the agreement and we honoured our agreement. Now, as I've mentioned to you, we didn't require the organisers to be there for a particular time or duration, or undertake particular activities. It was a general agreement that organisers would be provided, as and when required, in order to make sure the project was delivered successfully and without industrial disruption. So, that's the nature of the arrangement. So, when I was signing off on invoices, I was signing off consistent with the arrangement that we'd entered into. I wasn't checking to see, you know, how much time they'd spent there.

169. Michael Chen described the description on the invoice as 'a bit too short, too brief.'²⁷⁶ He was otherwise unable to shed light on how the original invoice in the amount of \$110,000 came to be raised in that manner, or why it was broken into instalments.

170. Cesar Melhem stated that he caused Michael Chen to raise the original tax invoice for \$100,000.00. Mr Melhem said that the chain of invoices reflected an agreement between he and Julian Rzesniowiecki that \$110,000 in services would be provided and agreed on the budget and invoices for those services.²⁷⁷ His description of the services that were provided by reference to these invoices was as follows:²⁷⁸

The services were where Union officials or officers of the AWU and specialists went to the site on the 45 kilometre project attending inductions on a weekly basis, attending crew meetings on a weekly basis, that was in addition to the other services that were provided by the Union to its members for dispute procedure handling, grievances handling, all those sorts of things, they were separate. That was in addition to the day-to-day representation by the organisers to members, so that's additional services to attend inductions and various other activities.

171. Both Cesar Melhem and Julian Rzesniowiecki gave evidence to the effect that the 'services' invoices reflected the services that were in fact provided pursuant to the agreement, namely, the provision of organiser support for the project. Even if it were assumed that the services were provided in the manner described by Mr Rzesniowiecki,

²⁷⁵ Julian Rzesniowiecki, 13/10/015, T192.16-34.

²⁷⁶ Michael Chen, T812.33-36.

²⁷⁷ Cesar Melhem, 22/10/2015, T898.29-42, T937.7-11.

²⁷⁸ Cesar Melhem, 22/10/2015, T937.28-42.

and Mr Melhem, the invoices do not evidence that they were provided or that they represented any value to the project. To that extent, they are false invoices because they too conceal the true purpose of the payments that they represent.

172. Invoice 018826 was issued by the AWU Victorian Branch on 30 June 2007, in the amount of \$8146.36 exclusive of GST and bearing the description ‘On-site OH&S Industry Induction (Red Card) Training.’²⁷⁹ A detailed breakdown of the courses and the cost per participant was then set out.
173. Invoice 019565 was issued by the AWU Victorian Branch on 1 October 2007, in the amount of \$4,545.45 exclusive of GST and bearing the description ‘FOUR tables to the 9TH ANNUAL AWU MEMBERS’ BALL on Saturday 27 October 2007.’²⁸⁰ It is signed as being approved for payment and annotated ‘paid’.

The final services invoice

174. As addressed in section A above, Julian Rzesniowiecki and Cesar Melhem corresponded on 31 March 2008 in relation to the final breakdown of the amount owing for that year.²⁸¹
175. The final invoice numbered 020645 was issued on 9 April 2008 from the AWU Victorian Branch in the amount of \$19,015.45 exclusive of GST. It was described as ‘Services – third instalment’ and then contained a breakdown as follows:

Original amount: \$36000.00

Absorb the payments made from January 2007:

- OHS Training \$825.00
- Red Card Training \$9,258.00
- AWU Ball \$5000.00

176. The breakdown in the invoice is not identical to that in Julian Rzesniowiecki’s email of 31 March 2008: it refers to OHS Training rather than the Australian Worker. The

²⁷⁹ Shorten MFI9, page 225.

²⁸⁰ Shorten MFI9, page 229.

²⁸¹ Shorten MFI9, page 233.

invoice also stated ‘As per Cesar Melhem’.²⁸² The invoice was stamped as having been paid on 15 May 2008 by EFT to State Funds.

177. On 10 April 2008 Julian Rzesniowiecki sent an email to Cesar Melhem stating:²⁸³

Hi mate,

You haven’t deducted the Australian Worker Ad \$5500 paid in May 07.

178. Despite this email, the invoice was paid in full on 15 May 2015.²⁸⁴

179. The final services invoice is consistent with the approach to invoicing that was adopted at the commencement of that year: namely, some invoices were issued for ‘services’ and the balance of the agreed sum was accounted for with services that TJH did not, on many occasions, need. Julian Rzesniowiecki’s email of 31 May 2015 makes plain that the Red Card Training, even if delivered, was not a cost the joint venture needed to incur because that service could have been delivered by John Holland. Moreover, advertising in the Australian Worker would have been of little commercial utility to TJH towards the end of the project. Indeed, both Gordon Ralph and Stephen Sasse agreed that there was little if any commercial benefit to placing advertisements in union publications.²⁸⁵

Accounting and approval of the invoices

180. Two sets of records from the JDE system are in evidence that relate to the processing of the invoices described above.

181. The first is the purchase orders. Purchase orders have been produced corresponding to each of the invoices described above.²⁸⁶ However, none of the invoices issued by the AWU make reference to a purchase order number as would ordinarily be expected. An analysis of the purchase orders reveals that, on all but one occasion,²⁸⁷ the purchase

²⁸² Shorten MFI9, page 233.

²⁸³ Shorten MFI9, page 234.

²⁸⁴ Shorten MFI9, page 235.

²⁸⁵ Stephen Sasse, 12/10/2015, T58.27-34; Gordon Ralph, T113.22-28; T114.26-29, T117.15-20, T119.3-9.

²⁸⁶ Rzesniowiecki MFI2, pages 136 to 179.

²⁸⁷ The purchase order relating to purchase of tickets to the IR regulations seminar: Shorten MFI9, page 196.

order was raised *after* the invoice was received by TJH. That is not consistent with usual accounting practice.²⁸⁸ Julian Rzesniowiecki says that he assumes that the purchase order was raised when he approved payment of an invoice.²⁸⁹ The evidence suggests that the invoices were almost invariably received from the AWU without the expenditure having been approved at the time the services were arranged or agreed to. It is respectfully submitted that that fact supports the drawing of an inference that the services described in the invoices were not provided.

182. The second set of records in evidence are approvals records from the JDE system.²⁹⁰ These records show approvals of invoices, up to a set payment approval threshold, by personnel in the accounts department. The approvals process was initiated by administrative staff in the human resources department (either Ms Swinley or Ms Viles²⁹¹), and then escalated to the accounts department officer with the relevant approval threshold. Michael Minotti gave evidence that, as co-signee of cheques for the joint venture, he undertook checks on the invoices immediately prior to payment, but that this process did not involve an inquiry as to whether the work described in an invoice was in fact done.²⁹²
183. Accordingly, the approvals records do not reveal a process by which the joint venture could satisfy itself, after the invoice was signed by Julian Rzesniowiecki as being approved for payment, that the services described in the invoices had been delivered.

D WERE THE INVOICES GENUINE?

184. Cesar Melhem asserts that each of the invoices described above relates to a service provided by the AWU.²⁹³ Bill Shorten gave evidence that he was satisfied that AWU was providing OH&S training, red card training and HSR training at the Eastlink Project.²⁹⁴ Bill Shorten says that many of the services that are described in the invoices

²⁸⁸ Mike Minotti, 19/10/2015, T577.28-40.

²⁸⁹ Julian Rzesniowiecki, 13/10/2015, T172.31-33.

²⁹⁰ Sasse MFI2, pages 1-22.

²⁹¹ Mike Minotti, 19/10/2015, T577.42-47.

²⁹² Mike Minotti, 19/10/2015, T583.1-29.

²⁹³ Cesar Melhem, witness statement, 9 October 2015, [10].

²⁹⁴ Bill Shorten, 9 July 2015, T119.17-26.

described above are standard business of unions.²⁹⁵ It is, according to Mr Shorten, in the interests of workers to have employers pay for services to union members such as OH&S training and entertainment.²⁹⁶

185. It is likely, on the evidence available, that the AWU did provide services in relation to some of the invoices described above. For example, with the exception of the two invoices issued by the AWU Vic branch, it is clear that TJH placed advertising in the Australian Worker, and that according to the general ledgers of the National Office the price charged for the advertising was in the range of what the AWU National Office was able to command for such a service.
186. Moreover, it is clear that (a) personnel from TJH and their partners attended the AWU ball; and (b) some training was conducted by the AWU in the nature of OH&S and Red Card training.
187. The AWU has produced a brochure setting out the training courses offered by the Victorian branch, including 5 day OH&S training and Red Card training.²⁹⁷ The prices for those courses are advertised as \$825.00 and \$100.00 respectively, the former of which is consistent with the amounts charged on some of the above invoices. The invoices for OH&S training for individual representatives, and Red Card training in May 2007,²⁹⁸ describe the training provided, to whom and when, and for a verifiable price. There seems little doubt that the AWU provided these services.
188. The problem is that, in respect of each of these services, the AWU has issued invoices that are either provably false (in the case of the AWU Vic invoices relating to Australian Worker Invoices), or describe services that the AWU does deliver but at an inflated price and with descriptions that do not withstand close scrutiny. That makes it difficult to determine which invoices are in relation to invoices legitimately provided and which are not. For example, it can be accepted that TJH purchased tables for the AWU balls and that some personnel attended the ball. However, there is no evidence to support the notion that four, or six, tables were paid for and filled by TJH staff at the AWU ball.

²⁹⁵ Bill Shorten, 9 July 2015, T116.24-29.

²⁹⁶ Bill Shorten, 9 July 2015, T117-118.

²⁹⁷ Shorten MFI9 pages 239-240.

²⁹⁸ Shorten MFI9 page 225.

Therefore, the invoices are at least in part falsified. Moreover, some of the services that were delivered (such as the Red Card Training) did not need to be. They were an unnecessary cost to the Eastlink project.

189. Taking into account the admissions by Julian Rzesniowiecki as to the purpose for issuing the invoices so as to disguise their true purpose, and the inferences that can be drawn from the documentary evidence, the Commissioner should find that a number of the invoices are false invoices, for the reasons described section C above.
190. For completeness, the Commissioner should find that the invoices at Shorten MFI9 pages 170, 185, 186, 196, 204, 206, 207, 210, 211, 217, 218, 229 and 233 are false invoices in that they do not describe services that were provided to the project or describe services that were provided, but at an inflated price, for the purpose of describing the true nature of the payments made to the AWU by TJH in relation to the invoices.
191. The Commissioner should also find that the invoices at Shorten MFI9, pages 168A, 169, 171A, 174, 176, 177, 180A, 191, 197, 198, 198A, 212A, 221, 225 are genuine invoices in that they properly describe services provided by the AWU to the project and at a price that properly reflects the cost of providing the services.

E CONCLUSIONS

192. As discussed above, it is submitted that the Commissioner should find that there was an agreement that TJH would pay a sum of \$100,000 plus GST to the AWU each year for the duration of the project. The following further findings are available:
 - (a) the genesis of the agreement was a proposal by Mr Shorten to Mr Sasse in late 2004 that the joint venture provide financial support to the AWU in relation to the dedication of an organiser or organisers to the project;
 - (b) that proposal was not the subject of a concluded agreement at the time that the contract was let and Julian Rzesniowiecki and Cesar Melhem assumed primary conduct of the negotiations;

- (c) discussions regarding financial support for the provision of an organiser or organisers took place between Julian Rzesniowiecki and Cesar Melhem while the negotiations for the EBA were completed;
- (d) at some point, most likely shortly after the 2005 EBA was finalised, Julian Rzesniowiecki and Cesar Melhem agreed on a sum of \$100,000 per year;
- (e) shortly thereafter, Julian Rzesniowiecki and Cesar Melhem determined that the payments pursuant to the agreement would be effected by the AWU issuing invoices to TJH described as services that the AWU might provide to the joint venture.

193. As set out in section D above, the Commissioner should find that an agreement in these terms was implemented by payment of invoices issued by the AWU, many of which were false invoices.

194. One further matter should be observed: Rule 4(34) of the AWU Rules (as at 23 May 2006) specified as an object of the AWU ‘to represent the interests of non-member employees, dependent and independent contractors and to charge fees for such representation.’²⁹⁹ There appears to be a suggestion in the evidence of Cesar Melhem that the payments received were in relation to such services being provided to non-members.³⁰⁰ That cannot be so for two reasons: *first*, the rule properly construed comprehends an agreement between the AWU and a non-member employee or contractor, not an employer, with fees being paid by the employee for the representation; and, *secondly*, if representation for non-members was the arrangement and it was properly within the AWU Rules, there would be no reason to conceal it.

Breach of duty

195. It is uncontroversial that the 2005 EBA was a radical agreement in the civil construction industry at that time. It involved the removal of a number of provisions beneficial to workers but detrimental to efficiency and productivity, such as fixed rostered days off,

²⁹⁹ AWI MFI2, page 26.

³⁰⁰ Cesar Melhem, 22/10/2015, T938.

inclement weather, and non-working delegates.³⁰¹ In exchange, the workers covered by the 2005 EBA were paid handsomely.³⁰² It is not suggested that the 2005 EBA in any way represented an impermissible compromise of members' rights or was not to their benefit. However, circumstances in which a substantial payment was proposed and agreed in connection with the negotiation and agreement of an EBA are troubling because they give rise to at least an appearance of a conflict of interest.

196. It is an inherent aspect of the process of enterprise bargaining that during negotiations a union, through its relevant officers, acts on behalf of and represents the interests of the union member employees. In the case of the 2005 EBA, which was a greenfields agreement under s 170LL of the *Workplace Relations Act 1996* (Cth), the officials' entitlement to negotiate arose from the entitlement of the AWU to represent the industrial interests of persons whose employment was likely to be subject to the agreement (pursuant to s 170LL(2)). Those employees' interests were affected because they were bound by the agreement while it was in operation (pursuant to s 170M(1)).³⁰³ In a practical sense, the agreement reached between the AWU and TJH was likely to have a significant impact on the terms and conditions of employment of member employees on the Eastlink project. In many ways, the position of the AWU officials negotiating the agreement in respect of those employees was akin to that of an agent.
197. This places the union officer acting as a bargaining representative in a different position to the union officer acting in the capacity as an officer of a union (and thereby, analogously to the position of a company director whose duties are owed to the company and not its members: see *Allen v Townsend* (1977) 31 FLR 431 at 483-485; *Scott v Jess* (1984) 3 FCR 263 at 287; *General Manager of The Fair Work Commission v Thomson (No 3)* [2015] FCA 1001 at [76]), with the result that fiduciary duties are owed by the union, and the official, to the employee members directly.³⁰⁴

³⁰¹ Bill Shorten, 9 July 2015, T133.29-32; T134.32-46.

³⁰² Cesar Melhem, witness statement, 9/10/2015, [6], [8].

³⁰³ The position is analogous to a trustee who is in a fiduciary position to ignorant or unascertained beneficiaries of a trust: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96.

³⁰⁴ In *Jupiters Limited v United Voice* [2001] FWA 8317 (5 December 2011) at [36]-[37] Commissioner Asbury held that a union acting in the capacity of bargaining representative was not in a fiduciary relationship with its members. Counsel Assisting submits that the decision is wrong in that (a) it approaches the question on a false basis, namely that a union could never obtain a personal benefit from the representation of members in the context of negotiations for an EBA; and (b) it wrongly assumes that it is necessary for a person to affect the

198. This is because the union and the official undertakes to enter into negotiations to secure terms of the proposed EBA on behalf of the members, who have no opportunity to vote for the agreement. As a matter of practicality, the union and its officials have conferred on them a discretion to reach terms with the employer, acting in the interests of members.³⁰⁵
199. Consequently, unions and union officials have duties when acting in the role of bargaining representative to:
- (a) avoid a position where there is a conflict, or a sensible, real or substantial possibility of conflict, between their interest and duty or between their duties,³⁰⁶ and
 - (b) avoid using their positions to confer an advantage on themselves or someone else or to act to the detriment of the members.³⁰⁷
200. It is submitted that it is correct to say that fiduciary duties were owed by each of the union, and relevant officials of the union undertaking the negotiations, to the TJH employees. The AWU was the entity that was supposed to be representing the interests of the AWU members in making the agreement under s 170LL and Mr Melhem was the principal individual through whose conduct that occurred.
201. Mr Melhem was also the official who concluded with Julian Rzesniowiecki the “side deal” pursuant to which the joint venture paid \$100,000 per year plus GST to the AWU.
202. The negotiation and payment of this “side deal” involved a conflict, or substantial possibility thereof, between the interests of the AWU on the one hand and the interests of AWU members who were TJH employees, on the other. No doubt, it was in the interests of the AWU to receive that sum of money. But the payments were in one

legal interests of members in order to stand in a fiduciary relationship to them. Several recognised fiduciary relations do not bear this character.

³⁰⁵ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96; see also *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 196 [70].

³⁰⁶ *Breen v Williams* (1996) 186 CLR 71 at 113; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 197 [74], 198 [77]–[79]; *Clay v Clay* (2001) 202 CLR 410 at 436; *Howard v FCT* (2014) 88 ALJR 667 at 677 [33], 681 [56], [59], [61].

³⁰⁷ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

important respect contrary to the interests of the AWU members employed by TJH. That is because what was in reality no more than a very large donation from TJH to the AWU must inevitably have weakened the AWU's bargaining position, both in relation to the 2005 EBA and in relation to the AWU's engagement with the workers on the Eastlink site over the life of the project. It compromised the AWU's capacity to represent the interests of its employee members when it came to industrial relations issues that may arise on site. That is because the relevant organisers and officials were effectively in the pay of the employers.

203. The fact that the payments were described as being for the purpose of compensation or defraying of expenses involved in maintaining a presence on the site does not cure the apparent conflict for the reasons stated above. Moreover, the fact that the terms of the 2005 EBA, and the commitment of organisers and other officials to the Eastlink project, may have been of benefit to the workers, is irrelevant to the question of whether negotiation of a side deal produces a conflict of interests. It ignores the potential of such side payments to affect the capacity of the AWU to represent the interest of its members, both when undertaking negotiations and in dealing with TJH over the course of the project. Once a side payment is sought and made, the question arises as to whether a better result might have been obtained had there been no side deal that compromised the AWU's bargaining position.
204. Moreover, there is no suggestion that the agreement was disclosed to the AWU members at any stage of the project.³⁰⁸ Cesar Melham contends that the union made a profit on the invoices which allowed it to provide additional resources to the project site,³⁰⁹ but in the absence of any disclosure of the arrangement to the members there was no means by which the members employed on the Eastlink project could be satisfied of this.
205. It is submitted that the AWU and Mr Melhem each owed fiduciary duties to members employed by TJH. The AWU, in entering into the arrangement and seeking payments pursuant to it, acted in a position of actual conflict of interest and duty or where there was a real and substantial possibility of such conflict. The AWU's self-interest

³⁰⁸ Gordon Ralph was not aware of arrangement being disclosed to members: Gordon Ralph, 12/10/2015, T109.16-22.

³⁰⁹ Cesar Melhem, witness statement, 9/10/2015, [10].

conflicted with its fiduciary duties to the TJH employees. Mr Melhem advanced the interests of the AWU in circumstances where those interests conflicted, or where there was a real and substantial possibility of conflict, with his duties to the members of the AWU who were or would be TJH employees.

Unlawful commissions

206. Section 176 of the *Crimes Act 1958* (Vic) relevantly provides:

- (1) Whosoever being an agent corruptly receives or solicits from any person for himself or for any other person any valuable consideration—
 - (a) as an inducement or reward for or otherwise on account of doing or forbearing to do or having done or forborne to do any act in relation to his principal's affairs or business; or
 - (b) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business; or
- (2) Whosoever corruptly gives or offers to any agent any valuable consideration—
 - (a) as an inducement or reward for or otherwise on account of doing or forbearing to do or having done or forborne to do any act in relation to his principal's affairs or business; or
 - (b) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business—

shall be guilty of an indictable offence, and shall be liable if a corporation to a level 5 fine and if any other person to level 5 imprisonment (10 years maximum) or a level 5 fine or both.

207. A detailed analysis of the above provision is detailed in counsel assisting's submissions in relation to Cleanevent.³¹⁰ Significantly, a union official engaged to act on behalf of members is an agent for the purposes of s 176 and a corporation may be an agent for the purposes of s 176 of the *Crimes Act 1968* (Vic).³¹¹

³¹⁰ See Counsel Assisting Submissions Chapter 2.

³¹¹ *R v Gallagher* [1986] VR 219 at 225–226 (FC).

208. The AWU is and was a body corporate by operation of s 27 of the *Fair Work (Registered Organisations) Act 2009* (Cth) and its predecessor legislation. In the present case, Cesar Melhem was as Assistant Branch Secretary, by the rules of the AWU, empowered to act consistently with the objects of the Union in relation to representing the interests of members in the course of their employment,³¹² and was, consistently with authority and the definition of agent in the *Crimes Act 1968* (Vic), an ‘agent’ within the meaning of s 176.³¹³ He was, in that sense, the directing mind and will of the AWU.³¹⁴

209. In light of the evidence of Messrs Sasse and Connell of the significance of the 2005 EBA to the project and the ongoing significance of the AWU maintaining a presence on the site (as accepted by Gordon Ralph) it is apparent that the payments agreed to and made by TJH:

- (a) would objectively tend to influence Cesar Melhem and the AWU to show favour to TJH in relation to its attendances on site and its attitude to industrial relations issues arising in the course of the project;
- (b) to make the promised commitments to dedicate organisers to the project to, inter alia, increase the influence of the AWU and reduce that of the CFMEU and promote industrial peace, being a step taken in relation to the business and affairs of the members; and
- (c) was actually intended by Julian Rzesniowiecki and TJH to influence Cesar Melhem and the Union to do these things.

210. There is also a strong inference that Mr Melhem and the Union would have understood that Julian Rzesniowiecki agreed to make the payments comprehended by the side deal for the desired purpose of Union officials showing favour towards TJH, or dedicating organisers so as to ensure industrial peace. For the purposes of an offence against s 176(1)(b) it does not matter whether Cesar Melhem had any intention to show favour.

³¹² AWU MF12, pages 24-25, rule (4)(1)-(4), (21)-(29), 39(1)(n), (o), (2);.

³¹³ see s 75(1) of the *Crimes Act* and *R v Gallagher* [1986] VR 219 at 224 (FC).

³¹⁴ *Tesco Supermarkets v Natrass* [1972] AC 153 at 170; *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530 at 82.

211. The elaborate scheme which was implemented to disguise the payment as payments for services, and to conceal the arrangement from the workers, supports the view that the payment was ‘corrupt’ according to ordinary standards of conduct (if it were assumed that was an element of the offence in Victoria). That is especially so when the means by which the payment was solicited by the AWU was by means of falsified invoices.
212. On his own evidence, Julian Rzesniowiecki caused the payments to be made for the purposes described above. Whether his conduct should be imputed to TJH requires consideration. TJH’s accounting records provide a prima facie basis for a finding that the payments were made by it or adopted by it in some way. Julian Rzesniowiecki’s role as the person with authority to cause expenses to be incurred in relation to human resources matters is clear, because on the evidence his approval of the invoices enabled them to be paid. In doing so, he acted in accordance with a budgetary allocation that enabled the expenses to be incurred without scrutiny, but on the basis that he was not entirely forthcoming as to the purpose of the payments.³¹⁵ However, from at the latest early 2006, he had disclosed the nature of the agreement to Gordon Ralph, the Project Director, who had assented to the payment arrangement continuing.³¹⁶ There can be no doubt that as Project Director Gordon Ralph was the directing mind and will of the company.
213. Accordingly, the Commission should conclude that:
- (a) Mr Melhem may have committed an offence against s 176(1)(a) and/or (b) of the *Crimes Act 1958* (Vic) by soliciting a corrupt commission;
 - (b) Mr Rzesniowiecki may have committed an offence against s 176(2)(a) and/or (b) of the *Crimes Act 1958* (Vic) by offering a corrupt commission; and
 - (c) The AWU may have committed an offence against s 176(1)(a) and/or (b) of the *Crimes Act 1958* (Vic) by soliciting or receiving a corrupt commission.
 - (d) TJH may have committed an offence against s 176(2)(a) and/or (b) of the *Crimes Act 1958* (Vic) by giving a corrupt commission.

³¹⁵ See paragraphs [101]-[102] above.

³¹⁶ See paragraph [103] above.

False accounting records

214. At all relevant times, section 83 of the *Crimes Act 1958* (Vic) provided:

False Accounting

(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another-

(a) Destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or

(b) In furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in material particular-

He is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

(2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

215. It is clear that the invoices issued by the AWU to TJH and referred to above were records or documents made or required for any accounting purpose within the meaning of section 83(1)(a). Moreover, entry of the invoices into the accounting systems of TJH for the purposes of facilitating payment of the invoices (including raising the purchase orders and causing records of approval and payment of the invoices) is the creation of a record or records for an accounting purpose, as well as making use of false accounting records, being the invoices.

216. It is also clear that whoever prepared the invoices, and entered the accounting records into the TJH systems, and whoever concurred in their preparation, falsified them within the meaning of section 83(1)(a). That follows from the terms of section 83(2). For present purposes, counsel assisting focus on the conduct of those who caused the invoices to be raised and the accounting entries to be made, rather than those who physically created the invoices or entered the accounts information in the TJH system. That is, in relation to the AWU, Cesar Melhem, and in relation to TJH, Julian Rzesniowiecki.

217. The question is whether the person who prepared the invoices (or concurred in their preparation) did so ‘dishonestly, with a view to gain for himself or another’ within the meaning of section 83(1).
218. Cesar Melhem acted dishonestly within the meaning of this section. Despite his protestations that all invoices were in relation to services that were in fact delivered, that is demonstrably not the case. Cesar Melhem must have known this to be the case. Moreover, to the extent that the invoices did reflect a service in fact delivered in whole or in part, Cesar Melhem knew that they concealed an entirely different arrangement, namely, payment for the dedication of organisers to the project. He did so with a view to producing a gain for the AWU in the sense that the purpose of the invoices was to procure payments of money to the AWU.
219. Julian Rzesniowiecki also acted dishonestly within the meaning of this section. He knew, on his own admission, that the purpose of all of the invoices being issued in the form that they were was to conceal their true purpose. He actively concealed the nature of the true arrangement from other personnel at TJV and at Thiess, and the falsification of the invoices was another aspect of this concealment. Julian Rzesniowiecki also acted with a view to producing a gain for the AWU in the sense that the purpose of the invoices was to procure payments of money to the AWU.
220. It is also evident that in the present case, both the issuer and the recipient were aware of the creation of the false invoices and therefore there was no deception as between those persons. However, it is equally evident that a number of other persons within TJH were deceived by the false invoices and caused them to be paid accordingly. What is required for contravention of s 83 of the *Crimes Act 1958* (Vic) is dishonesty and it is submitted that knowingly causing a document to be created making a claim for payment to be made on a false basis is sufficient for that purpose.
221. The conduct and position of Mr Melhem, being at the relevant time the Assistant Branch Secretary, and then the Branch Secretary, and the person who provided the directions to issue the falsified invoices, is a sufficient basis on which to find that for the purposes of soliciting the payments, he was the ‘directing mind and will’ of that organisation.³¹⁷

³¹⁷ See *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530 at 82; *Tesco Supermarkets v Natrass* [1972] AC 153 at 170.

The AWU on any view adopted Mr Melhem's conduct by receiving the payments in question and dealing with them for its own benefit.³¹⁸ That is sufficient to make the AWU potentially guilty of an offence under s 83 of the *Crimes Act 1958* (Vic).

222. Section 84 of the *Crimes Act 1958* (Vic) recognises that a body corporate capable of committing an offence under s 83. That section relevantly provides:

Liability of company officers for certain offences by company

- (1) Where an offence committed by a body corporate under section 81, 82 or 83 is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

223. Cesar Melhem was in the position of being a director, manager, secretary or other similar officer of their respective bodies corporate. He caused or procured the creation of the false documents that attracted potential liability under s 83 of the *Crimes Act 1958* (Vic).

224. For the above reasons, it is submitted that Cesar Melhem, the AWU and Julian Rzesniowiecki may have committed offences under s 83 of the *Crimes Act 1958* (Vic) in respect of the creation of the false TJH invoices.

³¹⁸ See *Grocon v CFMEU* [2013] VSC 275 at [60] (adopting Brennan J's analysis in *Environment Protection Authority v Caltex Refinery Co Pty Ltd* (1993) 178 CLR 477 at 514-515).