

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

SUBMISSIONS OF COUNSEL ASSISTING

AWU: CHAPTER 5

ACI/O-I

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A INTRODUCTION

1. This case study explores payments made to the AWU by ACI Operations Pty Ltd (**ACI**) over a number of years. Specifically, this case study addresses two categories of payment.
2. First, three payments of about \$160,000 (inclusive of GST) each paid by ACI to the AWU between 2003 and 2005. The invoices issued by the AWU for those amounts described the payments as 'paid education leave.'
3. Secondly, five payments paid by ACI to the AWU in the amount of \$5,400 (inclusive of GST) each between 2008 and 2012. The payments were made pursuant to invoices described as being for '12 Membership Yearly fees'.

B THE ACI GLASS BUSINESS IN VICTORIA

4. ACI Glass Packaging was a business owned and operated by ACI. ACI was for many years the sole producer of glass containers in Australia and New Zealand. ACI was acquired by Owens-Illinois Inc as part of a global takeover of the glass and packaging firm BTR plc, in about 1998. Prior to that time, ACI was a subsidiary of BTR Nylex.¹

¹ Gilhome MFI-1, 14/10/15, T:5.36-39.

5. ACI has headquarters in Hawthorn and a glass packaging plant in Spotswood, Victoria.² It also operates glass packaging plants in Adelaide, Sydney and Brisbane. Until 2008, ACI operated a glass mould factory at Box Hill in Victoria.³
6. The Spotswood plant employed about 400-500 workers in the mid 1990s.⁴ The workforce was totally unionised and the major union for glass workers was the AWU.⁵ By arrangement between the AWU and glass manufacturers when the Australian Glass Workers' Union was amalgamated into the AWU, there was a dedicated Glass and Container Industry Branch of the AWU.⁶ That branch ceased operation on 31 August 2004.⁷

Broadbanding

7. In general terms, the glass plant operated a production line. The production line had what was called a 'hot end' and a 'cold end'. The hot end was where machines formed the glass containers that were made. The cold end was where the products produced by the machines were inspected, surface treated and packaged. In around the mid-1990s, ACI began a process of 'broadbanding' at the Spotswood plant. Mr Greg

² Gilhome MFI-1, 14/10/15, p 7.39-44, 8.10-14.

³ Gilhome MFI-1, 14/10/15, T:9.11-13.

⁴ Gilhome MFI-1, 14/10/15, T:9.29-47, 10.1-3.

⁵ Gilhome MFI-1, 14/10/15, T:10.1-15, 12.7-9.

⁶ Gilhome MFI-1, 14/10/15, T:10.25-42, 11.9-11.

⁷ AWU MFI-15, 6/11/15, p 10.

Savage was the plant manager at Spotswood from 2001 to 2009. He explained broadbanding in the following terms:⁸

A key component of broadbanding was the fact that production workers could be trained to work on both the hot end (where the Job Change Crew changed bottle types on the machines forming the containers) and cold end (where the products were inspected, surface treated and packaged) off the production line. This gave O-I [ACI] increased flexibility in deploying production workers to where they were needed most depending on what orders were required. This resulted in the Job Change crews being able to change the production machine settings in as little as 2 hours.

8. The CEO of ACI at this time was Mr Peter Robinson. Mr Robinson explained that the broadbanding process was in part the result of pressure on wage rates from a competitor, Amcor, who had started up its own business in around the early 1990s.⁹ The advantages of the broadbanding process to ACI were increased flexibility in deploying production workers and greater efficiencies.¹⁰ It also enabled ACI to decrease the ETU's influence at the Spotswood plant by decreasing the electricians' job change role.¹¹ Broadbanding, whilst resulting in a more efficient use of production workers also resulted in redundancies.¹²
9. The broadbanding process was a gradual one. As stated above, it commenced in the mid-1990s and appears to have carried through until the mid-2000s. Provisions dealing with

⁸ Greg Savage, witness statement, 15/10/15, para 29.

⁹ Robinson MFI-1, 14/10/15,T:10.15-28.

¹⁰ Greg Savage, witness statement, 15/10/15, paras 29-34.

¹¹ Greg Savage, witness statement, 15/10/15, para 32.

¹² Greg Savage, witness statement, 15/10/15, paras 41-44.

broadbanding were included in EBAs entered into in relation to the Spotswood plant from 1996 through to 2006.

10. Broadbanding, as the above description indicates, required extensive training. That training was provided by ACI itself.¹³ Mr Zbigniew Kaminski was a worker at the Spotswood plant and an AWU shop steward. He gave evidence that training in relation to broadbanding was provided by the Spotswood plant manager. Initially that was Mr Tony Krznar and then later Min Lee.¹⁴ Ms Prema Chippendale, another glass worker and AWU delegate gave similar evidence.¹⁵

11. There was significant industrial unrest at Spotswood and other ACI plants in the mid1990s.¹⁶ Mike Gilhome's evidence is that, at the time he commenced work for BTR Nylex in the mid-1990s, the Spotswood plant was 'the worst plant I ever saw.'¹⁷ The plant was subject to numerous bans, stoppages and demarcation disputes between the AWU and AMWU.¹⁸ There was significant industrial action in 2003 at ACI's Box Hill plant, involving predominately the AMWU.¹⁹

¹³ Paul Vine, witness statement, 22/10/15, para 21; Mike Gilhome, 14/10/15, T:352.28-43; Gilhome MFI-1, 14/10/15, p 25.9-19.

¹⁴ Zbigniew Kaminski, witness statement, 15/10/15, paras 33-34.

¹⁵ Prema Chippendale, witness statement, 15/10/15, paras 29-33.

¹⁶ Greg Savage, witness statement, 15/10/15, paras 11-15, Zbigniew Kaminski, witness statement, 15/10/15, paras 25-32, Prema Chippendale, witness statement, 15/10/15, para 15.

¹⁷ Gilhome MFI-1, 14/10/15, T:17.15-16.

¹⁸ Gilhome MFI-1, 14/10/15, T:17.18-37.

¹⁹ Paul Vine, witness statement, 22/10/15, paras 22-28.

Industrial agreements

12. Provision was made for the implementation of the broadbanding process referred to above in a series of industrial agreements between ACI and the AWU.

13. The Australian Glass Manufacturers Company Spotswood – Glass Workers Certified Agreement 1996, certified on 19 December 1996 (**1996 EBA**),²⁰ contained a number of relevant features:
 - (a) First, it applied an objective of measures to achieve ‘productivity, efficiency and flexibility’ gains provided for in Appendix A to the Agreement.²¹ Appendix A provided for voluntary training for existing workers and mandatory training for new workers and comprehended both internal and external, accredited training.²²

 - (b) Second, Appendix A provided for ‘hot and cold end job change flexibility’, namely, the removal of job demarcation and the introduction of a ‘broad-banded classification structure’ that was dependent on being trained to work across multiple manufacturing tasks, and training to facilitate this.²³

²⁰ Shorten MFI-12, 9/7/15, p 83.

²¹ Shorten MFI-12, 9/7/15, p 86, clause 7(a).

²² Shorten MFI-12, 9/7/15, p 91.

²³ Shorten MFI-12, 9/7/15, pp 93-96, p 107 (Attachment D).

14. The above provisions were repeated, in substantially similar terms, in the ACI Glass Packaging Melbourne – Glass Workers Certified Agreement 1999 certified on 25 October 1999 (**1999 EBA**),²⁴ ACI Glass Packaging Melbourne – Glass Workers Certified Agreement 2001 (**2001 EBA**) certified on 3 September 2001,²⁵ ACI Glass Packaging Melbourne Glass Workers Certified Agreement 2003 certified on 6 October 2003 (**2003 EBA**),²⁶ and the O-I Melbourne Glass Workers Certified Agreement 2006 (**2006 EBA**) certified on 16 March 2006.²⁷
15. It is worth noting at this point that all of the above agreements provided for paid union training leave for delegates, allowing 10 days’ paid training leave per shop steward which was capable of being pooled to allow for a single shop steward to take a longer period of leave based on the entitlements of other shop stewards of the same union, to a maximum of four weeks per year.²⁸ The paid training leave provisions did not comprehend any payments to the union, rather, they operated to require ACI to continue to pay delegates whilst on training

²⁴ Shorten MFI-12, 9/7/15, pp 314, 318-319 (clause 7(a), (g)), pp 324-325 (clause 15), p 335 (Appendix A), pp 340-353 (Attachments A-C). The 1999 EBA also provided for payment of workers to attend training and meetings with appropriate penalties for out of shift training, see pp 374-376.

²⁵ Shorten MFI-12, 9/7/15, pp 108, 112-113 (clauses 7(a), (g)), pp 118-119 (clause 15), p 129 (Appendix A), pp 133-147 (Attachments A-C). The 2001 EBA also contained similar provisions regarding payment for training and meetings (see pp 168-169).

²⁶ Shorten MFI-12, 9/7/15, pp 188,190-191 (clauses 7.1, 7.7), pp 194-195 (clause 15), p 203 (Appendix A), pp 205-214 (Attachments A-C). The 2003 EBA also contained similar provisions regarding payment for training and meetings (see pp 234-235).

²⁷ Shorten MFI-12, 9/7/15, pp 250, 252 (clauses 7.1, 7.6), p 257 (clause 20), p 264 (Appendix A), pp 266-281 (Attachment A). The 2006 EBA also contained similar provisions regarding payment for training and meetings (see pp 288-289, Attachment D).

²⁸ Shorten MFI-12, 9/7/15, pp 98, 101.

leave. Moreover, the provision did not operate in favour of AWU members generally, it benefited only shop stewards.

16. On 22 December 2003 a further agreement between ACI, the AMWU, AWU and CEPU was certified.²⁹ This concerned redundancies. It applied at each of the ACI glass plants at Spotswood, Penrith, South Brisbane, West Croydon, and Canning Vale,³⁰ and provided inter alia for four weeks' severance pay on top of four weeks' pay per year of continuous service and a retrenchment payment,³¹ and consultation obligations before any redundancies were confirmed.³²

C PAID EDUCATION LEAVE PAYMENTS FROM 2003 TO 2005

Payments and Invoices

17. The first payment of \$145,000 plus GST was made on 1 August 2003.³³ This payment was made pursuant to two invoices. The first, tax invoice 002790, was issued on 26 June 2003 in the amount of \$79,750.00 inclusive of GST.³⁴ The

²⁹ Shorten MFI-12, 9/7/15, p 244.

³⁰ Shorten MFI-12, 9/7/15, p 245 (clause 3).

³¹ Shorten MFI-12, 9/7/15, p 247 (clause 9).

³² Shorten MFI-12, 9/7/15, p 248.

³³ Shorten MFI-12, 9/7/15, pp 10-11.

³⁴ Shorten MFI-12, 9/7/15, p 10.

second invoice was issued on 9 July 2003, for an identical amount.³⁵

18. It is apparent that the first invoice was issued pursuant to a request in an email from Michael Chen, financial controller at the AWU,³⁶ to Kris Bondin, an accountant at the AWU,³⁷ on 26 May 2003.³⁸ The email asks simply for an invoice to ACI, attention Mike Gilhome, for \$72,500 plus GST. There is a handwritten note on the email stating 'paid education' and 'Paid Education Leave'. Mr Chen did not know whose handwriting it was and could not shed any light on the circumstances in which the email or invoice were created.³⁹

19. The second payment, of \$145,600 plus GST, was made on 2 July 2004.⁴⁰ The relevant invoice is dated 2 June 2004 (invoice 006248).⁴¹ It contains the description:

Paid Education leave

\$0.1 per hour x 35 x 52 weeks x 800 people

20. The genesis of this description appears to be a note in Mr Melhem's handwriting marked 'private and confidential', containing the above formula and the total amount and address

³⁵ Shorten MFI-12, 9/7/15, p 11.

³⁶ Michael Chen, witness statement, 21/10/15, para 5.

³⁷ Michael Chen, witness statement, 21/10/15, para 28.

³⁸ Shorten MFI-12, 9/7/15, p 7.

³⁹ Michael Chen, witness statement, 21/10/15, para 28.

⁴⁰ Shorten MFI-12, 9/7/15, p 23.

⁴¹ Shorten MFI-12, 9/7/15, p 23.

details for the invoice.⁴² Mr Chen prepared an invoice requisition form on the basis of this note, which was signed by Mr Melhem.⁴³

21. The third payment, again of \$145,600 plus GST, was made on 16 June 2005 pursuant to an invoice dated 24 May 2005 (invoice 010167).⁴⁴ That invoice contained the same formula, save that '800 people' was replaced with '800 member'. No invoice requisition was produced in relation to this invoice.

22. The formula contained in the invoices pursuant to which the second and third payments was described by Mr Robinson as a 'nonsense formula'.⁴⁵ This formula calculated the sum payable by reference to 800 'people' and 800 'members'. Mr Robinson referred at one point in his private hearing to '800 employees',⁴⁶ and Mr Melhem asserted that the figure of 800 on these invoices was a reference to the number of employees employed by ACI nationally.⁴⁷ In his public hearing, Mr Gilhome said the formula was a reference to the number of members of the Glass and Container Industry Branch (which, as referred to below, was about 1,800).⁴⁸ As submitted below, Mr Gilhome's evidence was invention but it is significant that

⁴² Shorten MFI-12, 9/7/15, p 22.

⁴³ Shorten MFI-12, 9/7/15, p 24.

⁴⁴ Shorten MFI-12, 9/7/15, p 36.

⁴⁵ Peter Robinson, 14/10/15, T:329.35.

⁴⁶ Robinson MFI-1, 14/10/15, pp 13.47-14.1.

⁴⁷ Cesar Melhem, ACI Glass witness statement, 22/10/15, para 7.

⁴⁸ Mike Gilhome, 14/10/15, T:359.25-33.

he was not able to invent an explanation that coincided with Mr Melhem's. This strongly suggests that he and Mr Melhem had no shared understanding at the time of the basis on which the payments were quantified.

23. ACI has provided information regarding employee numbers and AWU membership numbers at ACI at the relevant times. That information is tendered with these submissions.⁴⁹ The information indicates that, in the period 2002 - 2005:⁵⁰
 - (a) the number of employees nationally ranged from 1498 to 1466;
 - (b) the number of employees at Spotswood ranged from 376 to 365; and
 - (c) the number of employees nationally who were AWU members ranged from 667 to 604.
24. There is no sensible explanation for the formula on these invoices.

Connection between payments and EBA

25. That the payments were connected with negotiations for the 2003 EBA is, it is submitted, an inference that is inescapable.

⁴⁹ Valerie Lester, witness statement, 6/11/15.

⁵⁰ Valerie Lester, witness statement, 6/11/15, paras 4-6.

Mr Melhem said that a claim was made for paid education in the AWU's log of claims.⁵¹ The three payments were made by ACI on invoices issued at around the time of the anniversary of the commencement of each year of the 2003 EBA (that is, 1 July 2003). The payments stopped when a new EBA was negotiated.

26. It is also clear that the arrangement to make the payments was struck at the time negotiations for the 2003 EBA were ongoing. The 2001 EBA had a nominal expiry date of 30 June 2003.⁵² By clause 13, negotiations for a new EBA were required to commence four months prior to that expiry date, that is, by the end of February 2003.⁵³ The first record of an instruction to issue an invoice in relation to the payments (referred to below) is dated 26 May 2003.⁵⁴ The first payment was made on 1 August 2003. The attachments to the 2003 EBA dealing with broadbanding were signed by ACI on 25 August 2003.⁵⁵ The EBA itself was signed on 22 September 2003.⁵⁶

27. Mr Shorten accepted that the arrangement was struck during the course of EBA negotiations.⁵⁷ The effect of Mr Melhem's evidence was that he could not recall whether the agreement

⁵¹ Cesar Melhem, 22/10/15, T:958.32-959.8.

⁵² Shorten MFI-12, 9/7/15, p 111 (clause 5).

⁵³ Shorten MFI-12, 9/7/15, p 117 (clause 13).

⁵⁴ Shorten MFI-12, 9/7/15, p 7.

⁵⁵ Shorten MFI-12, 9/7/15, pp 205- 207.

⁵⁶ Shorten MFI-12, 9/7/15, p 202.

⁵⁷ Bill Shorten, 9/7/15, T:156.6-9.

was struck during EBA negotiations and that he would need to check the invoices, and the date on which the EBA was concluded.⁵⁸ Mr Gilhome's position appeared to be that although the arrangement was struck at the time of EBA negotiations, it had nothing to do with those negotiations.⁵⁹ The timing of the invoices, and the fact that a claim had been made for the payments in the AWU's log of claims, contradicts Mr Gilhome's claim.

ACI accounting records

28. ACI's records in relation to these payments are scant. That may in part be due to the fact that the payments took place more than 7 years ago and the operation of a document retention/destruction policy. In substance, the ACI records indicate the following:
 - (a) The payments were all made by cheques drawn on an account with Westpac Banking Corporation numbered 034-002 529376, in the name of ACI Operations Pty Ltd, styled 'Packaging Corporate Account.'⁶⁰ This was a special account used for the making of confidential or sensitive payments.⁶¹

⁵⁸ Cesar Melhem, 22/10/15, T:959.11-20.

⁵⁹ Gilhome MFI-1, 14/10/15, pp 38.36-37.3.

⁶⁰ Robinson MFI-2, 14/10/15, pp 94-97.

⁶¹ Ridder MFI-1, 15/10/15, pp 14.3-20. Anna Velasco, witness statement, 14/10/15, para 70; Peter Robinson, 14/10/15, T:326.42-46, 330.38-40; Cooper MFI-1, 15/10/15, T:10.30-34.

Mr Cooper said that he would have been told to write cheques on this account, he was not sure by whom.⁶²

(b) The cheques by which the payments were made were signed by Greg Ridder, then the CFO of ACI,⁶³ and Neil Cooper, then Corporate Accounting Manager.⁶⁴ Mr Cooper wrote the cheques and the description on the cheque butts.⁶⁵ On those cheque butts, the description of the first payment was 'paid education leave' and the description of the second and third payments was 'HR Special CC.'⁶⁶ Mr Cooper had no recollection of the circumstances in which he came to write these descriptions. He said that he would have written 'paid education leave' on the first cheque butt because of what was written on the invoices.⁶⁷ He said that the description 'HR Special CC' on the second and third cheque butts would have been the result of someone telling him that that was the cost centre to which the payments were to be allocated.⁶⁸

(c) Expenses at this time at ACI were allocated to different cost centres. Mr Mitchell was at this time the person solely in charge of the HR Special Cost Centre.⁶⁹ However, he had no knowledge of the payments and ultimately they were not

⁶² Cooper MFI-1, 15/10/15, T:10.45-11.14.

⁶³ Ridder MFI-1, 15/10/15, T:3.20, 13.18-19, 22.33; Shorten MFI-12, 9/7/15, p 39.

⁶⁴ Cooper MFI-1, 15/10/15, T:18.19-20; Shorten MFI-12, 9/7/15, p 39.

⁶⁵ Cooper MFI-1, 15/10/15, T:4.32-46, 5.1-10, 18.16-38, 21.14-27.

⁶⁶ Velasco MFI-1, 14/10/15, p 3.

⁶⁷ Cooper MFI-1, 15/10/15, T:5.2-10.

⁶⁸ Cooper MFI-1, 15/10/15, pp 18.30-19.7, 21.18-27.

⁶⁹ Brendan Mitchell, 14/10/15, T:342.26-33.

allocated to this cost centre. Mr Gilhome did not have a cost centre.⁷⁰ The CEO also had a cost centre. It was to this cost centre that all payments were allocated.⁷¹

- (d) The first and second payments were recorded in the ACI ledgers as ‘Professional Fees Consulting’. The third payment was recorded as ‘Training’. No witness was able to explain how these entries came to be recorded. According to Mr Cooper, the entries would have been made by someone in the Finance Department, and on the basis of information of some kind provided by him. However he was not able to say what that information was, and gave evidence to the effect that it may have been supplemented or corrected by others.⁷²

29. Two points of significance emerge out of ACI’s records. The first is that the only reference to ‘paid education’ in those records is on one cheque butt filled out by Mr Cooper.⁷³ But Mr Cooper, in all probability, was either repeating what appeared on the first two invoices or something he had been told by Mr Gilhome.⁷⁴ The rest of ACI’s records contain a variety of the descriptions of the payments. Those descriptions are likely to have emanated from what Mr Gilhome told Mr

⁷⁰ Peter Robinson, 14/10/15, T:332.38-40.

⁷¹ Shorten MFI-12, 9/7/15, pp 393-400. See Cooper MFI-1, 15/10/15, T:21.43-46 where Mr Cooper confirmed that the reference to ‘OIAP Regional President’ in connection with the 2005 payment was to the same cost centre. In other words, the label of the CEO’s cost centre changed in that year.

⁷² Cooper MFI-1, 15/10/15, T:12.27-13.29.

⁷³ Velasco MFI-1, 14/10/15, p 3.

⁷⁴ Cooper MFI-1, 15/10/15, T:7.15-30.

Robinson, Mr Cooper, or both. The variety in those descriptions suggests that Mr Gilhome was unable or unwilling to give to persons within ACI any clear or accurate explanation of what the payments were for. The second point of significance to emerge out of ACI's records is that the payments were made from an account established for the purposes of making confidential or sensitive payments. If in truth the payments were for 'paid education leave' in the sense described by Mr Melhem, Mr Shorten and, at times Mr Gilhome, there was no good reason for them to have been made out of this account.

Who within ACI approved the payments?

30. The question of who, within ACI, approved the above payments is material for two purposes. First, in so far as it sheds light on the question of what the payments were for and why they were made. Secondly, because it bears upon the question of whether the payments were authorised by ACI. In 2015, after the payments came to light during the evidence of Mr Shorten, ACI commenced its own internal investigation into the payments. That was described in the witness statement of Anna Velasco. Beyond the accounting records described above, ACI's investigations have not unearthed any material that assists in the inquiry identified above.
31. The invoices were addressed to Mr Gilhome. He, however, had no budget and no cost centre to which expenses could be

allocated.⁷⁵ His evidence was that he ‘would have’ discussed the payments with Mr Robinson.⁷⁶ Mr Gilhome’s evidence was that his expenses came from the human resources budget in the corporate division of ACI.⁷⁷ The effect of his evidence was that he would personally approve invoices for matters such as training, but that the usual procedure was that he would obtain expenditure approval from the finance department and the CEO.⁷⁸

32. Paul Vine, who was ACI’s national employee relations manager for Australia at the time of the payments and reported to Mr Gilhome, had no knowledge of the payments.⁷⁹

33. Mr Cooper said that he could recall, in connection with one of the payments, that he spoke to Mr Gilhome, and that Mr Gilhome said something about some invoices to the AWU for paid education leave.⁸⁰ The substance of Mr Cooper’s evidence was that, apart from this recollection, he had no actual recollection of the circumstances in which these invoices were approved. Mr Cooper, however, said that for the payments to be allocated to the CEO’s cost centre, they would have had to have been authorised by Mr Robinson.⁸¹ Mr Ridder’s evidence

⁷⁵ Gilhome MFI-1, 14/10/15, T:14.1-6.

⁷⁶ Gilhome MFI-1, 14/10/15, T:47.36-46.

⁷⁷ Gilhome MFI-1, 14/10/15, T:14.3-6.

⁷⁸ Gilhome MFI-1, 14/10/15, T:14.8-13.

⁷⁹ Paul Vine, witness statement, 22/10/15, paras 5, 15.

⁸⁰ Cooper MFI-1, 15/10/15, T:5.30-8.26.

⁸¹ Cooper MFI-1, 15/10/15, T:14.27-15.23.

did not shed any additional light on who approved these payments. Nor did the evidence of Mr Vine, Mr Gilhome's assistant at the relevant times.

34. Mr Robinson was adamant that he had no recollection of the payments and thinks that is because he never knew about them. He denied that he discussed them with Mr Gilhome and said he was shocked when he heard about the payments during the Commission process.⁸² Mr Robinson said he had no idea what paid education leave was and had never seen any of the invoices in question.⁸³

35. Mr Robinson gave his evidence in a forthright and direct manner and there is no reason to doubt that he was endeavouring to give truthful answers to the questions asked of him. Mr Gilhome's evidence, for reasons developed below, was unsatisfactory in so many ways such that it is not possible to give any weight to it on this question. Notwithstanding the accounting material, the evidence, it is submitted, does not justify a conclusion that Mr Robinson approved the payments: his evidence that he was shocked by the payments and his evidence that he may well not have picked up amounts of this size allocated to his cost centre⁸⁴, was credible. The consequences of that are explored further below. Regardless of whether Mr Robinson's recollection was incorrect, and in fact

⁸² Peter Robinson, 14/10/15, T:332.42-333.32.

⁸³ Robinson MFI-1, 14/10/15, T:13.11-37.

⁸⁴ Peter Robinson, 14/10/15, T:332.15-40.

he in some sense authorised the payments, his evidence does not shed any light on the nature and purpose of the payments.

What became of the funds?

36. All of the amounts the subject of the invoices in question were entered into the Paid Education Income ledger of the Victorian Branch's general ledger. Entries were made in this ledger on an accruals basis, upon the issue of an invoice.⁸⁵ Thus, for example, the invoice of 2 June 2004 (invoice 006248)⁸⁶ was recorded in the Paid Education Income ledger for the 2004 financial year, despite being paid on 2 July 2004.
37. The first payment of \$145,000 plus GST made by ACI was deposited into a general bank account maintained by the Victorian Branch of the AWU for a variety of purposes.⁸⁷
38. The second and third payments were deposited into the Victorian Branch of the AWU's Long Service Leave account.⁸⁸ Both amounts were deposited in the 2004-2005 financial year. The only significant transfer of money out of that account in that year was a transfer of \$350,000 on 3 June 2005 to a National Special Purpose Account 'to be transferred to AWU Loan with Members Equity', which was reversed on 30 June

⁸⁵ Shorten MFI-12, 9/7/15, pp 305-307.

⁸⁶ Shorten MFI-12, 9/7/15, p 23.

⁸⁷ Robinson MFI-2, 14/10/15, p 98.

⁸⁸ Shorten MFI-12, 9/7/15, pp 312-313.

2005.’⁸⁹ The 2005-2006 general ledger records two transactions with the same description, one in the sum of \$350,000 on 7 July 2005 and one in the sum of \$240,000 on 25 November 2005.⁹⁰

39. It is apparent that monies in the Long Service Leave account were used to discharge part of the indebtedness of the National Office to Members Equity Bank, and ultimately treated as loans by the Victorian Branch to the National Office.⁹¹ The loan from Members Equity Bank, it appears, was made in connection with renovations to the premises occupied by the Victorian Branch at Spencer Street, Melbourne.⁹² The accounts of the Victorian Branch of the AWU and the National Office do not record any repayments of the loan from the Victorian Branch since November 2005. The balance of the loan accounts as between the two entities has remained constant since financial year 2006-2007.
40. On one view, therefore, the second and third payments made by ACI to the Victorian Branch of the AWU were then lent by the Victorian Branch to the National Office for the purposes of enabling it to discharge its indebtedness. Mr Chen indicated that the monies in the Long Service Leave account could be used for any particular purpose, so long as sufficient monies were available to meet the AWU’s long service liabilities as

⁸⁹ Shorten MFI-12, 9/7/15, pp 312-313.

⁹⁰ Robinson MFI-2, 14/10/15, pp 105-106.

⁹¹ Robinson MFI-2, 14/10/15, pp 107, 120.

⁹² Robinson MFI-2, 14/10/15, p 120; Michael Chen, 21/10/15, T:821.25-26.

and when they arose. That is probably an accurate description from a legal perspective: monies in the Long Service Leave account were not trust monies or otherwise subject to any legal impediments on their use.

41. Mr Shorten could not explain how the second two payments came to be deposited into the AWU Long Service Leave account. He said it was not his practice to be issuing and checking every invoice directly.⁹³

42. Mr Melhem's explanation for the use of the funds in the above manner was that it made sense to transfer money from a non-interest bearing account to reduce the balance of the loan in question.⁹⁴ No doubt that that was so. Mr Melhem would not accept, however, that it followed that the monies paid by ACI were not being used for paid education.⁹⁵ The reason for this non-acceptance was not clear. Mr Melhem appeared to adopt the position that the ACI monies went into general revenue, and that training expenses were met from general revenue, and so therefore the ACI monies, in some sense, were applied to paid education.⁹⁶ But the same would be true for any payment into general revenue: including for example, payments for tickets to the AWU Ball and membership fees. Mr Melhem's explanation merely serves to underscore the point that the

⁹³ Bill Shorten, 9/7/15, T:152.25-44.

⁹⁴ Cesar Melhem, 22/10/15, T:970.37-971.32.

⁹⁵ Cesar Melhem, 22/10/15, T:971.21-32.

⁹⁶ Cesar Melhem, 22/10/15, T:970.37-971.32.

AWU had no obligation to do anything in particular with the monies in question.

43. The difficulty that arises because of the way in which the payments were dealt with is as follows. If the funds were in fact supposed to be ear-marked in some way to be used for particular purposes, namely education or training of some kind, then it is not apparent why they were in fact deployed for extraneous purposes. If, on the other hand, the funds were not supposed to be ear-marked for use in any particular way, then it is meaningless – or misleading - to describe them as being ‘for’ ‘paid education’.

Mr Gilhome’s evidence about the payments

44. All of the invoices were marked to the attention of Mike Gilhome. Mr Gilhome gave evidence before the Commission twice: once in private hearing and once in public. On neither occasion did he give any coherent explanation for the payments. As developed further below, there were inconsistencies between his account in public and private hearing. The Commission, it is submitted, should find that he was unwilling to give a truthful account of the genesis, nature and purpose of the payments and should be very cautious before giving any significant weight to his evidence.
45. A convenient starting point for analysis of Mr Gilhome’s evidence is that, on at least 10 occasions in his oral evidence at

the public hearing Mr Gilhome said words to the effect that in making the payments he was ‘supporting their training so they would support ours’.⁹⁷ Not once did Mr Gilhome make a statement of this kind at his private hearing.⁹⁸ At his private hearing, the closest Mr Gilhome came was to say ‘...look, we supported the Vic Branch of the AWU across the board, like a lot of companies did. And in terms of the broadbanding and the training and what have you, I would say that that related to that, to help them out, maybe. I don’t know’. That inconsistency gives rise to considerable concerns about Mr Gilhome’s evidence: it suggests that his claims about an arrangement for mutual ‘support’ were invented. It is convenient, however, to examine the evidence concerning exactly what sort of ‘support’ each of ACI and the AWU gave the other.

46. So far as the AWU’s ‘support’ for ACI’s training was concerned, there was no obligation of that kind in the 2003 EBA. It is clear that ‘support’ of this kind did not mean actually providing training. The substantial training that was required for the implementation of the broadbanding process was provided by ACI internally or by other providers.⁹⁹ Such OH&S training for delegates as was provided by the AWU was invoiced and paid for separately. The Commission sought

⁹⁷ See for example, Mike Gilhome, 14/10/15, T:366.25-26, 358.20-30, 362.16-17, 365.10-13, 367.14-21, 382.31-43, 393.22-36, 401.8-11, 408.19-21, 413.35-38.

⁹⁸ Gilhome MFI-1, 14/10/15, T:36.46-37.4

⁹⁹ Paul Vine, witness statement, 22/10/15, para 21; Mike Gilhome, 14/10/15, T:352.28-.43; Gilhome MFI-1, 14/10/15, p 25.9-19.

production from the AWU of documents recording any communications relating to membership, training, ‘paid education’ or any other services provided by the AWU to a number of companies, including ACI, in the period 2000 to date.¹⁰⁰ The documents produced in answer to that notice indicate that the AWU was in fact, from time to time providing OH&S training to ACI delegates. The nature of the training provided, and the payments for it, are documented in some detail.¹⁰¹ No other type of training or services is documented in the period during which the invoices were paid.

47. What, then, was the ‘support’ given to ACI by the AWU to which Mr Gilhome referred so often (at least in public hearing)? If there was any, it seems, from the production in response to the Commission’s request, not to have been the subject of any documentation. At his private hearing, Mr Gilhome referred on a number of occasions to expenses incurred by the AWU in connection with implementing broadbanding in ACI plants in Australia.¹⁰² He made similar references at his public hearing.¹⁰³ But what, exactly, did the AWU do to ‘implement’ broadbanding? Mr Gilhome never gave any clear explanation. The closest he came was the following answer to a question from Mr Melhem’s counsel

¹⁰⁰ AWU MFI-2, 23/10/15, pp 181-187.

¹⁰¹ See for example Robinson MFI-2, 14/10/15, pp 166-238.

¹⁰² See for example Gilhome MFI-1, 14/10/15, T:32.29,33.31, 36.46, 37.8,42.23-26..

¹⁰³ Mike Gilhome, 14/10/15, T:363.29-364.27.

about Mr Melhem's role in the changes necessitated by broadbanding¹⁰⁴:

Well, he was critical to it because he had the capacity to grow with the experience and understand what career paths were necessary. He had the capacity to coordinate with all his senior delegates, I suppose, across the country when we were talking about the definitions that we were writing and understand that. He had the capacity to argue that we should be looking at the full impact of technology in terms of manning and that's why we did a manning - we would have done one anyhow, and he became integral to the whole process and, of course, he enjoyed, as far as I could see, the full confidence of all the stewards, particularly at Spotswood, but across the board because they would ring him with particular queries because they'd sort of say to me from time to time, "I've got to talk to Cesar about that", you know, that's how I know; so he was pretty integral to the whole thing.

48. Other than suggesting that from time to time Mr Melhem spoke to delegates and had their confidence, this evidence does not rise higher than an assertion that Mr Melhem's role in the broadbanding process was important. It does not explain what it was that Mr Melhem or the AWU actually did at ACI that might have warranted the making of such large payments.
49. Evidence given by persons actually working at Spotswood gives a much more reliable and specific indication of the type of activities undertaken by AWU officials at that plant. *First*, the AWU convened EBA meetings and spoke to the workers in an endeavour to persuade them to enter into the EBA that had been agreed by ACI and the AWU.¹⁰⁵ *Secondly*, some employees complained about the broadbanding process: it required the same amount of work to be done by fewer people.

¹⁰⁴ Mike Gilhome, 15/10/15, T:389.10-25.

¹⁰⁵ Zbigniew Kaminski, witness statement, 15/10/15, paras 35-36.

This resulted in dissatisfaction from time to time.¹⁰⁶ Mr Savage gave evidence that he asked Mr Melhem and Mr Krishnan for assistance in ensuring AWU members complied with the EBA – that is, presumably, in ensuring that they were prepared to take on the additional and different work that broadbanding required of them.¹⁰⁷ Mr Melhem on occasions addressed the workers about such concerns – according to Prema Chippendale, to tell them that nothing could be done about it.¹⁰⁸ *Thirdly* and relatedly, broadbanding resulted in redundancies.¹⁰⁹ Mr Savage’s evidence was that he ‘engaged with’ Mr Melhem and Mr Krishnan about the redundancy process. He said that they were both aware of the cost pressures affecting ACI and were ‘pragmatic’ about the redundancy process. He worked primarily with Mr Krishnan in organising voluntary redundancies and would deal with Mr Melhem if there was a particular issue or dispute which required a higher level of authority.¹¹⁰

50. In the context of this evidence, the only sensible way to understand Mr Gilhome’s claims about the ‘support’ that ACI received from the AWU is as support in ‘selling’ the broadbanding process to the workers and preventing or avoiding industrial unrest which had the potential to arise out of such a process. It is likely that Mr Gilhome and Mr Melhem

¹⁰⁶ Prema Chippendale, witness statement, 15/10/15, para 24.

¹⁰⁷ Greg Savage, witness statement, 15/10/15, paras 35-36.

¹⁰⁸ Prema Chippendale, witness statement, 15/10/15, paras 25-26.

¹⁰⁹ Mike Gilhome, 14/10/15, T:351.37-352.8.

¹¹⁰ Greg Savage, witness statement, 15/10/15, paras 41-46.

both perceived, at the time of negotiating the 2003 EBA, that assistance of this kind would be required.

51. Dealing with EBAs, addressing workers' concerns about working conditions and dealing with redundancies are core areas of work for a union official. But 'services' of this kind are services provided by a union to its members. They are not services provided to employers. Where a union is paid \$145,000 per year by an employer to provide the very services that is supposed to be providing anyway to its members, the union's position is hopelessly compromised.

52. That Mr Gilhome expected the payments to compromise Mr Melhem and the AWU is suggested by the following passage of his evidence:¹¹¹

Q. Were you seeking industrial peace, is that the explanation?

A. No. We had a very good relationship. The AWU and before that the AGWU always had a good relationships [sic] with ACI.

Q. But did you see this as a method of continuing that good relationship?

A. No, I saw it as a method of us being able to argue, "We've supported your training so you continue to support ours". If, for instance, Cesar said, "Look, I'm now an Assistant Secretary and I can't do this particular thing", or someone more particularly at a higher level said, "Oh look, we want to pull him out and put someone else in as a co-ordinator", I wanted to get some argument so that we could say, "Well, we've supported you so you've got to support to see this through with us." And the thing is that I wasn't far wrong because he became an Assistant Secretary whilst I was still there, I think he became the State Secretary just before I left, or a bit before I left, and they did roll

¹¹¹ Mike Gilhome, 14/10/15, T:367.5-33.

up the branches a bit before I left. We were able to cement a lot of what we needed to do and the delegates were able to understand what was going on.

Q. That's the explanation you want to give if I was to ask the question, "What were you getting for you nearly half a million dollars that was spent"?

A. Yeah.

53. It is quite apparent from the above answers that Mr Gilhome saw the payments as bargaining chips. It is worth also noting that despite denying in the above evidence that the payments were a method of continuing a good relationship with the AWU, Mr Gilhome, towards the conclusion of his evidence the next day, accepted that the payments facilitated the continuation of a good relationship with the AWU.¹¹²

54. Mr Gilhome referred on a number of occasions to the payments being connected with some form of recompense for expenses incurred by the AWU in providing services to members of ACI.¹¹³ Mr Gilhome referred in his public hearing to those expenses as having been incurred over a four to five year period.¹¹⁴ This appeared to be no more than an attempt, after the event, to justify the payments. Mr Gilhome did not suggest that there was any discernible correlation between the quantum of such expenses and the amounts the subject of the invoices in question.¹¹⁵ ACI never asked and the AWU never provided

¹¹² Mike Gilhome, 15/10/15, T:414.30-43.

¹¹³ Mike Gilhome, 14/10/15, T:363.29-364.27; Gilhome MFI-1, 14/10/15, T:32.29-33.42.

¹¹⁴ Mike Gilhome, 14/10/15, T:364.31-37.

¹¹⁵ See for example Gilhome MFI-1, 14/10/15, T:32.12-33.42.

any form of reconciliation of what the expenses in question were.¹¹⁶

55. The above analysis deals with the ‘support’ said by Mr Gilhome to have been given by the AWU to ACI. What support, according to Mr Gilhome, was ACI providing to AWU’s training? The appropriate conclusion is, it is submitted, no more than support in the form of a donation of \$145,000 per year for three years. On the second day of his evidence at the public hearing, Mr Gilhome was examined by counsel for Mr Melhem. It was put to him that Mr Melhem was very keen to set up a training facility at the AWU. Mr Gilhome initially responded that he was aware that they were looking for facilities and training of their people as a major policy thing but was not aware of all the specific detail. He then agreed with the suggestion that he knew that the AWU wanted to expand their training base and set up a facility.¹¹⁷ It was then put to Mr Gilhome that he was paying money to the AWU to ‘...support the potential establishment of that training facility and those training programs...’. Mr Gilhome answered ‘Yes absolutely, yes’.¹¹⁸ Later in his examination by counsel for Mr Melhem, when asked whether he ‘...understood that what was being asked of you was to contribute to that training levy, or he says

¹¹⁶ Mike Gilhome, 14/10/15, T:364.39-365.5.

¹¹⁷ Mike Gilhome, 14/10/15, T:381.19-33.

¹¹⁸ Mike Gilhome, 14/10/15, T:381.43-46.

“leave”, to assist the Union to develop itself as a training facility...’ Mr Gilhome, twice, agreed.¹¹⁹

56. This was the first time in Mr Gilhome’s evidence that he had suggested that the monies were paid for the development of a ‘training facility’. In private hearing, he gave the following evidence:¹²⁰

Q. But why did you pay this money on 1 August 2003, Mr Gilhome?

A. I don’t know.

Q. Well, that just is not a credible answer , is it?

A. Well, it’s so long ago. I mean - -

Q. Well, it may be a long time ago, but this is a very large sum of money, isn’t it, Mr Gilhome?

A. Well, it’s not large in terms of, as I say, what we were dealing with in terms of all our expenses with broadbanding and the like.

Q. I’m not interested in those matters, Mr Gilhome. I’m interested in what you were paying the union. It was an extraordinarily large sum to pay the union, isn’t it?

A. Yes.

Q. And the only inference that one can reasonably draw, I suggest to you, is that it was to achieve some result in relation to the EBA that was being negotiated?

A. No, it wasn’t.

Q. Well, you say that - -

A. No, it wasn’t.

Q. - - but you can’t explain - -

¹¹⁹ Mike Gilhome, 15/10/15, T:392.7-14.

¹²⁰ Gilhome MFI-1, 14/10/15, T:39.5-40.7.

- A. No, I can't, but I can tell you it definitely wasn't.
- Q. Well, what was it for, then?
- A. I don't know.
- Q. What were you getting for your money?
- A. I don't know.
- Q. What were you getting for your money, Mr Gilhome?
- A. We weren't – it had nothing to do with the EBA negotiations.
- Q. What were you getting for your money, for your \$160,000?
- A. Well, we would have been helping the Union maybe, you know, as I say, defray expenses.
- Q. What expenses?
- A. I've just told you. You know, they were – they – Cesar Melhem was doing a hell of a lot of work for us, and the AWU State Branch were doing it, so maybe I've agreed to pay them some money to offset the cost of that. I don't know. That's the only thing I can think of.

57. This evidence is contrary to the propositions to which he agreed in answer to questions from counsel for Mr Melhem. Mr Gilhome's readiness to agree to propositions put to him by Mr Melhem's counsel gives rise to significant concerns about Mr Gilhome's reliability as a witness. The appropriate inference to draw is that he was agreeing with them because he perceived that, coming as they did from Mr Melhem's counsel, they would assist him and not because it was his honest evidence.

58. There were other reasons for concerns about Mr Gilhome's evidence. In his private hearing, Mr Gilhome was shown the first two invoices sent by the AWU. He gave evidence that he

did not understand the reference to 'paid education leave' on these invoices. His evidence included the following exchange:¹²¹

- Q. What do you mean, you "would have thought"?
- A. I don't understand – as I said to your investigator, I don't understand what the wording is.
- Q. What don't you understand? What bits of it don't you understand?
- A. The "paid education leave".
- Q. You're not familiar with that expression?
- A. I'm familiar with it. I'm familiar with it, but I - I don't know what it means there.
- Q. Well, why did you authorise it to be paid, then?
- A. I don't know.

59. Upon being shown the third invoice, dated 2 June 2004, Mr Gilhome was asked why it was described as paid education leave. Mr Gilhome answered 'I don't know'.¹²² Upon being shown the fourth and final invoice, Mr Gilhome was asked about the reference to '800 member'. Mr Gilhome accepted that ACI did not employ anything like 800 AWU members at Spotswood, and that the description was false to the extent that it was intended to reflect such members.¹²³

¹²¹ Gilhome MFI-1, 14/10/15, T:36.21-37.38.

¹²² Gilhome MFI-1, 14/10/15, T:42.14-29.

¹²³ Gilhome MFI-1, 14/10/15, T:45.5-19.

60. This evidence was inconsistent with the answers Mr Gilhome gave to the questions from counsel for Mr Melhem concerning the AWU's plans for a training facility, referred to above. It was also inconsistent with answers he gave to questions from counsel assisting in public hearing. When taken to the first invoice issued by AWU, and asked what the reference to 'paid education leave' referred to, Mr Gilhome answered:¹²⁴

Well, I understood it to be referring to a levy of delegate training or Union training, AWU training, that we had agreed we would pay.

61. Later in his evidence at the public hearing, Mr Gilhome was asked how he understood the paid education leave in that invoice had been calculated. He answered:¹²⁵

I didn't know but I thought it was just a levy on the basis of the Containers Branch Membership.

62. Mr Gilhome claimed that this was something that he recalled since his private hearing. He said:¹²⁶

Well, I remember – what I remember was I was a bit befuddled about the – I was thinking in terms of Spotswood and I knew they had 250, 300 people, and this had a lot more, it was 800-odd people in the invoice that I'm talking about, and I remembered that that would have been, this is subsequently, would have been the Containers Branch thing. I just didn't put the two together, that's all.

63. Counsel for Mr Melhem sought to elicit further evidence from Mr Gilhome about his approach to the private hearing. Mr Gilhome gave evidence that he was 'told very little' about the

¹²⁴ Mike Gilhome, 14/10/15, T:356.6-16.

¹²⁵ Mike Gilhome, 14/10/15, T:359.25-29.

¹²⁶ Mike Gilhome, 14/10/15, T:360.38-44.

private hearing and that 'I was told to come – that the Commissioner and Mr Stoljar wanted to have a chat to me'.¹²⁷ He later gave this evidence:¹²⁸

- Q. Did you know that your private hearing was about ACI?
- A. Yes.
- Q. What else did you know about your private hearing before you came?
- A. That the Commissioner and Mr Stoljar wanted to have a chat to me, that's the way it was - -
- Q. That was it?
- A. That's what I was told. I didn't even - to be honest, I didn't know I was going to be in a witness box. I was naive perhaps about that but I didn't realise that.
- Q. Nobody said, "We want you to come to a hearing", they said, "Come and have a chat"?
- A. They said the Commissioner and Mr Stoljar would like to have a chat to me.
- Q. Okay. It had been something like nine or 10 years?
- A. At least nine years, yes.

64. Mr Gilhome's evidence that he thought he was coming to the Commission for a chat was false and given in an attempt to explain the recent introduction in his evidence of the Container Branch. Mr Gilhome received on 1 July 2015 a summons to give evidence in the Commission.¹²⁹ The summons stated that

¹²⁷ Mike Gilhome, 15/10/15, T:396.19-22.

¹²⁸ Mike Gilhome, 15/10/15,T:397.21-40.

¹²⁹ Gilhome MFI-2, 15/10/15.

Mr Gilhome was required ‘...to appear before the Commission at the hearing to be held at Hearing Room ... to give evidence in relation to the matters into which the Commission is inquiring’.¹³⁰ That made it quite plain that the purpose of his coming to the Commission was much more than merely having an informal chat.

65. Further, Mr Gilhome accepted that he knew, prior to the private hearing, that he was going to be giving evidence in relation to ACI, and in relation to the question of paid education leave, and that he received communication from Commission staff in the weeks leading up to 1 July 2015.¹³¹ It is apparent from the transcript of his private hearing that prior to that hearing he had spoken to ‘people’ from the Commission and to persons he described as ‘investigators’ from the Commission and that he had been shown the ‘documentation’ – one would infer, including, at least, the invoices in question - about which he was asked questions.¹³²
66. Again, Mr Gilhome was being quite disingenuous in his answers to questions put by Mr Melhem’s counsel. The appropriate inference to draw is that he anticipated that those questions would provide him with a way to explain the inconsistencies between his evidence at private hearing and his evidence at public hearing.

¹³⁰ Gilhome MFI-2, 15/10/15.

¹³¹ Mike Gilhome, 15/10/15, T:415.7-37.

¹³² Gilhome MFI-1, 14/10/15, T:31.43-.44, 33.39-42.

67. There are still further difficulties with this aspect of Mr Gilhome's evidence. First, the 2004 Annual Return submitted by the AWU National Office indicate that as at 1 January 2004, the number of members of the Glass and Container Industry Branch of the AWU was 1,800.¹³³ Thus, the figure of 800 on the invoice of 2 June 2004 is not explained by the membership of the Branch. Secondly, the Glass and Container Industry Branch ceased operation on 31 August 2004.¹³⁴ Thus, the reference to 800 members on the invoice of 24 May 2005¹³⁵ cannot be explained by the number of members of the Glass and Container Industry Branch. Thirdly, nothing in the evidence explains, in any event, why the membership of the Glass and Container Industry Branch should form the basis for the quantification of the payments. If, as Mr Melhem and Mr Shorten claimed, the payments were for the benefits of all AWU members, why quantify them by reference to membership of the Glass and Container Industry Branch? If this was 'paid education' of the same kind as contained in the Potters and Ausreo EBAs, why not quantify payments by reference to the employees of ACI? There is no good explanation.

68. What is one to make of Mr Gilhome's evidence? It is submitted that the following conclusions should be drawn:

¹³³ AWU MFI-14, 6/11/15, p 4.

¹³⁴ AWU MFI-15, 6/11/15, p 10.

¹³⁵ Shorten MFI-12, 9/7/15, p36.

69. *First*, Mr Gilhome did not believe, at the time he entered into the arrangement with Mr Melhem or at the time payments were made pursuant to it, that the payments were for ‘paid education leave’ or training of any kind.
70. *Secondly*, Mr Gilhome was unwilling to give a truthful account of the arrangement that he struck with Mr Melhem, or of the payments made pursuant to it.
71. *Thirdly*, that Mr Gilhome was unwilling to give such a truthful account because, to his knowledge, the purpose of the arrangement was improper. It was improper because Mr Gilhome entered into the arrangements and made the payment for the purpose of obtaining for ACI more favourable treatment from the AWU in relation to ACI’s dealings with its employees than ACI would otherwise receive.

The evidence of Mr Melhem concerning the payments

72. Prior to his giving evidence on 22 October 2015, Mr Melhem was invited to provide a statement dealing with a number of matters including:¹³⁶

‘The circumstances concerning the invoices issued by the AWU to [ACI in 2003-2005]... In particular, whether, in 2004-2006, there was an agreement or arrangement whereby ACI would pay the AWU about \$160,000 a year for three years’

¹³⁶ AWU MFI-2, 23/10/15, p 131.

73. Mr Melhem took up that invitation. However, his account in his witness statement was sparse. The only account that he gave of the arrangement he had with Mr Gilhome was to say:¹³⁷

‘When Mr Gilhome says he thought the payments were to reimburse my expenses, he is partly right, but some of the funds were also devoted to the broader and more long term aim of establishing the AWU as a significant provider of training’.

74. In oral evidence Mr Melhem offered the following description of the circumstances in which the arrangement was struck:¹³⁸

...[There were] discussions with Mr Gilhome in relation to what the company was trying to achieve in their broadbanding classification structure and all the resources we were putting in, what we are trying to achieve as a Union, and broadly in relation to training and providing this training provider, et cetera, so that’s the discussions we had. And then Gilhome at a point in time then agreed and said “We think the company can support the AWU in relation to these objectives”, which is the training, and that’s where they agreed to the payment’.

75. When asked what, as he understood it, Mr Gilhome or ACI was getting for their money, Mr Melhem responded:¹³⁹

‘Well, supporting the AWU objective in relation to these training initiatives the AWU was doing. For example, we have a number of ACI employees who went out to do Certificate IV in Health and Safety paid by the AWU and a number of them did postgraduate diploma by Sydney University around that time as well. So they were supporting a concept of training as we supported their concept to make workplace changes, and so forth. So basically they supported what we were trying to do and it was part of the relationship we had with ACI’.

76. The proposition that any ACI employees had their Certificate IV in Health and Safety paid for by the AWU was not

¹³⁷ Cesar Melhem, ACI Glass witness statement, 22/10/15, para 8

¹³⁸ Cesar Melhem, 22/10/15, T:960.12-24.

¹³⁹ Cesar Melhem, 22/10/15, T:960.47-961.11.

suggested in evidence by any other witness (including Mr Savage (the ACI Spotswood plant manager), Mr Kaminski (an AWU shop steward at the time) and Ms Chippendale (an OHS officer at the time). It was not a proposition contained in Mr Melhem's witness statement. Nor was it a proposition suggested to any witness by Mr Melhem's counsel. In answer to Notice to Produce Documents No 1331, referred to above, no documents were produced by the AWU indicating that any such service was provided to ACI employees.¹⁴⁰

77. For the above reasons, this aspect of Mr Melhem's evidence should be treated with considerable caution. Since Mr Melhem gave that evidence, attempts have been made to determine whether any documents support it. The AWU ledgers contained a separate ledger for expenses described as 'university fees'. So far as those ledgers indicate, the AWU paid for no person to do any postgraduate diploma at Sydney University. Substantial sums are recorded as paid for Union officials, such as Ms Zoe Angus, to undertake postgraduate work. The ledgers recorded smaller sums paid for Certificate IV OH&S courses for unspecified persons.¹⁴¹ The Commission has issued Notice to Produce Documents No 2019 requesting the names of the persons who received the Certificate IV Health and Safety training recorded in the 'University Fees' section of the AWU's general ledgers.¹⁴² As at the date of

¹⁴⁰ AWU MFI-2, 23/10/15, pp 181-187.

¹⁴¹ AWU MFI-5, 6/11/15.

¹⁴² AWU MFI-19, 6/11/15.

these submissions, the AWU has not produced any records of the names of such persons.

78. The above issue is a side issue, and relevant mainly to credit. That is because even if it turns out that a small number of ACI employees had their fees paid for such courses, the evidence does not establish any connection between such payments and the paid education leave payments.
79. There were other aspects of Mr Melhem's evidence that gave rise to concerns about his credibility. His evidence that the figure of 800 in the formula on the ACI invoices referred to the number of ACI employees has been discussed above. Two further examples were given in the previous chapter: his assertion that the AWU on average spent about \$500,000 or \$600,000 on training¹⁴³ and his assertion that AWU spends far more on training than they ever receive, whether through paid education or invoicing for services.¹⁴⁴ Mr Melhem's evidence, it is submitted, should not be accepted unless given against his own interests or independently corroborated by objective material.
80. Putting aside Mr Melhem's claims that ACI employees attended level IV occupational health and safety training paid for by the AWU, the only part of his answer that identifies something that ACI got for its money is Mr Melhem's statement that the AWU '...supported their concept to make

¹⁴³ Cesar Melhem, 22/10/15, T:971.8-10.

¹⁴⁴ Cesar Melhem, 22/10/15, T:976.19-27.

workplace changes and so forth'.¹⁴⁵ That could only be a reference to 'support' in connection with broadbanding – or what Mr Melhem described in the passage quoted prior to the one above as 'what the company was trying to achieve in their broadbanding classification structure'. The only sensible way to understand such 'support' is as providing the 'services' identified above in connection with the discussion of Mr Gilhome's evidence – that is, the very services that the AWU was obliged to provide to its members: EBA negotiations, dealing with employee dissatisfaction regarding the 'upskilling' process entailed by broadbanding and regarding redundancies. The AWU was not actually training ACI employees: the only 'support' required was to persuade employees to accept and implement the changes involved in broadbanding without industrial unrest.

81. Mr Melhem claimed that the payments were in part to defray AWU expenses incurred in connection with 'support' in the implementation of broadbanding.¹⁴⁶ However, as with Mr Gilhome's claims to similar effect, this is difficult to accept. *First*, from the AWU's perspective, if this was in fact the case, there is no good reason for not describing that on the invoices. *Secondly*, Mr Melhem said that he did not have a breakdown of the split between amounts that were used for the purposes of education and amounts used to refund the AWU for his

¹⁴⁵ Cesar Melhem, 22/10/15, T:961.8-9.

¹⁴⁶ Cesar Melhem, 22/10/15, T:962.3-24; ACI Glass witness statement, 22/10/15, para 8.

expenses.¹⁴⁷ There is no discernible relationship between the quantum of those expenses and the amount of the payments. The likely position is that Mr Melhem's and Mr Gilhome's assertions that the payments were wholly or in part 'for' expenses incurred by the AWU were merely attempts, after the event, to justify the payments by asserting that the AWU in some vague sense deserved to receive them. Such assertions, it is submitted, do not accurately describe the purpose of the payments as contemplated by the parties at the time they were made.

82. Mr Melhem's repeated claims that (some unspecified part of) the payments were devoted to the aim of establishing the AWU as a 'significant provider of training'¹⁴⁸ do not withstand scrutiny. There are numerous difficulties. *First*, the funds were not in fact ear-marked for any particular use. *Secondly*, as the discussion of ACI's accounts in the previous chapter attempted to illustrate, at the time of the payments, the AWU was providing significant training. Mr Melhem's evidence does not give any indication of what more was necessary for the AWU to 'become' a significant provider of training. *Thirdly*, the AWU has produced to the Commission minutes of BCOM meetings for the Victorian Branch for the period 1999 – date. Beyond the proposal referred to at the meeting of 9 October 2001 (which, as discussed in the previous chapter, Mr

¹⁴⁷ Cesar Melhem, 22/10/15, T:964.19-37.

¹⁴⁸ Cesar Melhem, ACI Glass witness statement, 22/10/15, para 8; See also Cesar Melhem, 22/10/15, T:958.32-36, 960.6,15-20.

Shorten said was not pursued) those minutes do not refer to any proposal of the kind that Mr Melhem raises.¹⁴⁹

The evidence of Mr Shorten concerning the payments

83. Mr Shorten was State Secretary and National Secretary at the time these payments were negotiated and made. He said that he did not think that he was personally involved in the negotiations for the 2003 EBA, and that those negotiations were principally conducted by Mr Melhem on behalf of the AWU.¹⁵⁰ Mr Shorten said that he did not give instructions for the issue of the four invoices. However, he said that he might have spoken to Mr Gilhome about why a paid education levy was a good idea, and that Mr Melhem would have told him the ‘positive news’ regarding the payment of amounts such as these for paid education.¹⁵¹

84. Although at one point Mr Shorten accepted that there was no contractual obligation to make the payments,¹⁵² Mr Shorten’s final position appeared to be that there ‘would have been’ at least an oral agreement in respect of these payments.¹⁵³ The effect of his evidence was that he was one of the persons

¹⁴⁹ As discussed in the previous chapter, a proposal to establish a training fund at national level was made in May 2002. This proposal also was not pursued and, in any event, could not have been a proposal that the ACI payments were intended to implement. Had that been so, the invoices would have come from National Office.

¹⁵⁰ Bill Shorten, 9/7/15, T:145.2-46.

¹⁵¹ Bill Shorten, 9/7/15, T:146.32-147.19.

¹⁵² Bill Shorten, 9/7/15, T:149.7-10.

¹⁵³ Bill Shorten, 9/7/15, T:153.10-154.21.

involved in negotiating such an arrangement, although the particular detail of the agreement was something that he would not necessarily have been engaged in.¹⁵⁴

85. The evidence does not support a finding that Mr Shorten had any substantial involvement in the arrangement struck by Mr Gilhome and Mr Melhem. It is likely, however, that at some point he was informed that ACI was making payments for ‘paid education’ - either because at some point Mr Melhem told him or because, as someone with a particular interest in the concept of ‘paid education’, he noticed the significant increase in paid education revenue in the AWU accounts and made his own inquiries. It may also be that, since he and Mr Gilhome were on friendly terms, and since Mr Shorten said he might at some point have spoken to Mr Gilhome about paid education¹⁵⁵, that he was told of the payments by Mr Gilhome.

Conclusions regarding the 2003 – 2005 payments

86. The objective circumstances in which the payments were made suggest that they were not made for ‘paid education’ unless one takes that expression to mean a donation or gift to the union. Those circumstances include the following: -
- (a) As explained above, the arrangement to make the payments was made during the course of negotiations for the 2003

¹⁵⁴ Bill Shorten, 9/7/15, T:154.6-155.11.

¹⁵⁵ Bill Shorten, 9/7/15, T:146.1-2, 146.37-44.

EBA. The context of those EBA negotiations included what ACI, to the AWU's knowledge, regarded as the imperative to continue the broadbanding process and what both parties must have anticipated were the difficulties that were likely to arise in that process (that included employee dissatisfaction with the 'upskilling' and redundancies).

- (b) There was no reference in the 2003 EBA to the arrangement between Mr Melhem and Mr Gilhome, and the arrangement was not otherwise disclosed to ACI employees. No witness could explain why that was so.¹⁵⁶ Both Mr Melhem and Mr Shorten gave evidence to the effect that the AWU would have wanted such an arrangement included.¹⁵⁷ Mr Melhem said a claim to this effect was included in the AWU's log of claims. But these matters merely underscore the oddity of not having the arrangement included in the EBA. The EBA itself used the phrase 'paid education leave'¹⁵⁸ and obligations to make payments of paid education leave (albeit in much smaller amounts) were in fact recorded in EBAs entered into by Potters Industry Pty Ltd and Ausreo Pty Ltd at around the time of the negotiation of the 2003 EBA.¹⁵⁹ These circumstances suggest that the arrangement struck by Mr Gilhome and Mr Melhem was not in fact one to make payments of this kind.

¹⁵⁶ See Cesar Melhem, 22/10/15, T:965.9-21; Bill Shorten, 9/7/15, T:147.45-149.10.

¹⁵⁷ See Cesar Melhem, 22/10/15, T:958.32-44; Bill Shorten, 9/7/15, T:157.27-47.

¹⁵⁸ Shorten MFI-12, 9/7/15, p 195 (clause 15.5).

¹⁵⁹ Shorten MFI-1, 8/7/15, pp 1, 83.

- (c) The payments were made in the absence of any written agreement or indeed any supporting documentation other than invoices. That payments of this size would be made in these circumstances suggests that the parties were not prepared to document the true basis of the arrangement because they were concerned that it was not a legitimate one. Mr Mitchell, general manager of human resources described the payments as ‘staggering’ and was ‘shocked’ when he learnt of them through his appearances at the Commission.¹⁶⁰ In contrast, as stated above, arrangements for the provision by the AWU of OH&S training to delegates employed at ACI, involving payments of much smaller amounts, were fairly well documented.
- (d) The first payment was of two invoices for equal amounts issued about two weeks apart – a circumstance that itself invites suspicion. No witness explained why two invoices were issued for identical amounts two weeks apart. Mr Chen said that it must have been because Mr Melhem asked for that to occur.¹⁶¹ Mr Melhem and Mr Chen both suggested as a possibility that it may have something to do with the fact that one invoice was issued in each financial year. That possibility merely begs the question of why it was thought necessary or desirable to issue the invoices in separate financial years.

¹⁶⁰ Brendan Mitchell, 14/10/15, T:339.14-19.

¹⁶¹ Michael Chen, 21/10/15, T:816.8-19.

- (e) The descriptions on the invoices pursuant to which the second and third payments were made contained a formula, described by Mr Robinson as a 'nonsense formula'.¹⁶² Mr Robinson's description was accurate. Mr Melhem and Mr Gilhome gave conflicting accounts about the source of the figure of 800 in the formula, and neither account could be correct.
- (f) The accounting records of ACI do not suggest that the payments were treated by ACI as 'paid education'. Those records indicate that there was either no clear view within ACI as to what the payments were for, or an attempt, in which Mr Gilhome must have played a substantial or solitary part, to disguise the true nature of the payments.
- (g) The payments were made from an ACI account used for confidential or sensitive transactions. If the payments had truly been for 'paid education leave' there would have been no need for them to be made from such an account: there is nothing confidential or sensitive about an arrangement of this kind.
- (h) The first of the three payments was treated by the AWU as part of general revenue. The second and third payments were paid into the AWU long service leave account and used to make a loan to the National Office for the purpose of enabling national office to reduce its indebtedness in connection with a loan used to renovate premises used by the Victorian Branch.

¹⁶² Peter Robinson, 14/10/15, T:329.35.

This indicates that, from the point of view of the AWU, the funds were not in any way earmarked to be used for 'paid education'.

- (i) The payments were not disclosed to AWU members employed by ACI.¹⁶³ There is no good explanation for such a failure if in truth Mr Gilhome and Mr Melhem were comfortable that the payments were legitimate.

87. The above circumstances suggest that the payments were not for 'paid education leave' unless one takes that concept to refer to a donation or gift to a union.

88. The only documentary evidence that the payments were in fact for 'paid education leave' is what appears on the invoices. But, for the reasons identified above, these invoices are inherently suspicious: the first two are for identical amounts two weeks apart, the second and third contain formulas for no witness could offer any satisfactory explanation, the reference to 'paid education leave' is cursory and question begging.

89. The above circumstances make it inherently unlikely that either Mr Gilhome or Mr Melhem actually thought the payments were 'for' 'paid education' in the sense of providing funds to facilitate training. Further, at the time the payments were negotiated, Mr Gilhome and Mr Melhem were actually discussing 'paid education leave' in the sense in which that

¹⁶³ Prema Chippendale, witness statement, 15/10/15, paras 36-37; Zbigniew Kaminski, witness statement, 15/10/15, paras 41-43.

phrase is used in the 2003 EBA.¹⁶⁴ It is highly unlikely that at the same time they were discussing a very different concept with a similar label (which they then determined to exclude from the EBA). That, no doubt, is why Mr Gilhome at his private hearing had no understanding of the reference to ‘paid education leave’ on the invoices.

90. What, then, was Mr Gilhome’s purpose in entering into the arrangement and arranging for the payments to be made? No reasonable employee in his position could have offered to make payments of this magnitude without expecting something in return. Mr Gilhome ultimately accepted that one of the reasons he made the payments was in the hope that they would facilitate a good relationship with the AWU throughout the broadbanding process.¹⁶⁵ It is but a short step to conclude that he expected the facilitation of that relationship to involve giving ACI more favourable treatment than would otherwise be given in relation to its dealings with its employees. It is submitted that that conclusion should be drawn: it is the only sensible way to understand the ‘support’ that Mr Gilhome claimed he wanted the AWU to give to the implementation of the broadbanding process. Mr Gilhome expected that the broadbanding process that was to be implemented under that EBA might create difficulties, including as a result of employee dissatisfaction with being forced to acquire new skills and work harder and also as a result of redundancies. He made the

¹⁶⁴ Mike Gilhome, 14/10/15, T:354.36-353.3.

¹⁶⁵ Mike Gilhome, 14/10/15, T:368.22-46.

payments in the belief that the AWU would should ACI favourable treatment in dealing with issues of this kind.

91. Mr Melhem denied that he believed that ACI was entering into the arrangement to make the payments in order to get the AWU to show it favour.¹⁶⁶ This evidence should not be accepted. Mr Melhem was a shrewd and intelligent man: it would have been obvious to him that neither Mr Gilhome nor ACI would make payments of this magnitude purely out of altruistic motivations. It is submitted that Mr Melhem must have understood that, in agreeing to make the payments, Mr Gilhome was expecting some favourable treatment in return. Having regard to Mr Melhem's and Mr Gilhome's claims about how closely involved Mr Melhem was in ACI's business, Mr Melhem must have known that the continuation of the broadbanding process had the potential to result in employee dissatisfaction, and that ACI, in making the payments, was expecting favourable treatment from the AWU in that regard.

D CONCLUSIONS REGARDING THE CONDUCT OF THE AWU, MR MELHEM AND MR GILHOME

Conflict between interests of AWU and interests of ACI glass workers

92. The negotiation and payment of the three amounts of \$145,000 involved an obvious conflict, or substantial possibility thereof, between the interests of the AWU on the one hand and the

¹⁶⁶ Cesar Melhem, 22/10/15, T:972.7-12.

interests of AWU members who were ACI employees, on the other. No doubt, it was in the interests of the AWU to receive almost half a million dollars. But the payments were in one important respect contrary to the interests of the AWU members employed by ACI. That is because what was in reality no more than a very large donation from ACI to the AWU must inevitably have weakened the AWU's bargaining position, both in relation to the 2003 EBA (which affected employees at Spotswood only) and in relation to the implementation of the broadbanding process (which affected all ACI employees). It compromised the AWU's capacity to represent the interests of its employee members when it came to difficulties regarding the implementation of the broadbanding process and/or redundancies. That was the very purpose for which Mr Gilhome made the payments.

93. Mr Melhem's response to the suggestion that there was a conflict was:¹⁶⁷

I say to that is this: I have delivered excellent working conditions and wages for the members, so that's a tick. The income to the members, their paid education leave went to the members, not to Bill Shorten, not to Cesar Melhem, went to the members. So where's the conflict? Members. Members. Where's - no-one is saying this money went to me, or to Bill Shorten, or any Union official. It went to the members. The members own the Union, for Christ's sake.

94. Mr Melhem's response involves two propositions. First, there was no conflict because the 2003 EBA was a good result for the glassworkers. Secondly, there was no conflict because, in effect, a benefit to the Union is a benefit to the members. Mr

¹⁶⁷ Cesar Melhem, 22/10/15, T:973.3-11.

Shorten's response to the suggestion that there was a conflict included Mr Melhem's first point and also a third point: that the AWU was 'transparent' about the paid education income.¹⁶⁸

95. The first of the above points (that the 2003 EBA was a good result for workers) is irrelevant to the question of whether negotiating a side deal involved a conflict of interest. It assumes, incorrectly, that the payments had no capacity to affect the capacity of the AWU to represent the interests of its members in dealings with ACI. Describing the 2003 EBA as a 'good result' also begs the question of whether it was a good result compared with the result that might have been obtained had there been no side deal that compromised the AWU's bargaining position.
96. The third point (that the arrangement was 'transparent') does not withstand scrutiny. There does not appear to be any dispute that it was not disclosed to workers voting on the EBA or that any prior approval by them was sought or given. That is sufficient to deal with the point. Further, for the reasons identified in the previous chapter of these submissions, it is hard to see how an AWU member could have found out about the arrangement after the event by looking at the AWU's books and records.
97. The second of the above points (that there was no conflict because the payments were a benefit to the AWU) assumes that

¹⁶⁸ Bill Shorten, 9/7/15, T:150.18-151.10.

the interests of the AWU and ACI glassworkers who were AWU members in respect of the payments were identical. However, they were not. The benefits to a glassworker from an increase in the AWU's revenue of \$450,000 are best described as theoretical or remote only. The interests of such a glassworker in being represented by the AWU for the purposes of obtaining an EBA on the best possible terms, and for the purposes of assistance in the course of implementing that EBA, were real and direct. The payments advanced merely theoretical or remote interests at the expense of real and direct interests.

98. The glassworkers, on whose behalf Mr Melhem was supposed to be acting, were deprived of any choice about whether the arrangement would be entered into or the payments pursuant to it made. In one sense it is speculation to imagine what their response would have been had proper disclosure been made – but as a matter of common sense it is hard to see how the arrangement could have met with any enthusiasm. Let it be assumed that, as Mr Melhem, Mr Shorten and Mr Gilhome (at times) claimed, the monies were in some sense earmarked to be used to train other AWU members (since they were not to be used to train ACI members). What possible benefit would an ACI glassworker receive from assistance being given to train someone else – say a mushroom picker, a labourer, or a netball player? Further, if the \$450,000 remained with ACI, that was money that was potentially available to be applied to increased wages, avoiding redundancies, or increasing redundancy payments. Could it really be supposed that the glassworkers

would have preferred that ACI pay that money to the AWU? Considerations such as these are illustrations of the conflicts involved in Mr Melhem's and the AWU's position.

99. At one point in his evidence, Mr Melhem suggested that the payments were analogous to donations made by companies to support community organisations. He said:¹⁶⁹

Companies do go and support community organisations for various projects and various activities, and they don't necessarily accept¹⁷⁰ a direct dividend. What is wrong with that concept?

100. The suggested analogy between the payments made by ACI and corporate donations to 'community organisations' is a false one. The payments by ACI were donations not to a disinterested community organisation but to a union charged with representing and promoting the interests of various persons in their dealings and relationships with ACI.

Duty to avoid conflict?

101. Fiduciaries owe duties, absent fully informed consent, to 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.¹⁷¹

¹⁶⁹ Cesar Melhem, 22/10/15, T:961.29-32.

¹⁷⁰ No transcript corrections have been suggested to this word. It is possible that Mr Melhem meant to say or did say 'expect'. Substitution of that word would not make any difference to the point being made.

¹⁷¹ See, eg, *Breen v Williams* (1996) 186 CLR 71 at 113; *Pilmer v Duke Group Ltd (in liq)*

102. Under the statutory regime in force at the time the arrangement was made, the AWU was in the process of making an enterprise agreement with ACI pursuant to s 170LJ of the *Workplace Relations Act 1996* (Cth). In negotiating with ACI during that process, the AWU was representing the interests of its members who would be covered by that agreement. ACI employees were not bound by the agreement reached by ACI and the AWU until it was approved by them by a majority and then certified by the Commission (see s170LJ(2), s170LT(5)). Thus, the AWU and Mr Melhem did not have legal authority to bind the ACI employees to the agreement reached with ACI. However, in practical terms, the conduct of the AWU and Mr Melhem significantly affected the interests of ACI employees. In a practical sense, the agreement reached between the AWU and ACI was likely to have a significant impact on the terms and conditions of employment of employees at Spotswood. In many ways, their position vis-à-vis those employees was akin to one of an agent.
103. The position of the AWU and Mr Melhem in relation to ACI employees at Spotswood during the 2003 EBA negotiations thus exhibited what Mason J in *Hospital Products Ltd v United States Surgical Corporation* described as the ‘critical feature’ of a fiduciary relationship: undertaking or agreeing:¹⁷²

(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].

¹⁷² (1984) 156 CLR 41 at 96. See also *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 196 [70].

‘to act for or on behalf of or in the interests of another person in the exercise of a power of discretion which will affect the interests of the other person in a legal or practical sense’.

104. Mason J went on to state:

‘The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions “for”, “on behalf of” and “in the interests of” signify that the fiduciary acts in a “representative” character in the exercise of his responsibility...’

105. The existence a fiduciary relationship in the present case is underscored by the fact that Mr Melhem was only in a position to request the payments, and Mr Gilhome was only interested in making them, because the Mr Melhem and the AWU were supposed to be representing the interests of its members in two senses. First, in coming to an agreement with ACI regarding the terms of the 2003 EBA, and secondly, in the implementation of that EBA, particularly the broadbanding process.

106. The foregoing has referred, to ‘the AWU and Mr Melhem’. It is submitted that it is correct to say that fiduciary duties were owed by each of these persons to the ACI Spotswood employees. The AWU was the entity that was supposed to be representing the interests of the AWU members in making the agreement under s 170LJ and Mr Melhem was the individual through whose conduct that occurred. Furthermore, Mr Melhem was the individual whose conduct in connection with the implementation of the broadbanding process had the capacity to most affect the interests of ACI employees. It was

his favour that Mr Gilhome was particularly anxious to court.¹⁷³

107. For the above reasons, it is submitted that the AWU and Mr Melhem both owed fiduciary duties to members employed by ACI. 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 conflicted with its fiduciary duties to the ACI glassworkers. Mr Melhem pursued 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 ACI glassworkers.

108. As a result, it is submitted that the AWU and Mr Melhem may have breached fiduciary duties owed to members employed by ACI by entering into an arrangement pursuant to which ACI paid \$145,000 per year to the AWU and seeking payments pursuant to that arrangement.

Corrupt Commissions: Mr Melhem and AWU

109. Section 176(1) of the Crimes Act 1958 (Vic) provides:

CRIMES ACT 1958 – SECT 176

Receipt or solicitation of secret commission by an agent an indictable offence

¹⁷³ See Mike Gilhome, 14/10/15, T:367.5-33 (quoted above).

(1) Whoever 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) Whoever 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.

110. The question arises as to whether any or all of Mr Melhem, the AWU, Mr Gilhome and ACI have committed an offence under this section.

111. As to Mr Melhem and the AWU, the payments were clearly 'valuable consideration' solicited 'for' the AWU. It is also, it is submitted, clear that the objective requirement in s 176(1)(b) is satisfied: that is, the receipt or expectation of payments of this kind would tend to influence Mr Melhem and the AWU to show favour (or forbear to show disfavour) to ACI in relation

to the affairs of ACI employees at Spotswood. A gift of such substantial sums must tend to create such influence.

112. The next issue is whether Mr Melhem and/or the AWU were ‘agents’ and the ACI employees ‘principals’ within the meaning of this section. This question is addressed in greater detail in counsel assisting’s submissions in relation to Cleanevent.¹⁷⁴ For essentially the reasons set out above, in connection with the submission that Mr Melhem and the AWU owed fiduciary duties to its members who were ACI employees, both were ‘agents’ within the meaning of s 176: both were acting or intending to act ‘for or on behalf of’ those employees.

113. The final question, in connection with the liability of Mr Melhem and the AWU is whether the payments from ACI were solicited or received ‘corruptly’ within the meaning of that section. An agent acts ‘corruptly’ within the meaning of this section if ‘he receives a benefit in the belief that the giver intends that it shall influence him to show favour in relation to the principal’s affairs’.¹⁷⁵ It is not necessary for the agent to have an actual intention to be influenced by the payment.¹⁷⁶

114. Mr Melhem denied that he believed that ACI was entering into the arrangement to make the payments in order to get the AWU

¹⁷⁴ See Counsel Assisting Submissions, Chapter 2.

¹⁷⁵ *R v Dillon and Riach* [1982] VR 434 at 436; *R v Gallagher* [1986] VR 219 at 231; *R v Jamieson* [1988] VR 879. See also *R v Nuttall* [2011] 1 Qd R 270 at [36].

¹⁷⁶ *R v Dillon and Riach* [1982] VR 434 at 436; *R v Gallagher* [1986] VR 219 at 228, 231.

to show it favour.¹⁷⁷ However, for the reasons given above, that evidence should not be accepted. No person of his intelligence and capabilities could have thought that payments of this magnitude, made for no consideration, would have been made without an expectation that the AWU would show favour to ACI in relation to its dealings with its employees. Further, the secretive nature of the payments, the absence of proper documentation in support of them, and the unsatisfactory evidence of Mr Melhem and Mr Gilhorne about them all support the inference that they were, to the knowledge of both parties, improper. If, as is submitted, the evidence of Mr Melhem and Mr Gilhorne is rejected, no contrary inference is reasonably available.

115. For the above reasons, it is submitted that Mr Melhem may have committed an offence under s 176(1)(b).

116. It is submitted that Mr Melhem's conduct should be attributed to the AWU because he was acting as the 'directing mind and will' of the union.¹⁷⁸ The terms of s176 itself makes it plain that corporations can commit offences under that section.¹⁷⁹ Mr Melhem was an organiser at the time the arrangement was struck, and not yet Secretary of the Victorian Branch. It was held in *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530 at

¹⁷⁷ Cesar Melhem, 22/10/15, T:972.7-12.

¹⁷⁸ *Tesco Supermarkets v Natrass* [1972] AC 153 at 170.

¹⁷⁹ The AWU was incorporated at this time by operation of s 27 of Schedule 1B to the *Workplace Relations Act 1996* (Cth).

[65] that the conduct of an organiser was, on the facts of that case, not to be attributed to his union for the purposes of liability under s 170NC of the *Workplace Relations Act 1996* (Cth). However, it is submitted that the facts in the present case are sufficient to attribute Mr Melhem's conduct to the AWU as its 'directing mind and will' for the purposes of the arrangement with Mr Gilhome. Mr Melhem was more than a 'mere organiser' in this respect: he was the national co-ordinator of the glass industry and had the carriage of the EBA negotiations. The invoices were issued on his, and no-one else's instructions. The AWU on any view adopted Mr Melhem's conduct by receiving the payments in question and dealing with them for its own benefit.¹⁸⁰

117. Accordingly, it is submitted that the AWU also may have committed an offence under s 176(1)(b).

Corrupt Commissions: Mr Gilhome and ACI

118. It is also submitted that Mr Gilhome may have committed an offence under s 176(2)(b). The only matter that requires further analysis is whether he offered the payments 'corruptly' within the meaning of that section. It is submitted that he did. For the reasons set out above, Mr Gilhome entered into the arrangement and procured the payments pursuant to it in the

¹⁸⁰ 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).

belief or expectation that the AWU would show ACI favour in relation to its dealings with its employees.

119. The question of whether Mr Gilhome's conduct should be imputed to ACI is more difficult. ACI'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. However there is not, it is submitted, a sufficient basis to impute Mr Gilhome's intentions in entering into the arrangement and making the payments to ACI. If, as submitted, Mr Robinson's evidence that he did not know about the payments is accepted, then the position is that, although the payments probably were made 'by' ACI, there is an insufficient basis to conclude that they were made with ACI bearing any particular intention. As a result, it is submitted, no finding should be made that ACI may have contravened s 176(2) as a result of these payments.

E '12 MONTH MEMBERSHIP' PAYMENTS 2008-2013

120. From April 2008 to March 2014, AWU Vic rendered invoices on an annual basis in the amount of \$5,400.00 inclusive of GST:
- (a) Invoice 020626 dated 3 April 2008 for the period 1 July 2007 to 30 June 2008, recorded as being paid on 29 May 2008 by EFT to State funds.¹⁸¹

¹⁸¹ Shorten MFI-12, 9/7/15, p 65.

- (b) Invoice 021461 dated 19 March 2009 for the period 1 July 2008 to 30 June 2009, recorded as being paid on 11 April 2009 by EFT to State funds.¹⁸²
- (c) Invoice 022183 dated 22 March 2010 for the period 1 July 2009 to 30 June 2010, recorded as having been approved for payment by Brendan Mitchell.¹⁸³
- (d) Invoice 022856 dated 9 March 2011 for the period 1 July 2010 to 30 June 2011, recorded as having been approved for payment by Brendan Mitchell.¹⁸⁴
- (e) Invoice 023539 dated 19 March 2012 for the period 1 July 2011 to 30 June 2012, recorded as having been approved for payment by Mario Minniti.¹⁸⁵
- (f) Invoice 024237 dated 1 March 2013 for the period 1 July 2012 to 30 June 2013, recorded as being 'ok to pay' but not signed.¹⁸⁶
- (g) Invoice 024956 dated 4 March 2014 for the period 1 July 2013 to 30 June 2014.¹⁸⁷

¹⁸² Shorten MFI-12, 9/7/15, p 66.

¹⁸³ Shorten MFI-12, 9/7/15, p 73.

¹⁸⁴ Shorten MFI-12, 9/7/15, p 74.

¹⁸⁵ Shorten MFI-12, 9/7/15, p 76.

¹⁸⁶ Shorten MFI-12, 9/7/15, p 77.

¹⁸⁷ Robinson MFI-2, 14/10/15, p 393.

121. The payments were not made pursuant to any written contract or any documented arrangement.¹⁸⁸
122. Each of the invoices bore the item code 'PAID EDUC' and the description '12 Membership Yearly Fees' and a description of each financial year. The invoices were all addressed to Mario Minniti of ACI. Mr Minniti was at this time employee relations manager and reported to Mr Brendan Mitchell, the director of human resources. The invoices were recorded in the AWU's ledgers as income under 'Paid Education'.
123. The SAP records of ACI/OI record payment of each of the above invoices shortly after they were issued, save for the final invoice.¹⁸⁹
124. That invoice was not paid. On 7 March 2014 Mario Minniti sent an email to an address for AWU accounts, stating:¹⁹⁰

Please be advised that effective immediately O-I Australia will no longer be responsible for the payment of the 12 membership fees, invoice number 024965.

125. On 13 March 2014, Mei Lin sent an email to John-Paul Blandthorn, copying Ben Davis, stating the following:¹⁹¹

By the way, we have invoiced \$5,400 to OI for 12 membership fees since 2010. However this year Mario Minniti said OI will no longer be

¹⁸⁸ As to ACI's records, see Anna Velasco, witness statement, 15/10/15, para 59.

¹⁸⁹ Velasco MFI-1, 14/10/15, pp 5, 89-90; Robinson MFI-2, 14/10/15, p 393.

¹⁹⁰ Shorten MFI-12, 9/7/15, p 78.

¹⁹¹ Shorten MFI-12, 9/7/15, p 79.

responsible for this payment. Could you please find out why and try to get this invoice paid?

126. On 17 March 2014 Ben Davis responded, stating ‘please stop chasing the OI invoice.’¹⁹² On 18 March 2014 AWU issued a credit note numbered 024964 in respect of invoice 024956, stating “REVERSE IT AS PER BEN DAVIS.”¹⁹³
127. Mr Davis said that he believed these payments were for paid education leave, not membership. So much is recorded on the spreadsheet prepared by Ms Lin.¹⁹⁴ Mr Davis gave evidence that he formed the view that the payments were of this nature after interviewing Mr Blandthorn. Mr Davis said he also spoke to Mr Minniti about the payments, who told him they were for paid education leave.¹⁹⁵
128. The substance of Mr Minniti’s evidence in his witness statement was as follows:¹⁹⁶

I thought that the invoicing arrangement was perfectly normal and that ACI must have been deducting union dues from individual employees and passing them on to the AWU. ACI had previously deducted union dues from individual employers. As a result, I approved payment of the 2011 and 2012 invoices without much thought at all. I assume that my former superior, Mr Mitchell, must have approved the invoices issued, in the period 2008-2010.

129. It is submitted that Mr Minniti did not actually think the arrangement was ‘perfectly normal’, or that he thought that ACI was deducting union dues from employees and passing them on, and that he was

¹⁹² Shorten MFI-12, 9/7/15, p 79.

¹⁹³ Robinson MFI-2 14/10/15 p 394.

¹⁹⁴ Lin MFI-1, 4/6/15, p 27.

¹⁹⁵ Ben Davis, 4/6/15, T:635.3-47, 636.1-7.

¹⁹⁶ Mario Minniti, witness statement, 15/10/15, para 10.

withholding his true recollection from the Commission. ACI employees were in fact paying union dues by payroll deduction.¹⁹⁷ An arrangement whereby ACI paid those fees to the union directly would have been abnormal (and, indeed, pointless).

130. Further, Mr Minniti's evidence was that when he received the invoice dated 4 March 2014 he took it to Mr Vine and spoke to him about it. It is unclear why he would have done that if he regarded the arrangement as 'perfectly normal'. After the cessation of these payments, Mr Minniti said that he had no complaints from any employee that their membership fees were no longer being paid.¹⁹⁸ He said that he did not make any enquiries of anyone on that topic. All of this suggests that he did not in fact think this arrangement was perfectly normal, and did not in fact believe it was one for the payment of membership fees.

131. The other difficulty with Mr Minniti's evidence is that it conflicts with evidence given by other witnesses. It conflicts with Mr Davis' evidence that Mr Minniti told him in 2014 that these payments were for 'paid education'.¹⁹⁹ It conflicts with Mr Vine's evidence that, when he spoke to Mr Minniti about the 4 March 2014 invoice, Mr Minniti told him that he did not know what that invoice was for.²⁰⁰ It conflicts with Mr Mitchell's evidence that Mr Minniti has told him recently that he could not recall what the payments were for.²⁰¹

¹⁹⁷ See, for example, Zbigniew Kaminski, witness statement, 15/10/15, para 12.

¹⁹⁸ Mario Minniti, 15/10/15, T:427.46-47, 428.1-5.

¹⁹⁹ Ben Davis, 4/6/15, T:635.3-47, 636.1-7.

²⁰⁰ Paul Vine, witness statement, 22/10/15, para 37

²⁰¹ Mitchell MFI-2, 14/10/15, T:30.4-30.

132. Some of the invoices were approved by Mr Mitchell.²⁰² Mr Mitchell's explanation for how he came to approve them was as follows. Mr Minniti was away at the time and he spoke to a departmental HR administrative assistant about the invoices who indicated to him that Mr Mitchell was told by the assistant that Mario 'customarily signed these' and on the basis of that assurance he approved them for payment.²⁰³ In oral evidence, Mr Mitchell said the following:²⁰⁴
133. These payments were an arrangement that carried over from Mr Gilhome's service with the company. My view was to continue to honour those arrangements.
134. Mr Mitchell said that he did not know what the nature of the arrangement was and that he had only subsequently found out about the payments from reading the transcripts of Royal Commission hearings.²⁰⁵ In his private hearing, Mr Mitchell said that he had been told by Mr Minniti in recent times that Mr Minniti could not recall what the invoices were about but that he 'assumed it was an arrangement that had been made prior to him taking over the employee relations role'.²⁰⁶
135. The rejection of the 2014 invoice by ACI was on the instruction of Mr Paul Vine. Mr Vine in his witness statement said that he was presented with an invoice by Mr Minniti in or around early 2014. Mr Vine said

²⁰² Shorten MFI-12, 9/7/15, pp 73-74.

²⁰³ Brendan Mitchell, 14/10/15, T:344.33-42; Mitchell MFI-2, 14/10/15, T:27.8-35.

²⁰⁴ Brendan Mitchell, 14/10/15, T:346.10-13.

²⁰⁵ Brendan Mitchell, 14/10/15, T:346.20-22.

²⁰⁶ Mitchell MFI-2, 14/10/15, T:30.4-30.

that he asked Mr Minniti if he could give him some background information about the invoice and that Mr Minniti told him that invoices for the same amount and description had been issued and authorised for payment in the past by Mr Mitchell but that Mr Minniti could not tell him what the invoice was for. Mr Vine said that the fact that ACI could not identify the reason for the invoice caused him concern so he instructed Mr Minniti not to pay it.²⁰⁷ As stated above, Mr Minniti would not have said this to Mr Vine if Mr Minniti in truth thought that the invoices were perfectly normal and involved the payment of membership fees.

136. Mr Melhem's evidence was that these payments were in fact for paid education but quantified on the basis of membership fees.²⁰⁸ Mr Melhem said he could not remember whether the arrangement was negotiated during Mr Gilhome's days or Mr Minniti's time.²⁰⁹ Mr Melhem was unable to explain why the arrangement with ACI moved from one pursuant to which \$160,000 per year was paid to one pursuant to which \$5,400 per year was paid. His position appeared to be 'you take what you get'.²¹⁰ His evidence in this respect was unsatisfactory. The circumstances in which an arrangement to make payments from 2008 was entered into are more recent than those in 2003, and yet Mr Melhem purported to explain the purposes of that earlier arrangement. The discrepancy between \$160,000 and \$5,400 is very large and, on Mr Melhem's evidence, the formula for quantifying

²⁰⁷ Paul Vine, witness statement, 22/10/15, paras 36-38.

²⁰⁸ Cesar Melhem, ACI Glass Witness statement, 22/10/15, para 10; Cesar Melhem, 22/10/15, T:973.28-45.

²⁰⁹ Cesar Melhem, 22/10/15, T:974.1-4.

²¹⁰ Cesar Melhem, 22/10/15, T:975.40-47, 976.1-11.

the payments is entirely different. The only other paid education leave arrangements at this time recorded in the AWU's financial records concern Potters and Ausreo and Huntsman. In all of these circumstances, one would expect Mr Melhem to be in a position to give a better explanation for the payments from 2008 – 2013 than he gave to the Commission.

137. Mr Gilhome had left ACI by the time the first of these invoices was issued. Mr Gilhome claimed to be unable to shed any light on what these invoices were for.²¹¹ The prospect that these payments were made pursuant to an arrangement struck by him cannot be ruled out. But nor, it is submitted, is there sufficient reliable evidence to establish that the payments were made pursuant to such an arrangement.

Conclusions

138. Mr Vine's position in 2014 that the payments 'did not look right' is telling. It adds support to what is suggested by the fact that the payments were made pursuant to what the AWU accepts were false invoices and in the absence of any documented arrangement. Further support is given to that conclusion by the fact that Mr Minniti, at least, was not prepared to give a frank explanation to the Commission of what the payments were for. The position he adopted was similar to the stance adopted by Mr Gilhome in relation to the 2003 payments: both men were in a position to give an honest account of the nature and purpose of the payments but, knowing the payments for which they

²¹¹ Mike Gilhome, 14/10/15, T:370.13-47, 371.1-43, 375.44-47, 376.1-2.

were responsible were improper, they preferred to withhold that account in an attempt to protect their own interests.

139. There is a question as to whether the AWU or one of its officers committed an offence under s 176(1) in procuring or soliciting the payments. Mr Blandthorn was the organiser responsible for ACI during the period in which these invoices were issued. The invoices were not canvassed with him in his evidence. In these circumstances, it is submitted that there is an insufficient basis to find that either he or the AWU may have contravened the section.

140. There is a question as to whether there is a sufficient basis to conclude that the payments were made by ACI and/or Mr Minniti 'corruptly' within the meaning of s 176(2) of the *Crimes Act 1958* (Vic). Payments of this kind tend to influence unions and their officials to show favour to employees in relation to the affairs of their employees. However, it is submitted there is insufficient evidence to make a finding that ACI and/or Mr Minniti had the required 'corrupt' intention under that section.