

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

SUBMISSIONS OF COUNSEL ASSISTING

AWU: CHAPTER 6

CHIQUITA MUSHROOMS

Subject	Paragraph
A INTRODUCTION	1
B NEGOTIATIONS	3
C THE PAID EDUCATION PAYMENTS	15
Why were the payments made?	18
D UNFAVOURABLE 2004 EBA	40
Redundancies and transfer to labour hire	44
Labour hire workers paid less to do more	55
E OH&S AND THE 2004 EBA	66

Subject	Paragraph
The piece rate system	67
OH&S issues identified in the evidence	70
OH&S under the 2004 EBA	73
Conclusion on OH&S	76
F CONCLUSIONS REGARDING CONDUCT OF AWU AND CHIQUITA	78
Breach of fiduciary duty	79
Corrupt Commissions	91

A INTRODUCTION

1. This case study concerns six payments of \$4,000 made by Chiquita Mushrooms Pty Ltd (**Chiquita**) to the AWU in 2003-2004. The payments were made pursuant to invoices that were described as being for ‘paid education’. The payments were made during a period in which Chiquita and the AWU were engaged in EBA negotiations.
2. The Commission heard evidence and received submissions in relation to this case study in 2014. Further evidence was received in 2015. These submissions are intended to replace the submissions that were previously Chapter 15.2 of the submissions of Counsel Assisting dated 31 October 2014.

B EBA NEGOTIATIONS

3. There were two enterprise agreements ('EBAs') reached in 2001 between Chiquita Mushrooms and the AWU. One, the Chiquita Mushrooms (Pickers) AWU Enterprise Agreement 2001 (**2001 EBA**)¹, covered the mushroom pickers employed to harvest mushrooms at Chiquita Mushrooms' Victorian operations; the other, the Chiquita Mushrooms Enterprise Agreement 2001² covered ancillary services personnel and is not relevant for present purposes. Both EBAs were signed by the then Secretary of the Victorian Branch of the AWU on 18 June 2001 and 24 November 2001, respectively.

4. The 2001 EBA had a nominal expiry date of 19 March 2003. Negotiations for a new EBA commenced in around October 2002. Those negotiations were protracted. Mr Leo led the negotiations on behalf of the AWU and Mr Agostino on behalf of Chiquita. In overview, they took the following course. By early March 2003, the AWU and Chiquita had not reached agreement on a new EBA but agreed to 'roll over' the 2001 EBA for a further year with 2% wage increases to allow negotiations to continue.³ As a result, in June 2003, an EBA was signed by the parties and approved by the Australian Industrial Relations Commission (**2003 EBA**).⁴ The 2003 EBA was for present purposes relevantly identical to the 2001 EBA, save that it made provision for the use of labour hire workers to fill vacancies

¹ Shorten MFI-13, 9/7/15, p 58.

² Shorten MFI-13, 9/7/15, p 99C

³ Shorten MFI-13, 9/7/15, p 23.

⁴ Shorten MFI-13, 9/7/15, pp 73 – 82.

generated by departing Chiquita employees.⁵ EBA negotiations, meanwhile, continued through 2003 into early 2004. An agreement was concluded in July 2004 and approved by the AIRC in August 2004 (**2004 EBA**).⁶ The 2001, 2003 and 2004 EBAs were read and interpreted in conjunction with the *Chiquita Mushrooms Pty Ltd Victorian Production Award (the Award)*.⁷

5. One key issue during EBA negotiations related to restrictions on the use of labour hire. Under the 2001 EBA, Chiquita was obliged to maintain the following minimum employment levels: 240 employees at Mernda and 37 employees at Yarrambat.⁸ The 2001 EBA also imposed restrictions on the number of labour hire employees that Chiquita was permitted to use. Clause 22 capped the number of such workers at 100 in the ‘A-side’ and 40 across the remainder of Mernda. No labour hire was permitted at Yarrambat without the agreement of the AWU. The reference to ‘A-side’ was to an area at Mernda used to experiment with different packaging and production techniques. Clause 22 of the 2001 EBA required that any labour hire employees be paid according to the terms of the 2001 EBA.⁹

⁵ Shorten MFI-13, 9/7/15, p 75 (clause 10.2).

⁶ Shorten MFI-13, 9/7/15, pp 85 – 99.

⁷ Shorten MFI-13, 9/7/15, pp 62, 74, 87; From 1994 to 2002 the Award was titled *Campbell Mushrooms Pty Ltd Victorian Production Award 1994*, Fair Work Commission, www.fwc.gov.au/documents/awardsandorders/L6498.doc, accessed 5/11/2015; from 2002 the Award was titled *Chiquita Mushrooms Pty Ltd Victorian Production Award*, Fair Work Commission, www.fwc.gov.au/documents/awardsandorders/html/PR925831.htm, accessed 5/11/2015.

⁸ Shorten MFI-15, 9/7/15, p 4 (clause 10.2).

⁹ Shorten MFI-13, 9/7/15, p 66.

6. Chiquita emphasised during EBA negotiations that restrictions on the use of labour hire caused significant problems. The main reason such restrictions caused problems was Chiquita's Workcover premiums. Minutes of a meeting during EBA negotiations on 7 February 2003 record Chiquita representatives describing that problem.¹⁰ Chiquita's premiums had gone from \$1.2 million at the time of the 2001 EBA to \$6.2 million or 47% of its wage bill. The industry rate was 7%. The reason those premiums had increased was the high number of claims for injuries made by Chiquita employees. The reason increased labour hire would assist in solving this problem was that injuries to labour hire workers would affect the premiums of the labour hire company in question, and not Chiquita. The minutes of the 7 February 2003 record the problem being expressed by Chiquita in the following way:¹¹

Contractors are used solely because of our 47% premium (\$6.2 million) compared to our contractors premium of 7% - That's \$20.48 per hour as distinct from \$16.40 per hour - \$4 an hour cheaper – roughly another \$8 thousand dollars per person per year

7. Mr Agostino's evidence was that in 2001 there were approximately 150 labour hire workers picking mushrooms on the site. He said that from 2001, when Chiquita employees were injured or left, he replaced them with labour hire employees and as a result the number of labour hire workers steadily increased during the period from 2001 to about 200 in 2003.¹² Mr Agostino did not tell the AWU about this.¹³ No doubt that was because the strategy was impermissible under the 2001

¹⁰ Shorten MFI-13, 9/7/15, p 4.

¹¹ Shorten MFI-13, 9/7/15, p 5.

¹² Joseph Agostino, second witness statement, 18/9/214, paras 5-6; first witness statement, 18/9/14, para 15.

¹³ Joseph Agostino, 18/9/24, T:130.34-41, 162.34-47, 163.1-5.

EBA, which, as discussed above, capped the number of labour hire employees at 140. The strategy was made permissible under the 2003 EBA, in the sense that vacancies arising after the commencement of that EBA could be filled through labour hire, but, subject to that, the cap of 140 remained.¹⁴

8. The labour hire companies used by Chiquita from 2001 – 2003 were, initially, Weststaff and then later during this period Northern Labour Solutions (NLS).¹⁵ Mr Agostino said that he began using another company, OneForce Group Australia (OneForce), on the ‘B side’ in late 2002.¹⁶ On 17 June 2003, Mr Agostino wrote to the Australian Taxation Office stating that he had been informed that NLS had not been withholding the correct amount of tax from employees’ wages all correctly paying superannuation contributions.¹⁷ Mr Agostino said that he wrote this letter at Mr Leo’s request because Mr Leo had expressed concerns to him about NLS’s practices.¹⁸ Mr Leo himself wrote a similar letter on 28 August 2003.¹⁹

9. The arrangement for the payment of paid education leave was struck at around this time. The evidence concerning that is discussed below. For present purposes, it may be noted that Mr Agostino’s position, disputed by Mr Leo, was that the arrangement was brought about

¹⁴ Shorten MFI-13, 9/7/15, p 77.

¹⁵ Joseph Agostino, first witness statement, 18/9/14, para 15.

¹⁶ Joseph Agostino, 18/9/14, T:161.31-44.

¹⁷ Shorten MFI-13, 9/7/15, p 27.

¹⁸ Joseph Agostino, 18/9/14, T:169.2-22.

¹⁹ Shorten MFI-13, 9/7/15, p 29.

because of Mr Leo's concern that the AWU was losing membership revenue as a result of the use of NLS.

10. On 18 December 2003 Mr Winter wrote to Mr Agostino.²⁰ Mr Winter asserted in the letter that as a result of Chiquita's use of NLS, it was in breach of clause 22 of the 2003 EBA. It is apparent from the first sentence of the letter that it had been preceded by investigations of NLS by the AWU and discussions between Mr Winter and Mr Leo. Mr Agostino responded to Mr Winter's letter the next day. Amongst other matters, he indicated that from that date Chiquita would 'put a freeze on any NLS (excepting students) recruitment pending resolution of this issue.'²¹

11. Mr Agostino said that from this time, Chiquita scaled down its use of NLS and scaled up its use of OneForce.²² Mr Agostino was questioned closely about the time at which he commenced using OneForce, and he was adamant that it was at around this time.²³ Mr Little, however, said that OneForce was not used by Chiquita until the 2004 EBA had been entered into.²⁴ Since Mr Little relied on Mr Agostino as to the nature of industrial relations on the site²⁵, Mr Agostino's evidence is to be preferred.

²⁰ Shorten MFI-13, 9/7/15, p 36.

²¹ Shorten MFI-13, 9/7/15, p 37.

²² Joseph Agostino, 18/9/14, T:160.17-21; 161.17-44.

²³ Joseph Agostino, 18/9/14, T:158.18, 159.1-47, 160.1-47, 161.1-47, 162.1-32.

²⁴ Stephen Little, 15/9/214, T:38.2-5.

²⁵ Stephen Little, 15/9/14, T:41.30-34.

12. Mr Agostino gave evidence that OneForce was recommended by Mr Leo on the basis that it had a good relationship with the AWU and encouraged its workers to become AWU members.²⁶ Mr Leo gave evidence that he did not nominate OneForce but simply suggested Mr Agostino give the director of OneForce a call because the AWU wanted someone union friendly to deal with.²⁷ He said he told Mr Agostino that the AWU would ‘prefer if possible to deal with union-friendly labour hire companies’.²⁸
13. Ultimately, Chiquita and the AWU agreed to the inclusion of a clause in the 2004 EBA that required Chiquita, unless otherwise agreed by the AWU, to use OneForce as the sole provider of labour hire on the site.²⁹
14. That was a decision that provided benefits both to Chiquita and to the AWU. From Chiquita’s perspective, OneForce was cheaper to use than Northern Labour Solutions.³⁰ From the AWU’s perspective, Mr Leo accepted that he preferred to deal with OneForce as a ‘union friendly’ labour hire company. Mr Leo also accepted that he regarded it as likely that OneForce would encourage union membership and as a result maintain revenue to the AWU.³¹ Mr Agostino’s evidence was that workers were paid the same by OneForce as they were by other

²⁶ Joseph Agostino, 18/9/14, T:144.36–46; Joseph Agostino, first witness statement, 18/9/2014, para 26.

²⁷ Frank Leo, 15/9/14, T:24.1-9.

²⁸ Frank Leo, 15/9/14, T:25.23-34.

²⁹ Shorten MFI-13, 9/7/15, p 94 (clause 25).

³⁰ Joseph Peter Agostino, witness statement, 18/9/14, para 27.

³¹ Frank Leo, 15/9/14, T:25.45-47-26.1-5.

labour hire companies, and that OneForce was cheaper for Chiquita because it charged Chiquita less for the provision of that labour.³²

C THE PAID EDUCATION PAYMENTS

15. The six payments of \$4,000 plus GST were made by Chiquita pursuant to invoices issued by the AWU each month from September 2003 until February 2004. Each invoice was for what was described as 'Paid Education'.³³ Further invoices were issued for the period March 2004 to June 2004 in similar terms.³⁴ These invoices, however, were not paid. Ultimately they were reversed by a credit note in October 2004.³⁵
16. Mr Agostino said he did not tell his employees about the arrangements.³⁶ Four former Chiquita employees gave evidence. All four gave evidence that they did not know of the \$4,000 payments.³⁷ Mr Shorten said he was sure that Mr Leo would have told the workers about the arrangement.³⁸
17. Chiquita had no contractual or other obligation to make the payments. That the arrangements were devoid of any obligation on the part of

³² Joseph Agostino, second witness statement, 18/9/14, para 24.

³³ Shorten MFI-13, 9/7/215, pp 107-112.

³⁴ Shorten MFI-13, 9/7/15, pp 112A-112D.

³⁵ Shorten MFI-13, 9/7/15, p 112E.

³⁶ Joseph Agostino, 18/9/14, T:149.36-38; second witness statement, 18/9/214, para 20.

³⁷ Sharon Dellevergini, witness statement, 21/10/15, paras 48-51; Marjorie Hodgson, witness statement, 22/10/15, paras 30-31; Marion Rogers, witness statement, 21/10/15, paras 48-49; Josephine Hodgson. 21/10/15, T:851.11-18.

³⁸ Bill Shorten, 9/7/2015, T:176.7-9.

Chiquita is illustrated by the fact that Chiquita unilaterally decided to stop making the payments after six months and by the fact that Chiquita never sought and the AWU never provided reports about how the monies were expended.³⁹

Why were the payments made?

18. The only significant dispute on the evidence concerned why the payments were sought and made. On or around 29 October 2003, Mr Little sent a letter to Mr Leo.⁴⁰ It stated:

Thank you for your letter dated August 5, 2003. I look forward to working with the AWU in developing the skills of our employees.

Chiquita Mushroom's will contribute \$4,000.00 per month from September 2003 which hopefully will enable you to subsidise training and development programs and paid education leave for your members and our employees.

We will review this amount in six months with a view of increasing this contribution.

19. Mr Leo's letter of 5 August 2003 (referred to in the first line of the correspondence quoted in the paragraph above) was not produced to the Commission. The letter of 29 October 2003 is a piece of contemporaneous evidence and therefore, having regard to the lapse of time since the events in question, a matter to which significant weight normally would be given. However, there is a distinction between the purposes for which Chiquita made the payments and the purposes for which Chiquita believed the monies would be used by the AWU. The

³⁹ Frank Leo, witness statement, 15/9/14, para 27.

⁴⁰ Leo MFI-6, 15/9/14, p 1.

letter does not assist in any significant way in assessing the former purpose: it does not contain any statement as to why Chiquita was prepared to pay the monies.

20. The weight to be given to the letter in assessing what Mr Little or Chiquita believed would be done with the monies is, it is submitted, undermined by a number of matters. First, Mr Agostino gave evidence to the effect that these letters ‘would have been’ written because it was likely that Chiquita had required something in writing from the AWU so as to ensure that the money it paid could be traced for its reporting requirements.⁴¹ Secondly, that the letter from Chiquita was something in the nature of a mere formality, and not a description of contemporaneous belief, is suggested by the fact that it was written after the first two invoices for paid education had been issued and paid. The first invoice was issued on 8 September 2003 and paid on 13 October 2003 and the second invoice was issued on 6 October 2003 and paid on 21 October 2003.⁴² Thirdly, as a statement of belief on the part of Chiquita and Mr Little, the letter does not go very far: it merely indicates that ‘hopefully’ the monies would enable the subsidisation of training programs for AWU members and Chiquita employees.

21. Mr Leo’s evidence as to how the above arrangement came about was as follows. He said that the arrangement arose in the context of negotiations for a new enterprise agreement⁴³ and at a time when the

⁴¹ Joseph Peter Agostino, 18/9/14, T:140.36-41, 141.1-12.

⁴² Shorten MFI-15, 9/7/15, pp 107, 108.

⁴³ Frank Leo, 15/9/14, T:14:29-39.

AWU sought what it called 'paid education leave' from employers during negotiations.⁴⁴

22. 'Paid education' was, in Mr Leo's words:⁴⁵

a general contribution sought by the AWU from all employers for the purposes of developing training programs and to cover the costs of paying members and delegates who attended AWU training programs and whose wages and costs for so attending were not covered by their employer.

23. Mr Leo's evidence was that Mr Agostino was not prepared to see a term for paid education written into the enterprise agreement but was nonetheless prepared to support the concept.⁴⁶

24. Mr Agostino gave a different account of the circumstances in which the above arrangement was made. Mr Agostino said that the arrangement had nothing to do with EBA negotiations.⁴⁷ He gave evidence that the arrangement came about because Mr Leo was upset about Chiquita Mushrooms' arrangement with NLS, that is, its strategy to implement a shift from employed workers to labour hire.⁴⁸ Mr Agostino's evidence was that sometime in early to mid 2003 Mr Leo complained to him that he could not get the workers supplied by NLS to become union members and pay union dues.⁴⁹ He gave evidence that he and Mr Leo had a conversation to the following effect:

⁴⁴ Frank Leo, 15/9/14, T:12.8-26.

⁴⁵ Frank Leo, witness statement, 15/9/14, para 15.

⁴⁶ Frank Leo, 15/9/2014, T:15.1-11.

⁴⁷ Joseph Agostino, 18/9/14, second witness statement, para 16.

⁴⁸ Joseph Peter Agostino, 18/9/14, T:134.15-27.

⁴⁹ Joseph Peter Agostino, witness statement, 18/9/14, para 17.

...the conversation went like this: 'These guys are no good, they won't work with us,' and I said, 'Well, you know, what's the problem?' And he said, 'I can't get them to work with us, I can't get their people to join up.' And I said, 'How is that my problem?' Because whether they join or not, that's their call? He said, 'Well we're missing out on revenue.' I said, 'And how's that my problem?' He said, 'We can't conduct training.' And I said - I think we spoke about a figure. I said, 'Put it in a letter to us and I'll see what we can do.'⁵⁰

25. Mr Agostino said he made the decision to pay this money to the AWU because \$4,000 represented 'a small price to pay'⁵¹ to keep the union 'at bay'.⁵² He explained in his first witness statement that he thought it was in Chiquita's interests to make the payments 'because I did not want production of the mushrooms to be disrupted by the AWU'.⁵³ In his second witness statement he expanded on this by saying:⁵⁴

19. In my experience in the industrial relations sector, the use of independent contractors is controversial. I was very concerned that Mr Leo would discover that Chiquita was using independent contractors and agitate Chiquita's in-house employees resulting in disruption to production and jeopardise future negotiations.

20. The payment of \$4,000 to the AWU for paid education leave seemed to me a very small price to pay to avoid any disruption to production arising from the use of independent contractors ...

26. Mr Agostino sought the approval of his general manager, Mr Little, for the payments. Mr Little had the authority to commit the business to make payments of this nature. The explanation given by Mr Little in his oral evidence for making the payments was as follows:⁵⁵

⁵⁰ Joseph Peter Agostino, 18/9/14, T:134.29-40.

⁵¹ Joseph Peter Agostino, 18/9/14, T:135.31-32.

⁵² Joseph Peter Agostino, 18/9/14, T:135.31-47, 136.1-5.

⁵³ Joseph Agostino, first witness statement, 18/9/14, para 18.

⁵⁴ Joseph Agostino, second witness statement, 18/9/14, paras 19-20.

⁵⁵ Stephen Little, 15/9/14, T:35.33-38.

My recollection of the time is, we were having issues regarding the employment of new people, additional people, and their lack of willingness to join the union. It's my understanding at the time that if there wasn't some movement on our part at least, it could lead to, let's put it, lack of harmony with the workforce.

27. In his witness statement, Mr Little said that, in addition to the above purpose, Chiquita also 'wanted to work with the AWU to improve occupational health and safety and reduce its WorkCover premiums and was amenable to contributing to an AWU training fund if that would assist it to achieve this goal'.⁵⁶ It is submitted that little weight should be given to this assertion and that Mr Little's oral evidence is a surer guide to his thinking at the time. There was not, in fact, any attempt by anyone at Chiquita to ascertain how the payments were dealt with. In fact, they were not contributed to an AWU training fund.
28. There are a number of reasons for preferring Mr Agostino's account over Mr Leo's.
29. *First*, it is unlikely that a company in Chiquita's position, earning about \$390,000 profit per year⁵⁷ and by all accounts in difficult financial circumstances, would have given \$24,000 to a union on the basis of some altruistic concern about improving training amongst AWU members. It is more likely that the payments were made for the purpose of obtaining a benefit for Chiquita. The only reason that suggests itself on the evidence is Mr Agostino's.
30. *Secondly*, Mr Agostino's evidence gives an explanation for the quantification of the payments: they were designed to compensate the

⁵⁶ Stephen Little, witness statement, 15/9/14, para 10.

⁵⁷ See Shorten MFI-13, 9/7/015, p 3.

AWU for a loss of membership revenue that was, at least in rough terms, ascertainable. Mr Leo offered no explanation for the quantification of the payments. They were not quantified in the way that other paid education payments were: that is, by reference to the number of employees of Chiquita, at a rate per employee per hour or per week (or on the basis of a percentage of payroll).

31. *Thirdly*, Mr Agostino's evidence explains why the payments stopped after 6 months notwithstanding the indication in Mr Little's letter of 29 October 2003 that Chiquita would 'review this amount in six months with a view of increasing this contribution'.⁵⁸ Mr Agostino gave evidence that he decided to stop making the payments because since January 2004 Chiquita Mushrooms had begun using workers supplied by OneForce, a labour hire company recommended by the AWU, (instead of Northern Labour Solutions).⁵⁹ He reasoned that if the AWU had a good working relationship with OneForce and OneForce encouraged union membership then it followed that Chiquita Mushrooms no longer needed to compensate the AWU for lost membership revenue.⁶⁰ He said that Northern Labour Solutions' services were progressively scaled back from December 2003 and the services provided by OneForce were progressively ramped up,⁶¹ such that by the time the 2004 EBA was in place OneForce was truly in

⁵⁸ Shorten MFI-13, 9/7/15, p 30.

⁵⁹ Joseph Peter Agostino, 18/9/14, T:143.11, 144.1-.2.

⁶⁰ Joseph Agostino, 18/9/14, T:143.11-17.

⁶¹ Joseph Agostino, 18/9/14, T:160.2-3.

place.⁶² Mr Agostino said that no-one at the AWU complained about the cessation of payments.⁶³

32. Mr Leo denied that OneForce was ‘in the picture’ by February 2004.⁶⁴ However, there is independent confirmation to the contrary. There was concern during 2004 EBA negotiations that the inclusion of a clause that required Chiquita to use OneForce might contravene s 45E of the *Trade Practices Act 1974* (Cth). In an email to Mr Agostino of 7 June 2004, a solicitor employed by Chiquita’s solicitors, Mallesons Stephen Jacques, said the following:⁶⁵

Consistent with my advice in February 2004, I remain concerned that NLS might have grounds to invoke section 45E of the Trade Practices Act by reason of, what appears to be, an understanding between Chiquita Mushrooms and the AWU which has the purpose of preventing Chiquita Mushrooms from acquiring the services of NLS.

33. The above email indicates that Mr Leo and Mr Agostino had come to an arrangement regarding the exclusive use of OneForce by Chiquita as early as February 2004. That supports Mr Agostino’s evidence and contradicts Mr Leo’s.
34. Mr Leo’s account of the purpose behind the paid education arrangement does not explain why the payments stopped. As indicated above, a credit note for these invoices was prepared on 5 October 2004. The credit note contained a notation ‘Will no longer pay. As per email and Frank Leo’.⁶⁶ The email referred to has not been

⁶² Joseph Agostino, 18/9/14, T:160.35-42.

⁶³ Joseph Agostino, 18/9/14, T:143.19-27.

⁶⁴ Frank Leo, witness statement, 15/9/14, para 26.

⁶⁵ Shorten MFI-13, 9/7/15, p 48.

⁶⁶ Shorten MFI-13, 9/7/15, p 112E.

produced to the Commission. The notation suggests that the decision to issue the credit note was Mr Leo's. Mr Leo, however, could offer no explanation for why the payments stopped. Mr Leo's evidence was, in essence, that he had nothing to do with the issuing of the credit note. He said that he did not become aware that Chiquita had stopped paying the invoices at this time, that no-one told him that Chiquita had stopped paying and that he did not make the decision to issue the credit note. He said he did not know who issued the credit note or why.⁶⁷ Mr Leo's evidence was that the Secretary of the branch had authority to write off an amount of this size.⁶⁸ Mr Shorten could not say why the credit note was issued, but looking at the notation 'as per email and Frank Leo', said that he assumed it was Mr Leo. Mr Shorten said that Mr Leo as assistant secretary had authority to make that decision.⁶⁹

35. Mr Leo's evidence on this topic should be treated with considerable caution. The notation on the credit note indicates that the cessation of payments came to his attention at the time, and that he approved the credit note or directed it to be issued. There is no good reason to doubt that objective evidence. The notation supports what one would ordinarily expect to have been the case: that an assistant secretary who makes an arrangement on behalf of the union under which the union receives significant revenue was consulted about and approved the cessation of that arrangement. It would have been understandable if Mr Leo had merely claimed that, with the passage of time, he no longer had a recollection of the circumstances in which the payments stopped. However his evidence, particularly his oral evidence, was to the effect

⁶⁷ Frank Leo, 15/9/14, T:21.37-47, 22.1-47, 23.1-10; witness statement, 15/9/14, para 26.

⁶⁸ Frank Leo, 15/9/14, T:23.1-3.

⁶⁹ Bill Shorten, 9/7/14, T:180.44-47, 181.1-14.

that he denied any involvement in the decision to issue the credit note.⁷⁰ That denial is contrary to the objective evidence and to what one would ordinarily expect.

36. The *fourth* matter that supports Mr Agostino's evidence about the circumstances in which the payments were made is that, in fact, the AWU had a preference for OneForce over NLS. Mr Leo gave evidence that Northern Labour Solutions did not encourage union membership and was reluctant to let the AWU talk to the pickers they engaged.⁷¹ Thus, it is likely that, in fact, the use of NLS did contribute to declining union revenues. Mr Leo's evidence was that OneForce was a 'union friendly' labour hire contractor, and that he expected that it would encourage union membership.⁷² Mr Leo accepted that, at least from mid-2014, he expected that membership revenue would be maintained through the use of OneForce.⁷³ Mr Leo gave evidence that he was not concerned about losing revenue from members of NLS when there were still Chiquita employees who were not members who he could have chased to become members.⁷⁴ However this evidence, too, should be treated with caution. Ordinarily, a union official would be concerned about a loss of revenue in these circumstances (and also about chasing Chiquita employees who were not members).

37. For the above reasons, the account of Mr Agostino as to the circumstances in which the arrangement was reached and purpose of

⁷⁰ Frank Leo, 15/9/14, T:21.37-41, 22.1-47, 23.110.

⁷¹ Frank Leo, 15/9/14, T:23.32-42.

⁷² Frank Leo, 15/9/14, T:25.23-34; witness statement, 15/9/14, para 31.

⁷³ Frank Leo, 15/9/14, T:26.3-15.

⁷⁴ Frank Leo, 15/9/2014, T:15.21-24, 17.18-26.

the payments should be preferred. It is necessary to refer to two further matters regarding those circumstances.

38. There was a dispute between Mr Agostino and Mr Leo about whether the arrangement was struck during EBA negotiations. Mr Agostino disputed that whilst Mr Leo said that a claim for paid education was included in the AWU's logs of claim and discussed and agreed to during EBA negotiations it was not included in the EBA because Mr Agostino did not want it to be.⁷⁵ Logs of claim served by the AWU in October 2002 and February 2003 include unquantified claims for 'paid education'.⁷⁶ Not very much turns on this dispute because it is unlikely that the arrangement between Mr Agostino and Mr Leo was simply the result of Mr Agostino accepting these claims. In the first place, Mr Agostino's evidence was that he understood that those claims concerned the right of Chiquita employees to be paid by Chiquita when they attended training.⁷⁷ In the second place, it is inherently unlikely that Mr Agostino would have agreed to such claims but then refused to have them included in the EBA. Mr Leo did not suggest any reason for Mr Agostino's refusal and none suggests itself. In the third place, on any view, the arrangement Mr Agostino reached with Mr Leo was reached at the time that EBA negotiations were ongoing – that is, around the middle of 2003.

39. The other additional matter is that there was some evidence as to what became of the payments. The effect of Mr Agostino's evidence was that no training was provided to Chiquita as a result of the payments

⁷⁵ Frank Leo, witness statement, 15/9/14, para 19.

⁷⁶ Shorten MFI-13, 9/7/15, pp 1, 2, 8.

⁷⁷ Joseph Agostino, 18/9/14, T:155.5-9; 169.36-47, 170.1-23.

but that he thought the payments were to be used for training AWU members not only at Chiquita but at other sites.⁷⁸ In giving this evidence Mr Agostino (who was in charge of training at Chiquita) was adamant that Mr Little was incorrect in his evidence⁷⁹ that some training occurred. Mr Agostino said that once whilst on AWU premises he noticed some people doing training, but that it did not involve any Chiquita employees and not with the money Chiquita provided.⁸⁰ Mr Little was hesitant and uncertain in giving evidence on this topic (understandably, since Mr Agostino was in charge of training) and Mr Agostino's evidence should be preferred to his. The effect of Mr Leo's evidence was that, beyond his belief that the monies went into general revenue, he had no idea how the money was spent.⁸¹

D UNFAVOURABLE 2004 EBA

40. The 2004 EBA left most Chiquita employees worse off financially than they were under the 2001 EBA.⁸² In broad terms, this was due to two features of the 2004 EBA. First, it permitted Chiquita to decrease the number of workers employed by it and increase the number of workers employed by labour hire companies. Secondly, it permitted those labour hire workers to be paid less than Chiquita employees, and in some instances less than such employees were paid under the 2001 EBA.

⁷⁸ Joseph Agostino, 18/9/14, T:139.30-47, 140.1-30.

⁷⁹ Stephen Little, 15/9/14, T:36.23-47, 37.1-6.

⁸⁰ Joseph Agostino, 18/9/14, T:140.5-18.

⁸¹ Frank Leo, 15/9/14, T:20.16-47, 21.1-8.

⁸² For convenience, this part of these submissions will refer to the 2001 EBA only, although precisely the same points can be made about a comparison between the 2004 and 2003 EBAs. The 2003 EBA in substance extended the 2001 EBA for a further year.

41. Before exploring these two matters in more detail, it is necessary to observe that there may be situations in which, for reasons such as a deterioration in economic conditions, employees of a company are left in a worse position under one EBA than they were under its predecessor. If such an EBA is the result of the fully informed consent of those employees then there is nothing inherently objectionable about such an outcome.

42. However, where, at the time of negotiations between the union and an employer for an EBA an arrangement is struck for the payment of money by the employer to the union, and that arrangement is not disclosed to the employees, and those employees obtain no discernible benefit from that arrangement, it is hard to see an unfavourable EBA as necessarily the result of unfavourable economic conditions. Understandably, some Chiquita employees who have since found out about the arrangement have expressed dissatisfaction with it. For example, Sharon Dellevergini was a picker employed by Chiquita from 1991 to 2004 and was made redundant shortly after the 2004 EBA was approved. She gave evidence that she had no knowledge of the payments of \$4,000 per month in 2003 and 2004. She said in her witness statement:⁸³

When I heard about it I was dumbfounded but it made sense to me considering the lack of support we received from the AWU during the redundancy process. It appeared to me during this time that the AWU was clearly doing what Chiquita wanted.

43. Secret arrangements of the kind under consideration naturally give rise to such appearances.

⁸³ Sharon Dellevergini, witness statement, 21/10/15, para 50.

Redundancies and transfer to labour hire

44. Under the 2001 EBA, Chiquita was obliged to maintain the following minimum employment levels: 240 employees at Mernda and 37 employees at Yarrambat.⁸⁴ Under the 2004 EBA, those numbers were reduced. Clause 12 of the 2004 EBA required there to be 120 Chiquita employees of which 90 were to be permanently based at Mernda and 30 ‘flexis’ based at Yarrambat. The phrase ‘flexis’ referred to the fact that those workers may be called to work at Mernda.⁸⁵
45. The 2001 EBA imposed corresponding restrictions on the number of labour hire workers that Chiquita was permitted to use. Clause 22 capped the number of such workers at 100 in the ‘A-site’ and 40 across the remainder of Mernda. No labour hire was permitted at Yarrambat without the agreement of the AWU. Under the 2004 EBA, there were no corresponding restrictions.⁸⁶
46. Mr Agostino gave evidence that Chiquita utilised what were from its point of view the more favourable provisions regarding used of labour hire. His evidence was that following the 2004 EBA Chiquita employed as pickers only the minimum number of in-house staff and sourced the remainder of its labour requirements from labour hire

⁸⁴ Shorten MFI-13, 9/7/15, p 64 (clause 10.2).

⁸⁵ Shorten MFI-13, 9/7/15, p 89 (clause 12).

⁸⁶ Shorten MFI-13, 9/7/15, p 94 (clause 25).

arrangements. He said that by the end of 2004 there up to 350 contractors.⁸⁷

47. The 2004 EBA allowed Chiquita to transfer employees from direct employment with Chiquita to employment as labour hire workers with OneForce which had a recruitment office at the Mernda site.⁸⁸ Chiquita achieved this with the knowledge and assistance AWU.
48. A number of former Chiquita employees gave evidence that soon after the finalisation of the 2004 EBA they were made redundant.
49. Sharon Dellevergini gave evidence that during a meeting between Frank Leo and Chiquita staff concerning the 2004 EBA, Frank Leo said to the pickers words to the following effect:⁸⁹

The company needs to make redundancies.

You are lucky to be getting any redundancy payment because you are employed as casuals. Casuals are not entitled to anything.

You can come back to work as agency workers.

You can keep your same jobs through One Force.

50. Approximately one week after the vote for the 2004 occurred Sharon Dellevergini accepted a voluntary redundancy on the basis that she

⁸⁷ Joseph Agostino, second witness statement, 18/9/14, para 10.

⁸⁸ Marjorie Hodgson, witness statement, 21/10/15, para 25; Marion Rogers, witness statement, 21/10/15, para 42.

⁸⁹ Sharon Dellevergini, witness statement, 21/10/15, para 23.

could apply for her same job through OneForce. She applied for a role through OneForce but was unsuccessful.⁹⁰

51. Josephine Hodgson was a picker employed by Chiquita from 1998 to 2004. She gave evidence that approximately 2 months after the 2004 EBA was certified she was asked to attend a meeting with Joe Agostino where he informed her that she had been selected for compulsory redundancy. At the end of this meeting Joe Agostino introduced Josephine Hodgson to a representative of OneForce. Josephine Hodgson applied for work with OneForce but was unsuccessful.⁹¹ She could not recall whether Frank Leo spoke to the pickers about being transferred to OneForce but thought if she did not take the redundancy and apply for a job with OneForce she would be sacked.⁹²

52. Marjorie Hodgson was a picker employed by Chiquita for 18 years.⁹³ Marjorie Hodgson took a voluntary redundancy from Chiquita and was successful in transferring to employment with OneForce. She worked as a labour hire employee with one Force for about 12 months.⁹⁴

53. Marion Rogers was a picker employed by Chiquita from 1991 to 2004. She took a voluntary redundancy soon after the 2004 EBA was certified. Marion Rogers was told by Joe Agostino that if she wanted to continue working at Mernda she would have to work for OneForce.

⁹⁰ Sharon Dellevergini, witness statement, 21/10/15, paras 37-41.

⁹¹ Josephine Hodgson, witness statement, 21/10/15, paras 3, 44-64, 70-77.

⁹² Marjorie Hodgson, witness statement, 21/10/215, paras 16, 21.

⁹³ Marjorie Hodgson, 21/10/15, T:855.33-38.

⁹⁴ Marjorie Hodgson, witness statement, 21/10/15, paras 8-9.

Marion Rogers gave evidence that she did not want to work for OneForce as she would be required to work for a flat hourly rate with no entitlement to bonuses.⁹⁵

54. Labour hire is insecure work. Once a Chiquita employee such as Marion Rogers was transferred from direct employment with Chiquita to a labour hire arrangement with OneForce, Chiquita was no longer required to ensure that worker was paid the federal minimum wage, award rates, leave entitlements or superannuation. The Award was a consent award which only bound Chiquita, its employees and the AWU. Chiquita merely had an obligation to the AWU under clause 25 of the 2004 EBA to ensure that workers at Chiquita were to be engaged in accordance with the 2004 EBA. This is not a right that OneForce labour hire workers could have enforced themselves. Only the AWU could take steps on their behalf to ensure OneForce employees working at Chiquita were paid correctly. Once Chiquita employees were transferred to OneForce they lost the protections provided for by the Award. This is discussed further below.

Labour hire workers paid less to do more

55. As stated in paragraph 5 above, the 2001 EBA required all labour hire workers to be paid on the same terms as Chiquita employees would be paid under the EBA. The 2004 EBA contained a similar clause.⁹⁶ However, there were two significant differences between the 2004 and 2001 EBAs in this regard.

⁹⁵ Sharon Dellevergini, witness statement, 21/10/15, paras 3, 42, 44.

⁹⁶ Shorten MFI-15, 9/7/15, p 94 (clause 25).

56. The first was that the 2004 EBA required any labour hire workers to be supplied by OneForce Recruitment, whilst the 2001 EBA contained no such restriction. For the reasons set out above, this benefited both the AWU and Chiquita. Mr Agostino's evidence, referred to above, was that OneForce paid employees the same rates as other labour hire companies.
57. The second difference was that the 2004 EBA made express provision for the payment of labour hire employees in some circumstances at lower rates than Chiquita employees. That is, although clause 25 of the 2004 EBA required labour hire workers to be 'engaged in accordance with the terms and conditions of the certified agreements' between the AWU and Chiquita, the terms and conditions of the 2004 EBA permitted Chiquita to pay labour hire workers at lower rates than Chiquita employees. In particular, rates for labour hire workers were lower in two respects.
58. First, the rates labour hire workers were entitled to for weekend work were lower. Under the 2001 EBA, first preference for weekend work was given to Chiquita employees.⁹⁷ Under the 2001 EBA all Chiquita workers (whether employees or labour hire staff) working on weekends were entitled to Award rates.⁹⁸ Under the Award, workers were entitled to the following penalty rates:⁹⁹

- (a) Saturdays up until 12pm at time and a half (clause 26);

⁹⁷ Shorten MFI-15, 9/07/15, p 64(clause 12).

⁹⁸ Shorten MFI-15, 9/07/15, p 62(clause 6); section 170LY of *Workplace Relations Act 1996* in force as at 1 August 2001.

⁹⁹ *Chiquita Mushrooms Pty Ltd Victorian Production Award*, Fair Work Commission, www.fwc.gov.au/documents/awardsandorders/html/PR925831.htm, accessed 5/11/2015.

- (b) Saturdays after 12pm at double time (clause 28.2.2);
- (c) Sundays at double time (clause 27); and
- (d) Public holidays at double time and a half (clause 32.3).

59. These weekend and public holiday penalty rate entitlements were provided for by the Award since at least 1994.¹⁰⁰

60. Under the 2004 EBA, however, the AWU and Chiquita agreed to introduce a weekend crew employed by a labour hire company.¹⁰¹ Such workers were paid at \$18.50 per hour, with 4% increases per annum. In addition, no piece rate was payable on weekends.¹⁰²

61. Under the 2004 EBA Chiquita employees simply could not work on weekends unless more than 80 workers were required. In that event, first preference is to employ Chiquita employees.¹⁰³ At least in 2004, the likelihood of this occurring appeared to be remote. The 'EBA newsletter' sent to Chiquita employees dated 7 July 2004 refers to this clause but proceeds on the basis that no more than 80 persons will work on weekends.¹⁰⁴

¹⁰⁰ *Campbell Mushrooms Pty Ltd Victorian Production Award 1994*, Fair Work Commission, www.fwc.gov.au/documents/awardsandorders/L6498.doc, accessed 5/11/2015.

¹⁰¹ Shorten MFI-15, 9/07/15, p 89 (clause 11).

¹⁰² Shorten MFI-15, 9/07/15, p 89; Joseph Agostino, second witness statement, 18/9/14, para 11.

¹⁰³ Shorten MFI-15, 9/07/15, p 89.

¹⁰⁴ Shorten MFI-15, 9/07/15, p 57.

62. Under the 2004 EBA all workers employed directly by Chiquita who worked on weekends were entitled to Award rates.¹⁰⁵ Therefore under the 2004 EBA from 31 May 2004 to 31 May 2005, an experienced picker employed directly by Chiquita was entitled to:¹⁰⁶

(a) Saturdays up until 12pm at \$22.17 per hour (\$14.78 x 1.5);

(b) Saturdays after 12pm at \$29.56 per hour (\$14.78 x 2);

(c) Sundays at \$29.56 per hour (\$14.78 x 2) ; and

(d) Public holidays at \$36.95 (\$14.78 x 2.5).

63. The need to avoid paying weekend penalty rates was a matter of some significance to Chiquita and was emphasised by Chiquita during EBA negotiations. Minutes of negotiations that took place on 7 February 2003 record: '[m]ushrooms is a 7 day operation but we can't afford to operate fully over weekends (like our competitors) because of penalty rates'.¹⁰⁷ Similar concerns were expressed at other meetings.¹⁰⁸

64. The second respect in which the terms and conditions for labour hire workers were less favourable than Chiquita employees was the piece rate payable for pre-pack button mushrooms. Under the 2001 agreement, the rate was \$3.08 per 2kg box for all workers and a limit

¹⁰⁵ Shorten MFI-15, 9/07/15, p 62 (clause 6); section 170LY of *Workplace Relations Act* 1996 in force as at 1 August 2001.

¹⁰⁶ Shorten MFI-15, 9/07/15, p 88.

¹⁰⁷ Shorten MFI-15, 9/07/15, p 5.

¹⁰⁸ Shorten MFI-15, 9/07/15, pp 10-11, 32.

of 10 pre-packs per day per worker was imposed.¹⁰⁹ Under the 2004 agreement, the same rate was applicable for Chiquita employees with a limit of 15 pre-packs per day.¹¹⁰ In contrast, labour hire workers were to be paid at half that rate (that is, at 77c per kilo) but there were no limits to the number of pre-packs they could be required to pick.¹¹¹

65. The importance to Chiquita of pre-packs was emphasised during the negotiations for the 2003 EBA. Minutes of negotiations that took place on 7 February 2003 record that '[d]emand for prepacks is growing by 30% throughout Australia'.¹¹² Minutes of a meeting of 25 November 2003 record a discussion about pre-packs which begins with Chiquita expressing the view that '[o]ur future is in pre-packs' and the AWU expressing a concern that '[w]e will not be able to sell a reduction or halving of the button prepack rate'.¹¹³ Similar concerns were expressed at other meetings.¹¹⁴ Mr Leo gave evidence to the following effect:¹¹⁵

'one of the issues, main issues I had at that time was the picking of pre-packs and that was their main area of making money and our members were adamant they weren't going to pick more than 15 a day, and the only way to do any better than that was to allow labour hire'

¹⁰⁹ Shorten MFI-13, 9/7/15, p 63 (clauses 8, 9).

¹¹⁰ Shorten MFI-13, 9/7/15, p 88 (clauses 8, 10).

¹¹¹ Shorten MFI-13, 9/7/15, pp 88, 90 (clauses 10, 14).

¹¹² Shorten MFI-13, 9/7/15, p 3.

¹¹³ Shorten MFI-13, 9/7/15, p 35.

¹¹⁴ Shorten MFI-13, 9/7/15, p 32.

¹¹⁵ Frank Leo, 15/9/14, T:28.10-14.

E OH&S AND THE 2004 EBA

66. A number of witnesses claimed that the 2004 EBA resulted in an improvement in working conditions for pickers. There are significant reasons to doubt such claims. As with wages, it is not obligatory for an EBA to result in an improvement in working conditions. Further, as Mr Leo said in his evidence, it is not obligatory to include in an EBA particular matters dealing with OH&S issues and indeed often it will be the case that, entirely appropriately, such matters are dealt with outside an EBA. It is necessary to deal with the issue for present purposes because the proposition that the 2004 EBA improved OH&S on the site was advanced to bolster claims that the paid education arrangement did not result in an unfavourable EBA.

The Piece Rate System

67. There was some evidence that the ‘piece rate’ system of pay under the 2001 EBA exacerbated OH&S issues. In summary, that was a system of remuneration which encouraged workers to pick mushrooms at a faster rate. The detail of the ‘piece rate’ system was as follows. Under the 2001 EBA, pickers were paid at an hourly rate together with a ‘bonus’. In broad terms, mushrooms picked were packaged in two different ways: in 4kg boxes and in 2kg ‘pre-pack’ boxes or trays. A ‘bonus’ was payable under the 2001 EBA for each 4kg box of mushrooms packed per hour in excess of four boxes.¹¹⁶ There was no cap on the number of 4kg boxes that could be packed.

¹¹⁶ Shorten MFI-13, 9/7/15, p 63 (clause 8).

68. Pre-packs were boxes or trays with about 10 punnets on them. The punnets were filled with mushrooms and, ultimately, sold in that form. Pre-packs were more difficult to pack because only the best quality mushrooms could be used and because of the shape of the pre-packs.¹¹⁷ A bonus of \$3.08 per 2kg 'pre-pack' box was payable but there was a cap of 10 pre-packs per day per employee.¹¹⁸ It would appear that pickers preferred to pick boxes to pre-packs, and that the cap of 10 pre-packs per day was designed to prevent Chiquita from requiring employees to pick more than that amount, rather than to stop employees from picking more than that amount.
69. For some pickers, the 'bonus' rate was a significant component of pickers' remuneration. Sharon Dellevergini gave evidence that on average she would pick 10 boxes per hour, and thus that the bonus rate formed a large portion of her wages.¹¹⁹ Marion Rogers gave evidence that she did not want to work for OneForce after the 2004 EBA because workers were paid at a flat hourly rate without bonuses.¹²⁰ In contrast, Marjorie Hodgson said that bonuses did not form a large part of her wages like some other pickers because she was not a fast picker.¹²¹

¹¹⁷ Sharon Dellevergini, 21/10/215, T:836.26-35; Marion Rogers, witness statement, 21/10/15, para 34; Marion Rogers, 21/10/15, T:865.38-47, 866.1-15.

¹¹⁸ Shorten MFI-13, 9/7/15, p 63 (clause 9).

¹¹⁹ Sharon Dellevergini, witness statement, 21/10/15, para 8.

¹²⁰ Marion Rogers, witness statement, 21/10/15, para 44.

¹²¹ Marjorie Hodgson, witness statement, 21/01/15, para 29.

OH&S issues identified in the evidence

70. Mr Agostino's view was that the piece rate system contributed to workplace injuries. He gave evidence that, notwithstanding a variety of safety initiatives introduced by Chiquita, workers were prepared to sacrifice their health for financial gain.¹²²
71. The mushroom pickers who gave evidence (including Marion Rogers, a health and safety representative from 1994 until the time she accepted a voluntary redundancy in August 2004) had quite different views to Mr Agostino about the cause of high injury rates. Their view was that the main cause of injuries was the fact that mushroom beds had to be lifted and stacked on trolleys which were difficult to push around.¹²³ They also, to a lesser extent, identified the general repetitive nature of the work as a factor.¹²⁴
72. Mr Leo had a different view again on this issue. He identified a range of safety issues that in his view contributed to injuries on the site. They included trolley collapses, irregular maintenance on trolleys, workers picking for more than seven days in a row, and over-pinned mushroom beds.¹²⁵ An over-pinned mushroom bed was one with too many mushroom spores, making it harder to pick mushrooms.

¹²² Joseph Agostino, first witness statement, 18/9/14, para 13; Joseph Agostino, 18/9/14, T:130.1 -16.

¹²³ Sharon Dellevergini, witness statement, 21/10/2015, paras 14-21; Josephine Hodgson, witness statement, 21/10/2015, paras 20-25; Marion Rogers, witness statement, 21/10/2015, paras 10 – 23; T:868.40-47, 869.1-21.

¹²⁴ Sharon Dellevergini, 21/10/2015, T:838.28-.31; Josephine Hodgson, 21/10/2015, T:847.13 -27; Marjorie Hodgson, 21/10/2015, T:857.11 - 24.

¹²⁵ Frank Leo, witness statement, 15/9/2014, para 13.

Overpinning appears to have been the focus of attention from the AWU during this period, at least in relation to OH&S. Bans were issued by the AWU on the picking of mushrooms in over-pinned beds in 2002 and proceedings were commenced in the Australian Industrial Relations Commission. Extensive work was done by the AWU in identifying the problems with overpinning and attempting, in consultation with Chiquita, to develop a definition of overpinned boxes.¹²⁶ Overpinning was described by the AWU's National OHS Officer in correspondence to the AIRC in September 2002, as 'the central feature' in causing injuries at the site.¹²⁷

OH&S under the 2004 EBA

73. Mr Leo's evidence was that, generally, OH&S issues were not addressed in the 2004 EBA.¹²⁸ Consistently with that, none of the significant factors referred to by the mushroom pickers who gave evidence or by Mr Leo (such as the trolley system and over-pinning) was addressed in the 2004 EBA.
74. The only factor identified as a contributor to increased injuries that was addressed in the EBA was the 'piece rate' system. There were only two respects in which that modification which might have decreased the injury rate was the imposition of a cap on bonuses for boxes of mushrooms. First, as explained above, under the 2001 EBA, workers were paid a bonus rate for every box picked in excess of 4 boxes per

¹²⁶ See generally, Frank Leo, witness statement, 15/9/2014, pp 14-39.

¹²⁷ Frank Leo, witness statement, 15/9/2014, p 19.

¹²⁸ Frank Leo, witness statement, 15/9/214, para 14.

hour. There was no cap on the number of boxes that could be picked per hour. The 2004 EBA imposed a cap of 8 boxes per hour.¹²⁹ The significance of this modification should not be overstated. Ms Dellevergini's evidence was that she picked on average 10 boxes per hour, and for some workers, like Marjorie Hodgson, the bonus was not significant.

75. The second modification to the piece rate system which might have assisted in decreasing the injury rate was the abolition of bonus rates on weekends.¹³⁰ However, as discussed above, only labour hire employees were permitted to work on weekends. This modification therefore did not assist in improving safe working conditions for Chiquita employees (unless they took a redundancy and were offered jobs with OneForce and were prepared to work on weekends without penalty rates).

Conclusion on OH&S

76. There is good reason to be sceptical about the claims of a number of witnesses that the 2004 EBA resulted in a significant reduction in workplace injuries. Mr Agostino, for example, made such claims in his second witness statement.¹³¹ Mr Shorten said that the 2004 EBA 'was aimed at providing greater safety for the workforce', and that 'what drove the 2004 agreement was improved the safety of the

¹²⁹ Shorten MFI-13, 9/7/15, p 88 (clause 9).

¹³⁰ Shorten MFI-13, 9/7/15, p 89 (clause 11).

¹³¹ Joseph Agostino, second witness statement, 18/9/14, paras 11, 13.

workforce'.¹³² Mr Leo's evidence only went so high as to suggest that certain clauses of the 2004 EBA were 'aimed at' reducing injuries.¹³³

77. In truth, what drove the 2004 EBA was the adverse effect on Chiquita's business of its high Workcover premiums. The solution the parties arrived at was to shift the burden of unsafe work practices to an AWU approved labour hire company. The solution was not a good result for workers in any sense. Sometimes a combination of factors such as economic conditions will mean that an EBA produces less favourable conditions for employees than its predecessor. But this was a bad result that was arrived at in circumstances where Chiquita and the AWU had entered into a secret side deal for the payments of \$24,000.

F CONCLUSIONS REGARDING CONDUCT OF AWU AND CHIQUITA

78. Substantially the same issues arise in relation to these payments as arise in the ACI case study.

Breach of fiduciary duty

79. For the reasons given in the submissions on the ACI case study, it is submitted that Mr Leo and the AWU owed those of its members who were Chiquita employees fiduciary duties in the context of EBA negotiations with Chiquita. In entering into the arrangement for the

¹³² Bill Shorten, 9/7/15, T:182.12-14, 182.32-34.

¹³³ Frank Leo, witness statement, 15/9/14, paras 21-22.

payment of 'paid education', Mr Leo and the AWU may have been acting in a position of actual conflict or a position where there was a substantial possibility of such conflict. The payments conferred a direct benefit on the AWU and were contrary to the interests of Chiquita employees because they weakened the AWU's bargaining position in EBA negotiations. The payments were not disclosed to Chiquita employees.

80. For the above reasons, Mr Leo and the AWU may have breached their fiduciary duties to Chiquita employees who were AWU members.

Corrupt Commissions

81. For substantially the reasons expressed in the submissions on the ACI case study, the AWU and Mr Leo were acting as 'agents' of Chiquita employees, within the meaning of s 175(1) of the Crimes Act 1958 (Vic) at the time the arrangement to make the payments was negotiated.
82. The arrangement, and the payments pursuant to it, were such as to tend to influence the AWU and Mr Leo to show favour to the Chiquita in relation to the affairs of its employees. Gratuitous payments of substantial amounts to a union by an employer inevitably tend to produce such influence.
83. Were the payments made 'corruptly'? The issue is whether Chiquita intended the payments to influence Mr Leo and the AWU to show

Chiquita favour in relation to the affairs of Chiquita's employees, and whether Mr Leo believed Mr Agostino had that intention.¹³⁴

84. So far as Chiquita is concerned, the decision to make the payments was ultimately Mr Little's. However, for the reasons given earlier in these submissions, his purposes, were essentially the same as Mr Agostino's, that is, to avoid the industrial unrest that it was thought would be likely to arise if the AWU discovered the extent of Chiquita's use of independent contractors. A purpose of this kind entails an expectation or belief that the payments would cause the AWU to showing favour to Chiquita in its relations with its employees. Chiquita's use of labour hire in 2003 exceed the number of labour hire workers permitted under the 2001 EBA, and, when it came into force, the 2003 EBA. Chiquita's employees. If discovered that would have been a legitimate reason for complaint by Chiquita employees and by the AWU on their behalf. Chiquita's purpose in making the payments was to keep the AWU 'at bay' in this regard. This, it is submitted, is sufficient to warrant a finding that he made or offered the payments 'corruptly' within the meaning of s 176(2)(b).
85. Accordingly, it is submitted that Chiquita may have committed an offence under s 176(2)(b).
86. So far as Mr Leo and the AWU are concerned, if, as is submitted, one accepts Mr Agostino's account of the circumstances in which the payments were made, then Mr Leo must have believed that in making the payments Chiquita was intending the payments to influence Mr

¹³⁴ *R v Dillon and Riach* [1982] VR 434 at 436; *R v Gallagher* [1986] VR 219 at 231.

Leo and the AWU to show favour to Chiquita in relation to Chiquita's claim to use more labour hire. The payments, on Mr Agostino's evidence, arose out of Mr Leo's complaint that the AWU was losing revenue as a result of the use of a labour hire company that was not 'union friendly'. Mr Leo could not have thought that a company in such an evidently difficult financial position would have made the payments out of some altruistic purpose. Mr Leo did not claim that he took any steps to disclose the arrangement to members who were Chiquita employees.

87. For the above reasons, it is submitted that Mr Leo procured the payments 'corruptly' within the meaning of s 176(1)(b) and may have contravened that section.
88. It is also submitted that the AWU may have contravened that section. As in the case of Mr Melhem and ACI, Mr Leo did not procure the payments for his personal benefit: they were benefits to the AWU and received and adopted by it. Mr Leo was at all relevant times Assistant Secretary and for the reasons advanced in submissions on the Thiess Case Study, that is sufficient, it is submitted, for his conduct to be attributed to the AWU on the basis that he was acting as its 'directing mind and will'.
89. Accordingly it is submitted, the AWU may have contravened s 176(1)(b).