

SUBMISSIONS OF COUNSEL ASSISTING

AWU: CHAPTER 7

UNIBUILT

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A MR LOCKYER'S GROUP OF COMPANIES

1. Mr Ted Lockyer is retired. Previously, he conducted a business of providing labour labour services. That business was conducted through a variety of companies.
2. Unibuilt Pty Ltd was incorporated on 25 August 2004.¹ Mr Lockyer was the sole director of Unibuilt from 1 January 2006. Unibuilt was placed into liquidation on the application of the Deputy Commissioner of Taxation on 7 October 2010. It is still in the process of being wound up. The liquidator's final report indicates a variety of actions were contemplated by the liquidator for the purpose of pursuing funds for creditors. It is apparent that the liquidator took the view that Unibuilt traded whilst insolvent from at least 30 June 2008. Letters of demand were issued to Mr Lockyer in an attempt to recover the amount of \$630,391.87.²
3. Mr Lockyer also has been the principal of a number of other companies. One such company was Unibilt Pty Ltd (**Unibilt**). Unibilt was incorporated on 31 January 2003 and was then named EA Lockyer Pty Ltd.³ On 3 September 2006 EA Lockyer Pty Ltd changed its name to Unibilt. Mr Lockyer was the sole director of Unibilt from 31 January 2003 until its deregistration on 18 November 2010 and Mrs Lockyer was the sole shareholder.
4. Mr Lockyer also was the principal of Maintenance Resource Engineering Pty Ltd (**MRE**), a company incorporated on 22 June 1994.⁴ Mr Lockyer was the sole director of MRE from 2002 until its deregistration in November 2012. Capital Site Services Pty Ltd was another of Mr Lockyer's companies it was incorporated on 29 January 2003.⁵
5. Mr Lockyer had a close relationship with the AWU. An example of that was a proposal sent by Unibuilt on 22 September 2004, shortly after its incorporation, to the Shell

¹ Lockyer MFI-1, 16/10/15, p 1.

² Lockyer MFI-1, 16/10/15, p 86.

³ Lockyer MFI-1, 16/10/15, pp 8-9.

⁴ Lockyer MFI-1, 16/10/15, p 13.

⁵ Lockyer MFI-1, 16/10/15, p 20.

Refinery for the provision of scaffolding and crane hire services.⁶ In the proposal to Shell Refinery, Unibuilt said the following:⁷

Unibuilt has had an enterprise agreement designed with the cooperation of The Australian Workers' Union who has a vested interest in ensuring the continuing operation and investment in the Shell Corio Refinery. We anticipate having our agreement certified over the next four weeks (copy attached). The management of Unibuilt has a strong relationship with the Australian Workers' Union, which has enabled us to have a very flexible Enterprise Agreement as well as direct access to both the State Secretary and the Federal Secretary who have given us their full support.

6. It is obvious that Mr Lockyer was referring to Mr Melhem and to Mr Shorten in that letter. In private hearing Mr Lockyer, however, claimed that he did not know who the State Secretary and Federal Secretary were.⁸ He sought to underplay the extent of his relationship by claiming that these references were 'a bit of literary licence'.⁹ In public hearing, he ultimately conceded that this was one way in which he sought to sell Unibuilt to customers.¹⁰
7. It would appear that the enterprise agreement referred to in the above proposal was the agreement signed on 17 January 2005 by the AWU and Unibuilt.¹¹ It was signed on behalf of the AWU by Mr Melhem. The agreement was certified on 27 January 2005. The agreement had a nominal expiry date of 30 November 2007.¹²

B EMPLOYMENT OF MR LANCE WILSON

8. In early 2006 Mr Shorten was preselected by the Australian Labor Party for the seat of Maribyrnong. On 2 August 2006, Mr Shorten resigned as secretary of the Victorian Branch of the AWU and Mr Melhem replaced him. By at least some point in late 2006 or early 2007, Mr Shorten had begun preparations for campaigning for the Federal Election that was anticipated to be held in November 2007.

⁶ Lockyer MFI-1, 16/10/15, pp 343-344.

⁷ Lockyer MFI-1, 16/10/15, p 343.

⁸ Lockyer MFI-1, 16/10/15, T:11.37-40.

⁹ Lockyer MFI-1, 16/10/15, p12.12 - .23.

¹⁰ Ted Lockyer, 16/10/2015, T:515.8-.10.

¹¹ Shorten MFI-1, 8/7/15, pp 248-249.

¹² Shorten MFI-1, 8/7/15, p 225.

9. Both Mr Shorten and Mr Lockyer gave evidence that at some point in late 2006 or early 2007 Mr Shorten asked Mr Lockyer if he would be willing to pay to employ someone to support his campaign for Parliament and Mr Lockyer agreed.¹³ The conversation occurred at the AWU's offices in Spencer Street: that was the only place that Mr Shorten and Mr Lockyer tended to meet.¹⁴ Neither Mr Lockyer nor Mr Shorten was able to give any clear indication as to what Mr Lockyer was doing at the AWU's offices on this day. Mr Shorten's evidence was that he did not think it was to discuss an EBA.¹⁵ Mr Lockyer was unable to proffer any explanation as to why he was at the AWU's offices on that day, but denied that he could have been discussing an EBA.¹⁶ In private hearing he said he could have been talking to Mr Melhem or one of the organisers about 'what work was happening'.¹⁷
10. At some point after the above conversation, in February 2007, Mr Shorten, Mr Lockyer, and Mr Lance Wilson had a meeting at a café in Errol Street, North Melbourne. At that meeting, it was agreed that Unibuilt would pay Mr Wilson to work as Mr Shorten's campaign manager.
11. On 19 February 2007, Mr Michael Chen of the AWU emailed to Mr Lockyer a proposed contract between Unibuilt and Mr Wilson.¹⁸ It was in the form of a letter from Unibuilt to Mr Wilson. It began:
- 'I am pleased to offer you the position of Research Officer with Unibuilt Pty Ltd. You will be employed in accordance with the conditions of employment listed below. Please return the signed original to my office as soon as possible ... '
12. The letter proceeded to set out details of Mr Wilson's salary and entitlements. The description of Mr Wilson's employment in the contract was false. Mr Wilson did not occupy the position of 'research officer' with Unibuilt. Unibuilt was a labour hire company with no need of a research officer. In truth, Mr Wilson was operating at all times under the direction of Mr Shorten as Mr Shorten's campaign officer.¹⁹ He did not

¹³ Bill Shorten, 8/7/15, T:22.3 - .9.

¹⁴ Bill Shorten, 8/7/15, T:21.25 - .29.

¹⁵ Bill Shorten, 8/7/15, T:22.30 – 23.18.

¹⁶ Ted Lockyer, 8/7/15, T:494.17 – 494.39.

¹⁷ Lockyer MFI-2, 16/10/15, p22.19 - .30.

¹⁸ Shorten, MFI-3, 8/7/15.

¹⁹ Wilson MFI-1, 16/10/2015, p18.31-.32.

do any work for Mr Lockyer or Unibuilt.²⁰ Mr Wilson said that he never met with Mr Lockyer or spoke to him again.²¹

13. Mr Shorten accepted that the term 'research officer' in the document was incorrect and that Mr Wilson was a 'campaign resource'.²² Whether Mr Shorten ultimately accepted that Mr Wilson was not employed by Unibuilt is less clear. He gave the following evidence:²³

Q. It is not just a question of terminology, is it? He wasn't working for Unibuilt at all?

A. He was employed by Unibuilt and donated to work on my campaign.

Q. He had nothing to do with Unibuilt did he? Other than his meeting with Mr Lockyer that you attended, he simply worked on your campaign and his wages were paid for by Unibuilt?

A. It was a donation by Unibuilt of a person to work on my campaign, that is correct.

14. Mr Lockyer said he never signed the contract although he proceeded on the basis of it.²⁴ The document was drafted by Michael Chen in the AWU's offices on the instructions of Mr Shorten.²⁵ Mr Chen sent the contract to Mr Lockyer on 19 February 2007 by email. The email began 'Bill asked me to email you this letter of offer'.²⁶ Mr Shorten said he did not remember whether he had looked at the letter after Mr Chen had prepared it.²⁷

15. Mr Shorten did not recall what instructions he gave to Mr Chen however when asked if he told Mr Chen to describe Mr Wilson's position as research officer with Unibuilt, Mr Shorten said 'no, I'm not sure that I would have said that. He was a campaign resource, and that is how I would have described it'.²⁸ Mr Shorten's ultimate position on the instructions he gave Mr Chen is encapsulated by the following evidence:²⁹

²⁰ Lockyer MFI-2, 16/10/15, p29.41-44.

²¹ Wilson MFI-1, 16/10/15, p16.35-44.

²² Bill Shorten, 8/7/15, T:20.47-21.2.

²³ Bill Shorten, 8/7/15, T:21.5-15.

²⁴ Ted Lockyer, 16/10/15, T:490.40 – 491.9.

²⁵ Bill Shorten, 8/7/15. T:13.25-14.9; Shorten MFI-3, 8/7/15.

²⁶ Shorten MFI-3, 8/7/15.

²⁷ Bill Shorten, 8/7/15, T:20.25-33.

²⁸ Bill Shorten, 8/7/15, T:14.34-15.33.

²⁹ Bill Shorten, 8/7/15, T:16.16-21.

I would have asked Michael Chen could he please provide a draft document, “Mr Lockyer from Unibuilt is going to employ someone who is going to work on my campaign”, but beyond that I have to say, I don’t micromanage every detail of every administrative arrangement.

16. Mr Chen said he had no particular memory of Mr Wilson’s employment arrangements.³⁰
17. Mr Wilson was paid \$748 per fortnight by MRE from 28 February 2007 until 17 May 2007. The reason Mr Wilson was paid by MRE and not Unibuilt during this period is obscure. Mr Lockyer said it was because ‘when I transfer money to pay people, unless I specifically said it was coming from a particular company account, it would automatically go out as MRE because that was the original account that was at that bank’.³¹

C INTERPOSITION OF AWU

18. On 16 May 2007, Mr Lockyer, on Unibilt letterhead, sent a letter to Mr Melhem.³² The letter began:

‘As per our agreement, Lance Wilson will be contracted to Unibilt as of 17 May 2007. Unibilt agrees to pay you weekly for work completed by Lance...’

19. The description of Mr Wilson’s position, again, was false. The letter proceeded to set out details of Mr Wilson’s salary and entitlements.
20. At his private hearing, Mr Lockyer said, a number of times, that he did not recall why the arrangement for paying Mr Wilson changed in May 2007.³³ In public hearing, however, he said that the arrangement changed because he (or his companies) were having cashflow problems.³⁴ When it was put to him that he did not give this explanation at his private hearing, Mr Lockyer responded ‘maybe you didn’t ask me the question’. The question, however, was asked and more than once.

³⁰ Michael Chen, witness statement, 21/10/15, para 42.

³¹ Ted Lockyer, 16/10/2015, T:492.47 – 493.32; Lockyer MFI-2, 16/10/2015, p30.17-29.

³² Shorten MFI-1, 8/7/15, p261

³³ Lockyer MFI-2, 16/10/2015, p30.35-31.22.

³⁴ Ted Lockyer, 16/10/2015, T:499.34 - .38; 501.7 - .13.

21. Mr Melhem gave evidence after Mr Lockyer. He sought to add to Mr Lockyer's account of the reason for the change by claiming that he was 'definitely aware of complaint about Mr Wilson wasn't getting paid regularly'.³⁵ This evidence should not be accepted. Mr Melhem was then shown Mr Wilson's bank statements during the period that he was 'employed' directly by Unibuilt.³⁶ Those bank statements indicate that Mr Wilson was paid during that time regularly and without delay. Mr Wilson never suggested at his private hearing that this was a reason for the change in the arrangement: the substance of Mr Wilson's evidence was that he did not know why the change occurred.³⁷
22. Mr Melhem said that he spoke to Mr Lockyer a couple of weeks or months before he gave evidence. He said he did not recall whether he spoke to Mr Lockyer about the circumstances in which Mr Wilson came to be employed by the AWU in 2007. He said that he did not remember exactly how he came to be talking to Mr Lockyer but that he thought Mr Lockyer was doing some consultancy work for a cement company around Mr Melhem's office.³⁸ Mr Lockyer's evidence, both on 18 August 2015 and 16 October 2015, was that he was retired.³⁹
23. The evidence of Mr Melhem in the above two paragraphs tells against his credit. So too does Mr Lockyer's different accounts of the reasons for the 16 May 2007 letter at public and private hearing tell against his credit.
24. It may be, however, that although Mr Wilson's wages were paid regularly by Unibuilt (or MRE) Mr Lockyer was in fact having cashflow problems at this time. In fact, Unibuilt (or MRE or Unibilt) ceased paying the AWU later in 2007. Further, as stated above, the liquidator of Unibuilt was of the view that it was insolvent from at least 30 June 2008. The creation of the 'Unibilt' name on 3 September 2006, and the use of the Unibilt letterhead on the letter of 16 May 2007, suggests the possibility that at around this time Mr Lockyer contemplated that Unibuilt would be wound up but its business carried on by Unibilt through a phoenix type arrangement.

³⁵ Cesar Melhem, 22/10/2015, T:984.28-.34.

³⁶ Melhem MFI-3, 22/10/2015.

³⁷ Wilson MFI-1, 16/10/2015, p14.8 - .16.

³⁸ Cesar Melhem, 22/10/2015, T:985.13 – 986.2.

³⁹ Ted Lockyer, 16/10/2015, T:485.35; Lockyer MFI-2, 16/10/2015, p2.29.

25. Mr Wilson said that he had never seen the 16 May 2007 letter before being shown it by the Commission.⁴⁰ He said that he did become aware that in around May 2007 that Unibuilt stopped paying his wages and those wages started being paid by the AWU.⁴¹
26. Mr Shorten said that he did not see the letter of 16 May 2007 until he was provided with documents by the Commission.⁴² Mr Shorten said that he did not know why the letter was sent and that his understanding was that Unibuilt would be paying for Lance Wilson's employment in his campaign. He said that he could not recall whether he was aware of the change in these arrangements at this time. His position appeared to be that in substance nothing changed from his point of view: Mr Wilson remained his campaign director and his wages were paid, in effect, by Unibuilt.⁴³
27. From May 2007, Mr Wilson's wages were paid by the AWU. In turn, the AWU sent invoices to Unibuilt for the amount of those wages. The invoices sent by the AWU and paid by Unibuilt are described in the following table:

	Description	Tax Invoice No.	Amount	Cheque No.
31/05/07	The work was completed by Lance Wilson in May 2007 – 91.20 hours @ \$34.90 (incl GST)	018428	\$3,182.88	000111
27/06/07	The work was completed by Lance Wilson in June 2007 – 144.40 hours @ \$34.90 (incl GST)	018652	\$5039.56	000121
31/07/07	The work was completed by Lance Wilson in July 2007 – 197.60 hours @ \$34.90	019003	\$6,896.24	000130

⁴⁰ Wilson MFI-1, 16/10/2015, p11.33-41.

⁴¹ Wilson MFI-1, 16/10/2015, p13.30-40; 17.25-32.

⁴² Bill Shorten, 8/7/2015, T:27.12-28.

⁴³ Bill Shorten, 8/7/2015, T:27.32-28.45.

	(incl GST)			
31/08/07	The work was completed by Lance Wilson in August 2007 – 152.0 hours @ \$34.90 (incl GST)	019266	\$5,304.80	000140
30/09/07	The work was completed by Lance Wilson in September 2007 – 152.00 hours @ \$34.90 (incl GST)	019575	\$5,304.80	000170
TOTAL			\$32,359.60	

D CESSATION OF PAYMENTS

28. The last two invoices issued by the AWU were not paid by Unibuilt. Those were an invoice for \$6,631 dated 31 October 2007⁴⁴ and an invoice for \$6,100.52 dated 30 November 2007.⁴⁵ Mr Lockyer was sent a reminder email seeking payment of these invoices on 3 April 2008 and 11 September 2008.⁴⁶ On 1 October 2008, Mr Melhem sent an email to Mei Lin with the subject Unibilt and stating ‘can you advise Peter Troedale (scil. Troedel) to write the Unibilt debt’.⁴⁷ This resulted in two credit notes being issued for the two invoices just referred to.⁴⁸
29. Mr Lockyer said initially that he stopped making the payments because ‘I had a cash flow issue’.⁴⁹ He said however that at this time he was frustrated and that:⁵⁰

⁴⁴ Shorten MFI-1, 8/7/2015, p 293.

⁴⁵ Shorten MFI-1, 8/7/2015, p 294.

⁴⁶ Shorten MFI-1, 8/7/2015, p 302.

⁴⁷ Shorten MFI-1, 8/7/2015, p 304.

⁴⁸ Shorten MFI-1, 8/7/2015, p 305-306.

⁴⁹ Lockyer MFI-1, 16/10/15, T:25.6-7.

⁵⁰ Lockyer MFI-1, 16/10/15, T:25.19-23.

At that time I had achieved nothing, at the end of the day, I was dumb enough to think that may be there would be something at the end of the day, but I never went in there with the object of Bill providing me with something.

30. When he was asked what he was hoping to achieve, Mr Lockyer said:⁵¹

When you go to talk to a customer, if you can say to the customer- a potential customer rather – that you've got a good relationship with a trade union, in Victoria, because the trade unions are particularly strong, then that would give you an edge in talking to the customer.

Mr Lockyer went on to say:⁵²

I didn't want Bill in particular to do something. It would be that I could say to them, you can talk to the AWU, and they will tell you that they don't have a problem in working with me.

31. On 24 June 2008, Mr Shorten's office sent an email to Mr Lockyer asking Mr Lockyer to sponsor him on Mr Shorten's track along the Kokoda Trail. All funds raised were to go to a charity in Melbourne. Mr Lockyer on the same day forwarded the email to Mr Melhem and Mr Bob Smith with these comments:⁵³

MMMMMMMMMMMMMMMMMMMM

He does not know when to give up.

HAHAHAHAHAHAHAHAHAHA

32. Mr Lockyer was shown this email and asked whether he was annoyed with Mr Shorten. Mr Lockyer answered:⁵⁴

No, I was just- I felt that I had probably donated enough to Bill...I just felt that Bill had had enough of donations from me and there were other- yes, Bill had enough donations from me.

33. It would seem from a number of Mr Lockyer's answers that position he took, in short, was that he was not winning work in Victoria, and making the payments was no longer worth his while.⁵⁵

⁵¹ Lockyer MFI-1, 16/10/15, T:25.27-32.

⁵² Lockyer MFI-1, 16/10/15, T:25.35-38; 25.43-26.3.

⁵³ Shorten MFI-1, 8/7/2015, p 299.

⁵⁴ Lockyer MFI-1, 16/10/15, T:32.43-33.3.

⁵⁵ Lockyer MFI-1, 16/10/15, T:33.28-31; T:26.7-10.

E PURPOSE OF THE ARRANGEMENTS

34. The evidence of both Mr Shorten and Mr Lockyer was to the effect that the payments by Mr Lockyer's companies of Mr Wilson's wages, either directly or through the AWU, were donations to Mr Shorten or the Maribyrnong campaign.⁵⁶ This, it is submitted, must be correct, at least in the sense that the payments were not made pursuant to any contractual obligation and Mr Shorten was under no obligation to provide anything in return.
35. However, there are a number of curiosities if, in truth, what was involved was a mere donation. There first is that the arrangement was documented in the ways that it was. If, in truth, the arrangement was that Mr Wilson was to be employed by Mr Shorten but paid by Mr Lockyer or one of his companies, it would have been a simple matter to document it in those terms. Instead, false documents were created describing purported employment relationships that did not in truth exist. No witness could or would explain why this was thought necessary or desirable. Nor, it is submitted, does the evidence permit any definite finding to be made as to why the arrangements were set up in this way.
36. A second curiosity, related to the first, is that it was thought necessary to change the arrangement by interposing the AWU, and drafting a further false document to accommodate that. If the nature of the arrangement did not change, why was this change in documentation thought necessary or desirable? The only realistic possibility raised on the evidence is that it was thought at some point necessary to protect Mr Wilson from financial difficulties it was anticipated that Mr Lockyer's companies might have. The difficulty in making that finding, however, is that the two persons in a position to give an explanation for the change, Mr Lockyer and Mr Melhem, were not reliable witnesses. If one does not accept their evidence, the objective circumstances do not permit any sufficiently definite conclusion to be drawn on this issue.
37. A third curiosity, if the payments by Mr Lockyer's companies were in truth donations, is that Mr Lockyer did not record any of the payments as donations in the accounts of Unibuilt. Mr Lockyer said that he did not intend to account for these payments as

⁵⁶ Bill Shorten, 8/7/2015, T:5.33-40; 6.38-7.2; 12.17; 12.45-13.2; 15.4-11; 15.40-41; 22.11-28; 28.19-21; Lockyer MFI-2, 16/10/2015, pp21.33-23.40

donations but rather that he would just 'write it off as an expense'.⁵⁷ The profit and loss statement generated by Mr Lockyer's MYOB system recorded \$2700 in gifts and donations in the 2006 and 2007 financial year. That amount is less than the amount paid to Mr Wilson. The profit and loss statement for their next financial year recorded an amount of \$120 by way of gifts and donations. That, again, is well under the amount paid to Mr Wilson.

38. A fourth curiosity, if the payments were donations, is that Mr Shorten did not disclose the payments to Mr Wilson as donations. Mr Shorten said that this failure to disclose came to his attention in the few days before he gave evidence at the Commission.⁵⁸ Mr Shorten's candidate return for the 2007 Election was signed by him on 6 March 2008. It was drafted by Mr Wilson. It identified the total of gifts or donations received in the relevant period as nil.⁵⁹ On 6 July 2015, Mr Shorten wrote to the acting secretary of the Victorian Branch of the Australian Labor Party requesting that branch amend its financial disclosures for the 2007 Federal Election. The requested amendments were in connection with the payments made to Mr Wilson and also some payments made to Fiona Ward (dealt with below).⁶⁰
39. Mr Shorten said that the letter was written from two sources of information. First, Mr Wilson's group certificates and secondly, the material provided by the Royal Commission.⁶¹ The letter is dated 6 July 2015, the day that the Commission provided to Mr Shorten's legal representatives the bundle of documents containing material regarding Unibuilt and Mr Wilson. Mr Shorten said however, that he had known about the incorrect disclosure for 'a matter of weeks, maybe months' prior to 6 July 2015.⁶² Quite how Mr Shorten came to know of the incomplete disclosure, or why it took until 6 July 2015 to send a letter to the Victorian Branch of the ALP correcting that disclosure was not clear from his evidence. He denied that he was waiting to see whether anything

⁵⁷ Lockyer MFI-2, 16/10/2015, p28.20-35.

⁵⁸ Bill Shorten, 8/7/2015, T:39.18-28.

⁵⁹ Shorten MFI-4, 8/7/2015.

⁶⁰ Shorten, MFI-7, 8/720/15.

⁶¹ Bill Shorten, 8/7/2015, T:68.5-33.

⁶² Bill Shorten, 8/7/2015, T:69.22-27.

regarding the employment of Mr Wilson would emerge in the Royal Commission before making the disclosure.⁶³

40. The above matters, however, do not establish that Mr Shorten promised Mr Lockyer something in return for making the payments. There is no evidence of conduct of that kind.
41. It is plain, however, that Mr Lockyer hoped for a return on the monies that he caused to be spent on Mr Wilson's wages. That is apparent from a number of matters.
42. *First*, his evidence about why he stopped making the payments, discussed in the section above.
43. *Secondly*, the amounts paid were significant for Mr Lockyer's companies. It is inherently unlikely that he would make the payments without an expectation that they would result in a return.
44. *Thirdly*, the connection between the payments and Mr Lockyer's hope that his companies would receive a benefit is apparent from some of the correspondence in evidence. A week after he sent Mr Melhem the letter of 16 May 2007 varying Mr Wilson's employment arrangements, Mr Lockyer sent Mr Melhem an email regarding a proposed EBA for Unibilt for the 'Pilkington Repair Project'.⁶⁴ The temporal proximity of the two pieces of correspondence suggests that, Mr Lockyer's point of view, they were connected.
45. Further, it will be recalled that the Unibuilt EBA was due to expire in November 2007. On 4 October 2007, Mr Lockyer sent Mr Melhem a further draft collective agreement (for Unibilt) regarding a project at Tumet. In the email attaching the proposed agreement, Mr Lockyer asked Mr Melhem to arrange for the EBA to be signed off. In the same email, he noted that he had not paid the July and August accounts for Mr Wilson, and said that he would be in a position to bring them up to date in a short

⁶³ Bill Shorten, 8/7/2015, T:71.36-72.40.

⁶⁴ Shorten MFI-1, 8/7/2015, p 262.

time.⁶⁵ The connection between paying Mr Wilson's wages and maintaining good relations with the AWU is obvious.

46. *Fourthly*, the existence of a good relationship with the AWU was one of the claims made by Mr Lockyer's companies when seeking to promote themselves to potential clients. One example was quoted in the opening section of this chapter. There were other similar examples in evidence.⁶⁶ This was another example of Mr Lockyer's poor performance in the witness box. He took pains to attempt to distance himself from the statements in some of these documents, notwithstanding the evidence that he approved them.⁶⁷

F EMPLOYMENT OF FIONA WARD

Contractual arrangements

47. Mr Shorten's letter of 6 July 2015 referred to a donation of \$11,774.67 for 'campaign support' provided by the AWU.⁶⁸ This is a reference to the salary of Fiona Ward.

48. Ms Ward worked part time for Mr Shorten during the electoral campaign.⁶⁹ She did so pursuant to a contract signed by her on 16 January 2007 and by Mr Shorten on behalf of the AWU National Office.⁷⁰ The contract specified that she was to be offered 'the part time position of Campaign Officer with the AWU National Office'. It specified that she was to 'be responsible to the National Secretary of the union or his/her delegated person'. The Job Description was specified to be:

- Tasks as directed by the National Secretary
- Focus on community and political campaigning as per National Executive decisions.

⁶⁵ Shorten MFI-1, 8/7/2015, p 292.

⁶⁶ Lockyer MFI-1, 16/10/15, pp351, 374, 375, 376, 463.

⁶⁷ Ted Lockyer 16/10/2015, T:515.12 – 518.8

⁶⁸ Shorten, MFI-7, 8/7/15.

⁶⁹ Bill Shorten, 8/7/15, T:17.1-6, Shorten MFI-2.

⁷⁰ Ward MFI-2, 21/10/2015, pp 1-2.

49. The term of employment was specified to be from 15 January 2007 to the next Federal election. Ms Ward was engaged to work two days a week at a salary of \$50,000, 'pro-rata at \$20,000'. Provision was made for the payment of superannuation at 15% and reimbursement of up to \$250 per month for mobile phone costs.
50. Ms Ward said that Mr Shorten offered her the position (p10.18-.20) and that she dealt with Mr Chen in relation to the paperwork: Mr Chen handed her the contract and she signed it.⁷¹ The contract is in similar terms and style to the contract prepared by Mr Chen in connection with Mr Wilson.
51. Ms Ward gave evidence that at that time Mr Shorten offered her the position he indicated to her that she would be working on the 'Labor for Maribyrnong' campaign but employed by the AWU. Her understanding of the arrangement was that she was seconded to Mr Shorten's campaign from the AWU.⁷²
52. Ms Ward said that she worked initially from home and then, when it opened, from Mr Shorten's campaign office in Moonee Ponds (p5). She said she did 'not regularly' have any contact with anyone else from the AWU. She saw herself as working for Mr Shorten. She said that her role did not encompass providing any services to the AWU (p7.15-.17). When asked what she did on a daily basis as campaign officer, she said: 'I worked for the Labor for Maribyrnong campaign, and so I performed a range of functions that supported the campaign' (p5).
53. Ms Ward was paid a gross amount of \$19,694.99 by the AWU National Office over the period 23 January 2007 to 20 November 2007, being \$7,920.32 in the 2006-2007 financial year and \$11,774.67 in the 2007-2008 year.⁷³

Resolutions of the National Executive

54. Mr Shorten in oral evidence suggested that the National Secretary of the AWU had authority to commit resources to political campaigning.⁷⁴ An examination of the rules

⁷¹ Ward MFI-1, 16/10/2015, p12.39-.45.

⁷² Ward MFI-1, 16/10/2015, p10.22- 11.7.

⁷³ Ward MFI-2, 22/10/2015, p26

does not bear out that claim. As National Secretary, Mr Shorten had the power to appoint, control and dismiss National Office Staff⁷⁵ (a power which also resided in the National Executive⁷⁶). Donations, however, required the approval of the National Executive under rule 57 of the AWU rules in force.⁷⁷ Mr Shorten could not, as a fiduciary, participate in any decision to engage or allocate staff to work on his own campaign without the fully informed consent of the National Executive: to so participate would involve acting in a position of conflict between self-interest and his duties to the union.

55. Following his oral evidence, Mr Shorten was asked, through his solicitors, to indicate the basis on which the arrangements in respect of Fiona Ward were authorised. Mr Shorten indicated, through his solicitors, that the arrangements in respect of Ms Ward were discussed with the Executive of the National Branch of the AWU who authorised those arrangements. Through his solicitors, he gave the following more detailed explanation:⁷⁸

1. AWU National Executive support for Mr Shorten's electoral campaign was first informally discussed by the National Executive in January 2006 when the National Executive unanimously endorsed and supported his decision to nominate for Federal Parliament. Those informal discussions took place with the National Executive members at the time.
2. On 23 October 2006 the National Administrative Committee, a sub-committee of the National Executive, noted that a Clerk will be hired for 20 hours per week in the new year (2007) to help organise the campaign against the Howard Government and elect the ALP. Mr Shorten believes the Clerk employed in the new year was Fiona Ward to assist Mr Shorten on his electoral campaign.
3. The persons present at the National Administrative Committee meeting of 23 October 2006 are named in the Minutes of the National Administrative Committee.
4. On 22 November 2006 the National Executive formally received the Minutes of the National Administrative Committee meeting of 23 October 2006. See agenda item 7.2 in the Minutes of the meeting of the National Executive of the AWU of 22-23 November 2006. The persons present are named in the Minutes of the Meeting of the National Executive of the AWU of 22-23 November 2006.

⁷⁴ Bill Shorten, 8/7/2015, T:74.22-24.

⁷⁵ AWU MFI-2, 23/10/2015, p85 (rule 32(3)(b)).

⁷⁶ AWU MFI-2, 23/10/2015, p79 (rule 25(1)(c)).

⁷⁷ AWU MFI-2, 23/10/2015, p111 (rule 57).

⁷⁸ AWU-MFI-2, 23/10/2015, p133-134.

5. I note that on 16 February 2007 the National executive also formally resolved to provide financial support to the Federal election campaign of the ALP (see MFI 11 Tab 2 page 175).
56. It would seem from the minutes referred to that no formal decision of the National Executive was made concerning the engagement of Ms Ward or her allocation to Mr Shorten's campaign, in the sense that no resolution was passed and minuted. That is what the rules required to occur in the event that a donation was made. As indicated above, Mr Shorten's fiduciary position would have required that he not participate in any such resolution on that question
57. In so far as the National Administrative Committee considered the engagement of a further staff member on 23 October 2006, the minutes of that Committee meeting record that the following report was given by Mr Shorten:⁷⁹

National Office Staffing Update

The National Secretary gave a report on changes to staffing in the National Office and reported that Sam Wood had been transferred to the Victorian Branch, that Ainslie Gowan has resigned and will be replaced by Cath Sullivan who currently works at Channel Seven's Sunrise Program. Rod Currie has been hired as a new National Industry Officer and that a Clerk will be hired for 20 hours a week in the new year to help organise the campaign against the Howard Government

58. A proper construction of this minute is that Mr Shorten is reporting to the Administrative Committee a decision he has made or proposes to make in his capacity as National Secretary in the exercise of his power to appoint, control and dismiss National Office Staff.⁸⁰ Such approval could not, in any event have been given by the Administrative Committee.
59. On the other hand the minutes of the above Administrative Committee were tabled at the National Executive Meeting of 22 November 2006. A motion was moved that 'The report be received'.⁸¹ It appears then that in substance the National Executive knew, and approved, as at 22 November 2006, that the National Secretary proposed to hire a part time person to assist with or work on the Federal election campaign. This was the meeting of the National Executive immediately prior to the engagement of Ms Ward.

⁷⁹ AWU MFI-2, 23/10/2015, p138-139.

⁸⁰ AWU MFI-2, 23/10/2015, p85 (rule 32(3)(b)).

⁸¹ AWU MFI-2, 23/10/2015, p146.

60. At a meeting of the National Executive on 16 February 2007, Mr Shorten moved that the principles for the Federal Election 2007 be:⁸²
1. Each branch nominates an election contact.
 2. Identify members that live in target seats.
 3. Identify undecided voters/telephone.
 4. Follow up and support marginal seats.
 5. Register members not enrolled.
 6. Conduct a series of worksite meetings.
 7. Utilise The Worker, coordinated meetings and financial resources. Branches and National Office to help provide strategic assistance to the election.
61. The motion was carried. Although the motion refers to ‘financial resources’, it could not be said to authorise any particular expenditure. This meeting was the first meeting after Ms Ward’s contract of employment had been entered into.
62. The only member of the National Executive other than Mr Shorten asked about this issue was Mr Howes. Mr Howes, through his solicitors, said that he had no independent recollection of any specific discussion at the AWU National Executive regarding the appointment of Ms Ward. The only record of any discussion or authorisation in that regard to which Mr Howes, through his solicitors, pointed, were the minutes of the Administrative Committee Meeting of 23 October 2006.
63. Absent a formal resolution, Mr Shorten would have needed the fully informed consent of the National Executive before engaging the services of Ms Ward, at least if she was going to work on his campaign. Mr Shorten’s evidence as set about above was that her engagement was discussed at National Executive level. Given the limited evidence on this topic it would not be appropriate for a finding to be made to the contrary.

G EVALUATING THE CONDUCT OF AWU OFFICIALS

64. The assessment of the conduct of Mr Shorten and Mr Melhem in respect of the arrangements regarding Mr Wilson and Ms Ward falls within paragraphs (g), (h) and (k)

⁸² Shorten MFI-11, 9/7/2015, p 175.

of the terms of reference. The following analysis considers Mr Shorten's conduct in connection with the arrangements regarding Mr Wilson; Mr Melhem's involvement in those matters; and disclosure under the *Commonwealth Electoral Act 1918* (Cth).

Arrangements regarding Mr Wilson

65. It is plain that Mr Shorten and the Australian Labour Party obtained an advantage from the arrangements from the payment of Mr Wilson's wages by Mr Lockyer's companies. It is plain also that the arrangement was procured by Mr Shorten: he asked Mr Lockyer to make the payments. The question is whether there may have been anything improper or unlawful about that. It is submitted that the evidence does not establish that there was.
66. The starting point is that this Commission is concerned with duties owed by union officials in their capacity as union officials. Such an official could act improperly if he or she used his or her position in order to obtain or procure a benefit for himself or a third party. But the evidence does not establish that Mr Shorten so acted here. It is true that Mr Shorten asked Mr Lockyer to make the payments at a time when Mr Lockyer was at the AWU's offices. The letter of employment for Mr Wilson was drawn up by one of the AWU's employees, Mr Chen. But these pieces of evidence do not establish that Mr Shorten in any relevant sense used his position as an officer of the AWU to procure the payments. Nor was this a situation akin to diversion of corporate opportunity: it was not a situation where, for example, someone was interested in donating to money to the AWU but was persuaded instead to donate that money to the electoral campaign of an officer.
67. There was a connection between Mr Shorten's position as AWU Secretary and Mr Lockyer's preparedness to make the payments. For the reasons set out above it is likely that Mr Lockyer only agreed to make the payments because he hoped that it would profit him and his companies in the long term. Among things he hoped that they would build goodwill with the AWU and facilitate or improve his prospects of obtaining work, whether through obtaining an EBA or otherwise. But the evidence of the interactions between Mr Shorten and Mr Lockyer does not suggest that Mr Shorten encouraged these

hopes on the part of Mr Lockyer or made any suggestion to the effect that Mr Lockyer's hopes would be realised.

68. Another matter to consider is whether there was a real and substantial possibility that Mr Shorten would be involved in EBA negotiations with Mr Lockyer. There was evidence that as at 23 May 2007, negotiations between Mr Lockyer and Mr Melhem about an EBA in relation to the Pilkington Repair Project were in their final stages.⁸³ It is apparent from a draft of that EBA that it was an agreement confined to a project in Victoria and that it was anticipated that it would be concluded with the Victorian Branch of the AWU.⁸⁴ There is no evidence that Mr Shorten was in fact involved in the negotiation of the Pilkington EBA and his evidence was that as National Secretary (but no longer Secretary of the Victorian Branch) in 2007 he was not involved in negotiating Victorian Branch EBAs.⁸⁵ Accordingly, it is submitted that the negotiations between Mr Lockyer and the AWU regarding this EBA do not establish a real and substantial possibility of conflict of interest and duty.
69. There was also evidence that negotiations for the existing Unibuilt EBA were due to commence by August 2007. That EBA applied to any sites on which Unibuilt worked in Australia.⁸⁶ It was, in that sense, a national agreement. It was signed on behalf of the AWU by Mr Melhem. There was evidence that Unibuilt performed and sought work in other states. There was a possibility that, if negotiations for the renewal of this EBA commenced, the National Secretary of the AWU might be involved at some point. Mr Shorten suggested in his evidence that he may have lodged a statutory declaration in connection with the EBA when it was first negotiated.⁸⁷ However, there is no evidence that negotiations were on foot at the time at which Mr Shorten made the arrangements in respect of Mr Wilson (late 2006 – February 2007). Had such negotiations commenced, and had the involvement of the National Secretary been required, Mr Shorten's fiduciary duty would have required him to declare a conflict and absent himself. There is no suggestion, however, that the need for that ever arose. In October 2007 Mr Lockyer sent

⁸³ Shorten MFI-1, 8/7/2015, p262.

⁸⁴ Shorten MFI-1, 8/7/2015, p264, 284.

⁸⁵ Bill Shorten, 8/7/2015, T:22.35-36.

⁸⁶ Shorten MFI-1, 8/7/2015, p225.

⁸⁷ Bill Shorten, 8/7/2015, T:9.17-.18.

an email to Mr Melhem proposing an EBA for Unibilt⁸⁸, however, there is no suggestion that Mr Shorten was involved in any negotiations that might have taken place.

70. Yet another matter to be considered is whether the creation of the material documenting Mr Wilson's employment arrangements involved the commission of an offence. For the reasons given, the letter of offer sent to Mr Wilson and the letter from Unibilt to the AWU contained false descriptions of the arrangements that were in fact entered into. Nonetheless, it is submitted, the evidence does not establish that this involved any offence. The documents were not 'record[s] or document[s] made or required for any accounting purpose' within the meaning of s 83 of the *Crimes Act 1958 (Vic)*.⁸⁹ The documents, although false, were not 'false documents' within the meaning of s 83A(6) of that Act. There is no suggestion that the documents were used for the purposes of gaining any advantage contrary to provisions such as s 82 of the *Crimes Act 1958 (Vic)*.
71. There are questions, considered below, as to whether interposition of the AWU in May 2007 and the subsequent failure to pursue monies owed by Unibuilt/Unibilt to the AWU were in the best interests of the AWU. The evidence does not, however, establish that Mr Shorten had any involvement in those matters.

The conduct of Mr Melhem

72. The two issues that arise in relation to Mr Melhem's conduct concern (a) his decision to allow the Victorian Branch of the AWU to be interposed in the arrangements involving Mr Wilson in May 2007; and (b) his decision to issue a credit note in respect of the debt owed by Unibilt/Unibuilt to the AWU.
73. By agreeing to the interposition of the Victorian Branch of the AWU in May 2007, Mr Melhem shifted the risk of Unibuilt/Unibilt's failure from Mr Wilson (and Mr Shorten) to the Victorian Branch of the AWU. On Mr Melhem's own evidence, he did that in circumstances where Mr Wilson had complained that he was not being paid promptly by

⁸⁸ Shorten MFI-1, 8/7/2015, p292.

⁸⁹ See, for example, *R v Jenkins* (2002) 6 VR 81 at [38].

Mr Lockyer.⁹⁰ Mr Melham gave evidence that, however, he was not concerned about any shifting of risk to the AWU. He said:⁹¹

‘Oh, there’s no risk at all because I was even happy to pay Mr Wilson whether – whether MRE or – I think that’s Maintenance Resource or Unibuilt, whatever, paid their wages or not. That was not a concern for me. I would have been happy to even pay Mr Wilson from the AWU account to assist Mr Shorten on his campaign. That is quite right within the AWU rules, so that wasn’t an issue for me at all. That wasn’t an issue whether the company reimbursed the AWU or not. That’s something I didn’t really care about.

74. It is submitted that Mr Melhem’s construction of the rules is incorrect. Under the AWU rules, Mr Melhem had the power to ‘Appoint, control and dismiss the clerical, research, accountancy and other staff of the Branch’.⁹² Mr Wilson, however, was not in any meaningful sense ‘staff of the Branch’. And, even if he were, Mr Melhem had no power to ‘donate’ Mr Wilson’s services to Mr Shorten without a resolution of the National Executive to approve that donation under rule 57.⁹³
75. The interposition of the AWU, however, caused no immediate loss to the union. That occurred following Mr Lockyer’s refusal to pay the last two invoices sent by the AWU. The result of his refusal to pay, and Mr Melhem’s decision to write off the debt, is that the risk assumed by the AWU in May 2007 came home and the AWU, and not Unibuilt, ‘donated’ the money the subject of these two invoices to Mr Shorten’s campaign.
76. It is a moot point whether the AWU made a ‘donation’ within the meaning of rule 57 at the time of its interposition in the arrangements in May 2007, or at the time that the Unibuilt debt was written off. At whatever time the donation was made, Mr Melhem had no authority to make it.
77. As a result, it is submitted that Mr Melhem may have contravened rule 57 of the AWU rules.

⁹⁰ Cesar Melhem, 22/10/2015, T:984.4-.17.

⁹¹ Cesar Melhem, 22/10/2015, T:988.147- 989.9.

⁹² AWU MFI-2, 23/10/2015, p97 (rule 39(1)(b)).

⁹³ AWU MFI-2, 23/10/2015, p94 (rule 57).

Disclosure under the *Commonwealth Electoral Act 1918 (Cth)*

78. The payments made by the AWU and by Mr Lockyer's companies to Mr Wilson and the payments by the AWU to Ms Ward were benefits that required disclosure under Part XX of the *Commonwealth Electoral Act 1918 (Cth)*. Because the benefits were greater than \$10,000, disclosure was required by Unibuilt (or one of the Lockyer companies) and by the AWU under Division 4 of that Part. Such donations also were required to be disclosed by either or both of Mr Shorten and the ALP. The view that has been taken by Mr Shorten, apparently in line with the general practice of the ALP, is that disclosure is required by the ALP only.
79. The evidence does not establish that the above arrangements were entered into for the purpose of avoiding disclosure requirements under the *Commonwealth Electoral Act 1918 (Cth)*. Further, Mr Shorten has taken steps to correct the fact that no disclosure was made and the limitation period for the prosecutions of any offences has expired.⁹⁴

⁹⁴ *Commonwealth Electoral Act 1918 (Cth)*, s 315(11).