

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

SUBMISSIONS OF COUNSEL ASSISTING

AWU: CHAPTER 8

WINSLOW CONSTRUCTORS

Subject	Paragraph
A INTRODUCTION	1
B ARRANGEMENT FOR THE PAYMENT OF MEMBERSHIP CONTRIBUTIONS	4
C FALSE INVOICING	8
Mr Melhem's roles in the creation of false invoices	13
Why were false invoices sent and paid?	30
D MEMBERSHIP ISSUES	45
Relevant provisions of the AWU Rules	46

Subject	Paragraph
Membership numbers falsely inflated	52
E UNSATISFACTORY ASPECTS OF THE RELATIONSHIP BETWEEN THE AWU AND WINSLOW	63
Disclosure to Winslow of material obtained during collective bargaining with a competitor	66
Comparison of Winslow and BMD EBAs	76
F CONCLUSIONS	82

A INTRODUCTION

1. Winslow Constructors Pty Ltd (**Winslow**) is a civil construction company. It is part of a group of companies known as the Winslow Group that has been operating for about 30 years. Winslow's principal business concerns greenfields subdivisions.¹
2. Other companies in the Winslow Group operate in other areas of the civil construction industry. For example, Winslow Infrastructure Pty Ltd operates in the infrastructure area.
3. This chapter concerns a long standing arrangement between the AWU and Winslow for the payment by Winslow of membership fees for

¹ Dino Strano, 3/6/15, T:534.9, 534.19-20.

certain of its employees. The arrangement resulted in false invoicing, inflation of AWU membership numbers and Winslow obtaining favourable treatment from the AWU in relation to at least one of Winslow's competitors.

B ARRANGEMENT FOR THE PAYMENT OF MEMBERSHIP CONTRIBUTIONS

4. Since the mid-1990s, Winslow and the AWU have had an arrangement whereby Winslow pays to the AWU membership fees for all of Winslow's permanent employees of more than one year's standing (other than administrative staff and management).²
5. Mr Dino Strano is the managing director of Winslow and has been involved in the Winslow Group for 30 years. He gave oral evidence at the Commission. Mr Strano said that the arrangement for membership was only in place in respect of Winslow (as distinct from other entities in the Winslow Group) because other entities had EBAs which required the payment of higher wages and different conditions. He said that as a result 'we don't feel like we need to pay that benefit because the employees are better rewarded and it's their responsibility'.³
6. According to Mr Strano, the reason behind the arrangement was that in the 1990s the CFMEU was a very hard union to deal with and he wished for Winslow to be associated with the AWU.⁴ Mr Strano said

² Dino Strano, 3/6/15, T:533.13-31, 534.29-43; Peter Smoljko, 4/6/15, T:568.4-12.

³ Dino Strano, 3/6/15, T:534.17-27.

⁴ Dino Strano, 3/6/15, T:551.26-47, 552.1-9.

that this arrangement ‘evolved’ out of dealings with Craig Winter and Don Henderson, and subsequently Bill Shorten, Peter Smoljko, Cesar Melhem and various other organisers.⁵ According to Mr Smoljko, the arrangement was in place in 1998 when he became the organiser for Winslow.⁶

7. The arrangement worked in the following way. Each twelve months (or, on occasions, each six months) Winslow would send a list of its eligible employees to the AWU. The AWU would then cross check this list against its own records and (sometimes after further discussion with Winslow) then send the company an invoice for the membership fees for the employees in question. In evidence before the Commission are invoices for the period 2004 to 2013. Until March 2008, the invoices were expressed to be for the payment of membership fees for particular periods for particular numbers of members.⁷

C FALSE INVOICING

8. On 19 March 2008, the AWU sent an invoice to Winslow, attention Peter Smoljko, for ‘OH&S Training & Workplace Inspections’. The invoice was for a total amount of \$9,945. That amount was expressed to be calculated by multiplying \$106.36 plus GST by 85 members.⁸ In truth, the invoice was for membership fees. From this time, a number of invoices sent by the AWU and paid by Winslow purported to be

⁵ Dino Strano, 3/6/15, T:552.11-18.

⁶ Peter Smoljko, 4/6/15, T:569.3-9.

⁷ See for example, Melhem MFI-7, 2/6/15, pp 8, 33, 37, 51.

⁸ Melhem MFI-7, 2/6/15, p 53.

invoices for training fees of one kind or another when in fact they were for membership fees.⁹

9. The internal accounting system used by the AWU at all relevant times contained general ledgers. One of the general ledger categories was membership income.¹⁰ All of the money paid by Winslow pursuant to these invoices was recorded in the AWU general ledgers under this category.
10. From 21 January 2010, the invoices issued by the AWU to Winslow, in addition to containing a description that referred to training of some kind, contained an 'Item Code' described as 'Membership'.¹¹ The practice at the AWU was that any invoices with an item code 'membership', was entered into the membership income ledger. The membership income ledger was operated on an accruals basis, so that upon the issue of any invoice coded 'Membership', an entry was made in the ledgers in respect of that invoice.
11. There is no doubt that the invoices issued from 19 March 2008 were false invoices. So much was accepted by Mr Strano¹² and Mr Smoljko.¹³ This evidence was against interest, and thereby of considerable weight. Further, in circumstances described in more

⁹ Melhem MFI-7, 2/6/15, pp 61, 70, 73, 75, 77, 81, 85.

¹⁰ See for example Melhem MFI-8, 2/6/15, pp 89, 110, 136, 135, 177, 194A, 212A, 231A, 255A.

¹¹ Melhem MFI-7, 2/6/15, pp 70, 75, 77, 81, 85.

¹² Dino Strano, 3/6/15, T:537.44-46, 539.34-40, 534.10-20, 546.47, 547.1-8, 548.42-47, 549.1-5, 549.22-25.

¹³ Peter Smoljko, 4/6/15, T:575.3-47, 577.22-47, 578.1-7, 579.35-47, 580.1-9, 582.21-47, 583.25, 583.37-47, 584.1-34, 586.37-44, 588.37-47, 589.1-17.

detail below, the present secretary of the AWU, Mr Ben Davis, caused amended invoices to be issued to Winslow in 2015, in recognition that the references to training on the invoices issued from 2009 were false.¹⁴

12. Mr Melhem was willing to concede that some of the invoices might have had a 'wrong description'.¹⁵ However, he also contended that the AWU did provide training for Winslow and that some of the invoices could have been for that also.¹⁶ That evidence should be rejected. It was mere speculation and inconsistent with the evidence of Mr Strano, Mr Smoljko and Mr Davis.

Mr Melhem's role in the creation of false invoices

13. Why were false invoices issued? The possibility that they were issued as a result of a clerical mistake can be dismissed. That is obvious from the fact that so many false invoices were issued over a period of approximately five years.
14. The position, it is submitted, is that the invoices were issued on the instructions of Mr Melhem. To make out that submission, it is convenient to confine attention to three particular invoices. The first two were sent on 12 May 2011. Those invoices were issued in the

¹⁴ See Mei-Lin MFI-1, 4/6/15, p 36; Melhem MFI-7, 2/6/15, p 118.

¹⁵ Cesar Melhem, 2/6/15, T:352.29-30.

¹⁶ Cesar Melhem, 2/6/15, T:352.38-353.6, 357.41-47, 359.1-24.

following circumstances. On 7 April 2011, Mr Melhem sent an email to Mr Smoljko stating:¹⁷

As discussed today can you send me an up to date employees list for Winslow Constructors for 2010/2011 financial year so we can send an invoice re training cost as discussed, I have discussed this with Dino a few weeks ago.

15. There has not been produced to the Commission any employees list for the 2010/2011 financial year. However, lists were produced in relation to some other years, and the exchange of lists appears to have been the procedure adopted by Winslow and the AWU for reaching agreement on which employees Winslow was to pay membership fees for.

16. Mr Smoljko forwarded Mr Melhem's email to Mr Strano on 8 April 2011 with the comment 'we will discuss this next week'.¹⁸ It would seem that Mr Strano and Mr Melhem had lunch on the 10th of May 2011.¹⁹ On 12 May 2011, Mei Lin sent to Mr Smoljko, in an email copied to Mr Melhem²⁰, two invoices: one for 'Providing OHS Training in Financial Year 2010/2011' in an amount including GST of \$38,857.50, and another for 'Providing Red Card Training in Financial Year 2010/2011' in the same amount.²¹ Both invoices were coded 'membership'. Ms Mei Lin was the financial controller of the AWU from 2007.

¹⁷ Melhem MFI-7, 2/6/15, p 211.

¹⁸ Melhem MFI-7, 2/6/15, p 211.

¹⁹ Melhem MFI-7, 2/6/15, p 210.

²⁰ Melhem MFI-7, 2/6/15, pp 206-207.

²¹ Melhem MFI-7, 2/6/15, pp 208-209.

17. It is plain that these are the invoices contemplated by Mr Melhem's email of 7 April 2011. That is, they are invoices described as being for training but which in fact were for the payment of membership fees. Mr Melhem, when he sent the above email to Mr Smoljko, must have intended that invoices with false descriptions be issued. Mr Smoljko accepted that Mr Melhem was telling him in the above email that Mr Melhem was going to send him a false invoice.²²
18. When asked about these invoices and this email, Mr Melhem's position appeared to be that he did not recall them but that training was carried out within Winslow and that these invoices could be in relation to such training as well as membership.²³ As set out above, that is inconsistent with all of the other evidence and should be rejected. There is, in addition, the consideration that invoices in identical amounts for purportedly different services were issued. That further indicates that the services described were not the true subject of the invoice.
19. Mr Melhem's email to Mr Smoljko demonstrates that Mr Melhem knew and approved of the practice of issuing false invoices, and that that was a matter he had discussed with Mr Smoljko.
20. The second invoice that demonstrates Mr Melhem's role in the creation of false invoices is dated 21 January 2010. Ms Lin gave a statement to the Commission in which she said that she prepared invoices addressed to Winslow from 21 January 2010 until 6 March 2013. Ms Lin claimed that she prepared the descriptions in these invoices on the

²² Peter Smoljko, 4/6/15, T:584.28-34.

²³ Cesar Melhem, 2/6/15, T:357.18-47, 358.1-46.

basis of instructions provided either by Angela Leo, Cesar Melhem, or Mr Melhem's assistant Rebecca Eagles.²⁴

21. Ms Leo's evidence was that neither she nor the membership department of which she was head was involved in drafting the terms of invoices of this kind.²⁵ There is reason to doubt that evidence, at least in so far as it concerns the Winslow invoice dated 21 January 2010.

22. That invoice initially was issued for an amount of \$45,396 inclusive of GST.²⁶ That invoice was drafted as a result of two emails from Angela Leo on the same day. The first was an email to Jelica Addamo. It stated:²⁷

Can you please organise an invoice to be sent to Peter Smoljko for a 12 month period but instead of stating Membership, it is to be for Training / Red Card – Health and Safety – Consulting.

When invoice is generated, can you please scan a copy of it to Cesar please.

23. Shortly after sending this email, Ms Leo sent another email to Ms Lin copied to Ms Addamo. The email read as follows:

Hi Mei,

Can you please organise an invoice for Winslow as per Cesar' [sic] request below. This is to be sent to Peter Smoljko and a copy scanned to Cesar.

²⁴ Mei Lin, witness statement, 4/6/15, paras 18-26.

²⁵ Angela Leo, witness statement, 21/10/15, para 13.

²⁶ Mei Lin, MFI-1, 4/6/15, p 2.

²⁷ Mei Lin, MFI-1, 4/6/15, p 3.

The amount is to be for: \$45,396.00 being 12 months membership for 97 members. Invoice is to be made out for Training/Red Card/OHS etc not Membership.

When money comes in, it will be divided evenly against all members at Winslow as membership payments.

24. Mr Davis, on the basis of his experience at the AWU, said that the request to scan a copy of the invoice to Mr Melhem 'would have been' made because Mr Melhem asked to see it.²⁸ Ms Leo's evidence was that she could not recall the circumstances of this email, but assumed that she had been directed to organise that invoice by Mr Melhem.²⁹ Her assumption appeared to be based on her evidence that at this time she was not familiar with 'Company Paid' (that is the AWU practice, in relation to some companies, of invoicing employers for membership fees of their employees).³⁰ Ms Leo said that the person responsible for Company Paid was Ms Addamo. Ms Addamo's evidence was that she assumed that Ms Leo's email to Ms Lin was prompted by her (Ms Addamo) telling Ms Leo that Ms Addamo was not the person responsible for sending such invoices.³¹

25. If Ms Leo's and Ms Addamo's evidence is accepted, then, according to Ms Lin, the instruction to issue the invoice came either from Mr Melhem or his assistant, Ms Eagles. In the event that it was Ms Eagles, it is safe to infer that she was acting on Mr Melhem's instructions. Ms Leo's and Ms Addamo's evidence is corroborated by the terms of Ms Leo's email to Ms Lin. That email states that the invoice is to be issued 'as per Cesar's request'. That indicates that Mr

²⁸ Ben Davis, 4/6/15, T:643.26-31.

²⁹ Angela Leo, witness statement, 21/10/15, para 28

³⁰ Angela Leo, 21/10/15, T:792.18-28, 793.7-19.

³¹ Jelica Addamo, witness statement, 21/10/15, para 18.

Melhem instructed Ms Leo to arrange for the issue of an invoice in the terms described in that email. The very terms of the email ('[i]nvoice is to be made out for Training ... not Membership') indicate that Mr Melhem must have known that he was giving an instruction to issue a false invoice.

26. There is further evidence of Mr Melhem's role in the creation of this invoice. A credit note was issued in respect of the invoice issued on the day of this email. The credit note is in the same terms as the invoice, however, beneath the description red card training and OHS training in 2009 - 2010, there appears 'REVERSE IT AS PER CESAR MELHEM' together with handwritten words 'only pay six months membership first'.³² It is apparent from the credit note that, again, Mr Melhem was intimately involved in the creation of these invoices.
27. As a result of that credit note being issued, a further invoice was issued, also dated 21 January 2010, with the same false description, but for an amount of \$23,166 inclusive of GST.³³ That invoice was paid by Winslow.
28. Mr Melhem's evidence was that he could not recall whether he did nor did not give Ms Leo instructions to prepare this invoice.³⁴ It is not entirely clear whether Mr Melhem accepted that this and other similar invoices were false. He seemed to suggest at times that they were not false because at some point training of some kind was carried out.³⁵

³² Mei Lin, MFI-1, 4/6/15, p 1.

³³ Melhem MFI-7, 2/6/15, p 70.

³⁴ Cesar Melhem, 22/10/15, T:1003.42-44, 1005.28-32.

³⁵ Cesar Melhem, 22/10/15, T:1004.24-37, 1005.1-26.

However he also said at another point that the invoices were ‘incorrectly described’ and that he advised Mr Davis to correct them.³⁶ Mr Davis did not give evidence that Mr Melhem was involved in the process of correcting these invoices.³⁷ Nothing to that effect was put to him by counsel for Mr Melhem. Mr Melhem made a similar claim in relation to an invoice issued to Downer EDI. For the reasons given in the submissions on that case study, there are good reasons to reject Mr Melhem’s evidence that he was involved in the process undertaken by Mr Davis and Ms Lin in 2014.

29. Although the above submissions have focused on Mr Melhem’s role in the creation of particular invoices, it is submitted that the appropriate inference to draw is that the same practice was followed in relation to all of the invoices from March 2008. That is, that their falsity was the result of a deliberate decision by Ms Lin, acting on the instructions of Mr Melhem, and that Mr Melhem had knowledge of their falsity at the time they were issued and paid. Mr Chen’s evidence was that generally item descriptions on invoices were drawn from the terms of invoice request forms.³⁸ Having regard to this evidence, to the evidence in relation to the particular invoices discussed above, and to the close relationship between Mr Melhem and Winslow representatives discussed below, it is likely that the practice in relation to all of the invoices during this period was the same.

³⁶ Cesar Melhem, 22/10/15, T:1004.37-45.

³⁷ Cf. Ben Davis, 4/6/15, T:632.4-34, 644.20-47, 645.2-46.

³⁸ Michael Chen, witness statement, 21/10/15, para 12.

Why were false invoices sent and paid?

30. Expenses incurred by a company in the course of business in connection with red card training and/or OHS training would, ordinarily, be tax deductible.³⁹ Expenses incurred in providing training to workers are properly described as losses or outgoings incurred in gaining or producing assessable income, and/or necessarily incurred in carrying on a business.
31. The payment of membership fees on behalf of employees is not so easily characterised. In the case of Winslow, such payments were not made pursuant to any contractual obligation. They cannot be described as ‘necessarily incurred’ in the course of carrying on Winslow’s business within the meaning of section 8-1 (1)(b) of the *Income Tax Assessment Act 1997* (Cth). Nor can they be characterised as expenses ‘incurred in gaining or producing’ Winslow’s successful income within the meaning of 8-1 (1)(a) of the *Income Tax Assessment Act 1997* (Cth). In truth, such payments are in the nature of fringe benefits provided by Winslow to its employees. The payment of union fees by an employer for an employee would, generally, amount to the provision of an expense payment fringe benefit. Fringe benefits tax would (in most circumstances) not be payable in relation to the benefit because of the operation of the ‘otherwise deductible’ rule.⁴⁰ In the result, (in most circumstances) the employer would not be assessed in respect of the payment as liable to pay fringe benefits tax. Nor,

³⁹ See section 8-1 of *Income Tax Assessment Act 1997* (Cth).

⁴⁰ See *Fringe Benefits Tax Assessment Act 1986* (Cth) s 20, s 24.

however, would the employer be able to claim a deduction for the payment.

32. Each false invoice was described as a 'tax invoice'. Mr Strano denied that he gave the people working in Winslow's accounts department any instructions to claim deductions in respect of the false invoice.⁴¹ However, no specific instructions would have been required having regard to what is apparent on the face of the invoices. That is, a person working in the Winslow accounts department, absent any instruction to the contrary, would be entitled to think (and indeed would have no reason otherwise than to think) that the invoices were in fact for training and to treat them in Winslow's accounts accordingly.

33. That in fact appears to have been what happened. Mr Strano said in oral evidence that Winslow did not claim a deduction for training expenses but rather recorded them as membership in its accounts.⁴² However, material provided to the Commission through Winslow's legal representatives subsequent to his hearing indicates that in fact the membership payments from 2008-2013 were recorded in Winslow's accounts as training expenses and that tax deductions were claimed for them as such.⁴³ It would appear from this material, also, that prior to 2008, when invoices issued by the AWU were not falsified, Winslow was nonetheless claiming deductions for membership fees paid by it on the basis that they were 'union fees'.⁴⁴

⁴¹ Dino Strano, 3/6/15, T:545.22-36.

⁴² Dino Strano, 3/6/15, T:538.8-15.

⁴³ AWU, MFI-2, 30/10/15, p 130

⁴⁴ AWU, MFI-2, 30/10/15, p 130.

34. No witness was able to give any explanation as to why the false invoices were created. Mr Smoljko said that he had no idea why the invoicing practice had changed.⁴⁵ He said that no one had discussed this change with him.⁴⁶ Mr Smoljko accepted that various invoices that he received and for which he authorised payment were false to his knowledge at the time.⁴⁷ Mr Strano also could give no explanation for why it was that false invoices commenced to be provided in 2008.⁴⁸

Possible false accounting offences and contraventions of the Fair Work (Registered Organisations) Act 2009 (Cth)

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

False Accounting

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

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

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

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

⁴⁵ Peter Smoljko, 4/6/15, T:573.40-46, 574.1-2.

⁴⁶ Peter Smoljko, 4/6/15, T:578.27-34.

⁴⁷ Peter Smoljko, 4/6/15, T:574.35-47, 575.1-47, 577.22-47, 578.1-7, 579.43-47, 580.1-2 582.21-47, 583.1-25, 588.44-47, 589.1-17, 590.7-31.

⁴⁸ Dino Strano, 3/6/15, T:538.21-27, 540.26-38.

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

36. It is clear that the invoices issued by the AWU to Winslow from March 2008 were records or documents made or required for any accounting purpose within the meaning of section 83 (1)(a). It is also clear that whoever prepared the invoices, and whoever concurred in their preparation, falsified them within the meaning of section 83 (1)(a). That follows from the terms of section 83 (2).
37. The real question is whether the person who prepared the invoices (or concurred in their preparation) did so 'dishonestly, with a view to gain for himself or another' within the meaning of section 83(1).
38. Mr Melhem, it is submitted, acted dishonestly within the meaning of this section. That is so, it is submitted, because, knowing that no training had been or would be provided to Winslow, he caused the invoices to be issued claiming payment for such training. He did so with a view to producing a gain for the AWU in the sense that the purpose of the invoices was to procure payments of money to the AWU.
39. It may be said, in answer to this submission, that Mr Melhem's conduct was not dishonest because the relevant people at Winslow knew that no training in fact had been provided, and were not themselves deceived by the invoices. However, the offence in question

is not (for example) obtaining a financial advantage by deception.⁴⁹ What is required is dishonesty and it is submitted that knowingly causing a document to be created making a claim for payment on a false basis is sufficient for that purpose. There is this further consideration: no witness has proffered any credible explanation for the issuing of so many false invoices over such a period. The email correspondence referred to in these submissions makes it plain that the creation of false invoices was deliberate. Mr Melhem, Mr Strano and Mr Smoljko were all intelligent men: persons of this calibre do not engage in a process of this kind over an extended period unless they perceive it as being in their interests to do so. In the absence of any credible explanation for the falsification that has occurred, there is nothing to contradict the inference that both parties believed they obtained an advantage out of the arrangement. And, as explained above, the invoices in fact facilitated the claiming of tax deductions by Winslow for training in circumstances where no training was provided and in fact facilitated increases in membership revenue in circumstances where the persons for whom membership fees were purportedly payable did not become members.

40. For the above reasons, it is submitted that Mr Melhem may have committed offences under s 83 of the *Crimes Act 1958* (Vic) in respect of the creation of the false Winslow invoices. Section 84 of the *Crimes Act 1958* (Vic) makes it plain that offences under s 83 can be committed by bodies corporate. Organisations registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) are bodies corporate: see s 27. Mr Melhem's conduct as the 'directing mind and

⁴⁹ Cf. *Crimes Act 1958* (Vic), s 82.

will' of the AWU⁵⁰, ought, it is submitted, to be attributed to the AWU such that it, too, may have committed the same offence.

41. Further, the conduct of Mr Melhem in relation to the creation of these invoices fell well short of the standards to be expected of a person in his position. It is submitted that, for the same reasons, Mr Melhem's conduct, in so far as it occurred after the commencement of the *Fair Work (Registered Organisations) Act 2009* (Cth), may have amounted to a contravention of his obligations under sections 285, 286 and 287 of that Act. The possible application of s 285 (due diligence) and s 286 (good faith and proper purpose) is, it is submitted self-evident. Section 287 (use of position), it is submitted, may have been contravened because, for the reasons identified above, the false invoices were used to gain an advantage for the AWU, namely, an increase in revenue and, ultimately, membership numbers.
42. There is a question as to whether Winslow and/or Mr Strano and Mr Smoljko may also have committed an offence under s 83. It would seem that both Mr Smoljko and Mr Strano authorised payment of the invoices, at least from 2009. Mr Smoljko accepted that he authorised the payment of invoices that he were false to his knowledge at the time. That is, the invoices dated 1 June 2009⁵¹; 21 January 2010⁵²; 10 June 2010⁵³; 1 June 2011⁵⁴; 14 May 2012⁵⁵; and 6 March 2013⁵⁶.

⁵⁰ See *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530 at 82; *Tesco Supermarkets v Natrass* [1972] AC 153 at 170.

⁵¹ Peter Smoljko, 4/6/15, T:575.3-47.

⁵² Peter Smoljko, 4/6/15, T:577.22-47, 578.1-7.

⁵³ Peter Smoljko, 4/6/15, T:579.35-47, 580.1-2.

43. Mr Strano wrote the cheques paying these invoices on behalf of Winslow, and his initials appear on the invoices dated 1 June 2011, 1 June 2011 and 14 May 2012. Drafts of the invoices dated 10 June 2010 and 6 March 2013 were emailed directly to him by the AWU.⁵⁷ Mr Strano would not accept that he realised at the time of receiving these invoices that they were false. On some occasions, he said that he could not recall what his state of mind was.⁵⁸ On other occasions, he appeared to seek to take refuge in the fact that the invoices, at least from 2010, had an item code 'membership'.⁵⁹ However, this evidence was not credible. The falseness of the invoices must have been apparent to Mr Strano at the time that he authorised their payment. He described Winslow's process in ensuring that the numbers of employees and amounts on the invoices were correct as 'pretty meticulous'.⁶⁰ Such a process cannot but have identified the falsity of the invoices.
44. It is submitted that Mr Smoljko and Mr Strano, and through them Winslow, may have made use of false accounting records within the meaning of s 83(1)(b) dishonestly with a view to a gain for Winslow and/or the AWU. Their use of the invoices was dishonest because it was done in circumstances where they knew the descriptions on the invoices to be false. They used the false invoices, with a view to

⁵⁴ Peter Smoljko, 4/6/15, T:582.21-47, 583.1-25.

⁵⁵ Peter Smoljko, 4/6/15, T:588.44-47, 589.1-17.

⁵⁶ Peter Smoljko, 4/6/15, T:590.7-31.

⁵⁷ Melhem MFI-7, 2/6/15, pp 72, 83.

⁵⁸ See for example, Dino Strano, 3/6/15, T:543.6-44.

⁵⁹ See for example, Dino Strano, 3/6/15, T:544.45-47, 545.1-2, 547.10-13.

⁶⁰ Dino Strano, 3/6/15, T:538.29-38.

causing a gain for Winslow by causing them to be passed on, in the way described by Mr Strano,⁶¹ to Winslow's accounts team with the result that training expenses were recorded in Winslow's accounts and tax deductions claimed for such expenses. Secondly, they used the false invoices with a view to causing a gain to the AWU by paying the AWU in circumstances where they knew the AWU had no entitlement to be paid on those invoices.

D MEMBERSHIP ISSUES

45. The above arrangements resulted in falsely inflated membership numbers. To see why that is so it is necessary first to analyse the relevant provisions of the AWU Rules.

Relevant provisions of the AWU Rules

46. Neither the *Fair Work (Registered Organisations Act) 2009* (Cth) nor the AWU Rules expressly deals with the payment of membership fees by employers. Section 166 of the *Fair Work (Registered Organisations Act) 2009* (Cth) makes membership subject to, amongst other matters, 'payment of any amount properly payable in relation to membership'. Neither that section nor any other section of the Act specifies how such an amount may be paid.
47. Rule 7 subsections 1 and 2 of the AWU Rules provides:⁶²

⁶¹ Dino Strano, 3/6/15, T:545.38-45.

⁶² AWU MFI-2, 30/10/15, pp 61-62. Rules 7 – 10 of the registered rules of the Australian Workers Union 23/5/2006 are quoted here. They are substantially the same as rules 7-10 of

RULE 7 – ADMISSION TO MEMBERSHIP

- (1) Application for membership in the Union may be made by:
 - a. electronically completing and submitting an application form including consent to the method of payment of the contribution as prescribed by Rule 9, through the official website of The Australian Workers' Union or a Branch of The Australian Workers' Union, or
 - b. signing of an application form of which the original must be provided to the union; and
 - i. the signing of a payroll deduction authority, or
 - ii. the signing of a Financial Institution Direct Debit Authority which has been approved by the National Executive, or
 - iii. the payment of the contribution as prescribed by Rule 9.
- (2) Any person having made application for membership as prescribed in sub-rule (1) of this Rule must, except as otherwise provided for in these Rules, be admitted to membership of the Union. A person will become a member from the date that the first payment of the contribution as prescribed in Rule 9 is received.

48. The last sentence of subsection 2 makes admission to membership conditional upon the receipt of the first payment of the membership contribution fee. However, it does not impose any limitations on how that fee can be paid. Rule 7 (1)(b)(iii) refers to payment of the contribution 'as specified by Rule 9'. Rule 9 relevantly provides that contributions 'to be paid by members' are those determined by the National Executive from time to time. Provision is made for the waiver of contributions by the National Executive.⁶³

the registered rules of the Australian Workers Union 19/3/15 being Melhem MFI-1, 1/6/15, pp 58-65.

⁶³ See Rule 9 (1): AWU MFI-2, 30/10/15, p 65.

49. Rule 10 provides:⁶⁴

RULE 10 - CONTRIBUTIONS – WHEN AND HOW PAYABLE

WHEN CONTRIBUTIONS ARE PAID

- (1) Quarterly contributions are due and payable on the first day of the first month of each quarter and must be paid no later than the last day of the first month of each quarter. Quarters are deemed to begin on the first day of July, October, January and April respectively.
- (2) Annual contributions are payable by members as determined from time to time by the National Executive. Annual contributions become payable on the first day of July each year and must be paid either by way of a lump sum or over such period and in such part payments as may be determined by the relevant Branch Secretary.

RECOVERY OF OWED CONTRIBUTIONS

- (3) Members who continue in arrears after 31st July each year, after being notified, may be sued for the recovery of any contributions owing.

PAYING CONTRIBUTIONS

- (4) All contributions, fines, levies and dues owing by a member must be paid to the Branch Secretary or other duly appointed representative of the Branch on whose register the member is enrolled, and such duly appointed representatives must immediately pay all such moneys received into the registered office of the Branch. Where there is no Branch established members must pay their dues to the National Secretary.

WAIVING PAYMENT OF CONTRIBUTIONS

- (5) National Executive may if it sees fit and subject to the agreement of any affected Branch Executive, waive payment of the whole or any portion of contributions, levies or other dues owing by any member or class of member if in its opinion special circumstances exist which make it desirable or reasonable to do so.

PAYROLL DEDUCTIONS

- (6) Notwithstanding anything elsewhere contained in the Rules, Branch Secretaries or other authorised Officers may, subject to the approval of the National Executive, make an arrangement with an employer for

⁶⁴ AWU MFI-2, 30/10/15, pp 66-67.

deducting, on the written authority of a member in the employment of the employer, amounts by way of contributions, levies, or other moneys payable to the Union, from the wages or moneys payable to a member by the employer. So long as such arrangement is in force, and a written authority by a member employed by the employer for the making of deductions in accordance with the arrangement remains in force, the member is (unless the member was an unfinancial member of the Union at the end of the quarter immediately preceding that during which he gave the authority) to be deemed to be a financial member of the Union and of their Branch and to be fully financial in the Union and their Branch, notwithstanding any other provision of these Rules. If such member owes any money to the Union (whether by way of arrears owing at the time the authority came into force, or other amounts the collection of which is not provided for by the arrangement) such money remains owing by the member and may be recovered by the Union, but does not affect their financial status as determined under this subrule. A member who was unfinancial at the end of the quarter immediately preceding that during which he gave the authority continues to remain unfinancial until he pays all amounts owing at such end of quarter, but as from the date of such payment their financial status is to be determined as if he had made such payment prior to giving authority.

Where such an arrangement was made, or such an authority was given before this subrule came into force, the financial status of any member who has given the authority, or has given any authority pursuant to the arrangement, is to be determined as if this subrule had been in force at that time.

DIRECT DEBIT PAYMENTS

- (7) Notwithstanding anything elsewhere contained in the Rules, Branch Secretaries or other authorised Officers may, subject to the approval of the National Executive, make an arrangement with a financial institution for deducting, on the written authority of a member who holds an account with the financial institution, amounts by way of contributions, levies or other moneys payable to the Union, from the member's account. So long as such arrangement is in force, and a written authority by a member who holds an account with the financial institution for the making of deductions in accordance with the arrangement remains in force, the member is (unless an unfinancial member of the Union at the end of the quarter immediately preceding that during which he gave the authority) to be deemed to be a financial member of the Union and of their Branch and to be fully financial in the Union and their Branch, notwithstanding

any other provision of these Rules. If such member owes any money to the Union (whether by way of arrears owing at the time the authority came into force, or other amounts the collection of which is not provided for by the arrangement) such money remains owing by the member and may be recovered by the Union, but does not affect their financial status as determined under this subrule. A member who was unfinancial at the end of the quarter immediately preceding that during which he gave the authority continues to remain unfinancial until he pays all amounts owing at such end of quarter, but as from the date of such payment their financial status is to be determined as if he had made such payment prior to giving authority.

Within this subrule "financial institution" includes a bank, building society, credit union or credit card organisation.

Where such an arrangement was made or such an authority given before this subrule came into force, the financial status of any member who has given the authority or has given any authority pursuant to the arrangement, is to be determined as if this subrule had been in force at the time.

50. It is apparent from rule 10 (2) that annual contributions are 'payable by members'. There is a question as to whether the words 'payable by members' in rule 10 (2) and the words 'paid by members' in rule 9 (1) preclude the payment of membership fees by employers. The answer probably depends on the circumstances. If a payment is made by an employer with the knowledge and consent of an employee then it may be that, on analysis, the payment is made by the member within the meaning of these rules because in effect, the employer is acting as the employee's agent. On the other hand, in circumstances where an employer makes a payment purportedly for membership but without the knowledge of the employee in question (see the Cleanevent Case Study discussed elsewhere within these submissions) it is difficult to see how the payment could in this situation be described as one in which the contributions is paid 'by' the member. The fact that very

few Winslow employees signed membership application forms (discussed below) tends to suggest that Winslow employees were mainly in the latter category.

51. Page 62 rule 9 (1). In the period 2008 to 2013 the contributions rates set by the National Executive was as follows:⁶⁵

	1 July 2008	1 July 2011	1 July 2013
Adult	\$450	\$500	\$550
Part Time	\$374.40	\$375	\$390
Junior (under 21)	\$324.50	\$325	\$325
Apprentice 1 st and 2 nd year			\$52
Apprentice 3 rd year	\$324.50	\$325	\$360
Apprentice 4 th year	\$324.50	\$325	\$463
WorkCover (not receiving makeup pay)	\$274.55	\$275	\$275
Offshore	\$600	\$630	\$630
Offshore – KTT Members		\$652	
Shearers		\$450	\$500
Wool Classers		\$400	\$450
Shed Hands		\$320	\$370
Learners (1 st Year Pastoral Trainees)		\$250	\$300
Netball Players Assoc		\$125	\$200
Australian Jockeys Assoc		\$125	\$125

⁶⁵ See BMD bundle, 29/5/15, pp 356-360.

Stable Employees Assoc Retired		\$260	\$332
	\$9.00		\$10

Membership numbers falsely inflated

52. The effect of rules 9 and 10 of the AWU Rules is that a person only becomes a member of the AWU after, amongst other things, he or she makes a membership contribution payment. As discussed above, there are difficulties with a person becoming a member by virtue of a payment made by his or her employer. Even putting those difficulties to one side, the membership arrangement between the AWU and Winslow had at least two further difficulties.
53. First, amounts less than the required amounts under rules 9 and 10 of the AWU rules were paid by way of membership contributions. As is apparent from the terms of those rules, the amount of the contribution that has to be paid is fixed by the National Executive. Only the National Executive has the power to vary or waive that contribution amount.⁶⁶ A person can only become a member if the amount of that contribution is paid.
54. It is apparent on the face of at least two Winslow invoices that the rates charged by the AWU to Winslow per member were less than those prescribed by the AWU National Executive. For example, the invoice sent on 10 June 2010 for \$44,401.50 inclusive of GST was for 115

⁶⁶ AWU MFI-2, 30/10/15, p 65.

members at a rate of \$386.10⁶⁷ however the prescribed rates for adults in fulltime employment at this time were \$450 per person. Mr Smoljko said that the membership fees paid for each employee of Winslow were the same as the standard membership fees payable by all AWU union members and that there was never any discount applied.⁶⁸ When asked about the invoice of 10 June 2010, Mr Smoljko said that at this time Winslow had a cash flow problem and that Mr Melhem agreed to suspend membership or payments for a short time. However the figure of \$386.10 was a reduction in rate and would not appear to have involved any suspension.

55. Thus, in the case of the 115 persons referred to in the invoice of 10 June 2010, those persons would not have become members at all if the payment was applied as their first membership contribution. In the case of those persons who were already members, the effect of the payment depends upon the operation of rule 15(3). That rule provides that a member is deemed to have resigned if he or she has not paid the annual contribution for a continuous period of 24 months.⁶⁹
56. The second difficulty with the arrangement was that there appears to have been a lack of attention to the requirement to obtain from the employees in question signed membership applications as required under rule 9 of the AWU rules. Ms Leo, who has been Team Leader of the Membership department since 30 September 2009, gave evidence that it was the practice of the membership department, in relation to Company Paid membership, to enter names into the membership roll

⁶⁷ Melhem MFI-7, 2/6/15, p 75.

⁶⁸ Peter Smoljko, 4/6/15, T:572.11-19, 581.21-38.

⁶⁹ AWU MFI-2, 30/10/15, p 69.

on the basis of lists provided by the company to the AWU, even if persons on the list had not filled out membership applications.⁷⁰

57. The Commission has performed an analysis of the membership status of 38 named employees provided by Winslow to the AWU on 28 May 2012.⁷¹ This list was sent by Mr Smoljko to Mr Melhem. On the same day, Mr Melhem forwarded the list to Angela Leo stating '*Add as new members company paid*'.⁷² There are 38 names on the list. Of those 38 names all but two⁷³ are recorded as having joined the AWU as members on 29 May 2012.
58. The list appears to relate to the invoice of 14 May 2012, for \$74,218.18. The invoice cannot have related to only the 38 persons named on the list: if that were the case, the membership fees charged would have been \$1,953.11 per person. It would thus seem that the 38 persons were those of Winslow's employees who had passed their probationary period since the date of the last invoice.
59. Membership application forms have been produced in relation to only 10 of the 38 names. Of those 10 application forms, 3 were submitted when the person in question was employed by a company other than

⁷⁰ Angela Leo, 21/10/15, T:785.33-44, 796.37-41.

⁷¹ See the list on page 193 of Melhem MFI-7, 2/6/2015.

⁷² Melhem MFI-7, 2/6/15, p 192.

⁷³ Mr Michael Allen, recorded as having joined on 17 March 2011 (and for whom a membership form has been produced dated 15 February 2011, lodged whilst he was an employee of Alcoa); and Pierre Loverdos, recorded as having joined on 16 July 2010, and for whom a membership form has been produced dated 14 July 2010, completed whilst he an employee of 'Hoare Bros'.

Winslow⁷⁴. The remaining seven application forms were dated either 3 July 2012 or 10 July 2012.

60. A similar analysis has been performed by the Commission in respect of a list of 250 full names prepared by Winslow on 10 April 2013.⁷⁵ A list, presumably the list of 250, was provided by Mr Smoljko to the AWU on or around 1 July 2013.⁷⁶ That list is apparent from the email from Mr Smojko to Ms Richardson of 6 March 2013 is a complete list of Winslow Constructors employees in an order of service.⁷⁷ Membership application forms have been produced for only 59 of those 254 names. Of those 59 persons, 15 of the application forms were provided whilst they were not employed by Winslow.

61. Thus, as with the arrangement with Cleanevent, the arrangement with Winslow has resulted in a significant number of persons becoming recorded as members of the AWU when in truth they are not members under the rules, and in circumstances where they may well not have known whether or not they were members.

62. It is submitted, as it was submitted in relation to the Cleanevent case study, that the consequence is that the AWU may have contravened sections 230(2) of the *Fair Work (Registered Organisations) Act 2009* (Cth) in that the AWU Vic Branch entered in the register of its members names of persons who were not members, namely, at least,

⁷⁴ Two of the three are Mr Allen and Mr Loverdos: see the footnote above. Two application forms were produced for the third, Mr Daniel Ernesti, one dated 1 July 2011 whilst he was an employee of Downer and one dated 30 June 2008 whilst he was an employee of 'Skilled'.

⁷⁵ The list appears at Melhem MFI-7, 2/6/15, pp 160-165.

⁷⁶ Melhem MFI-7, 2/6/15, p 137.

⁷⁷ Melhem MFI-7, 2/6/15, p 158.

the Winslow employees referred to above for whom no membership application was available.

E UNSATISFACTORY ASPECTS OF THE RELATIONSHIP BETWEEN THE AWU AND WINSLOW

63. Mr Ben Davis, the current State Secretary of the AWU Victoria said in evidence that he is uncomfortable with arrangements of the kind that the AWU and Winslow had because ‘I think employers paying membership dues on that scale profoundly weaken us in the workplace’. Mr Davis amplified that to include reducing the union’s bargaining power when bargaining with the employer in question on a particular EBA.⁷⁸ In the ACT CFMEU Case Study in hearings in Canberra, the current secretary of the ACT sub-branch of the CFMEU, Mr David Broadley, agreed with these sentiments.

64. Mr Broadley accepted that payments of union dues by employers inhibit the ability of the Union to negotiate on behalf of workers because the union ‘can’t go in as hard’.⁷⁹ Mr Broadley made an additional point which amounts to the proposition that such payments undermine the concept of voluntary association. He said:⁸⁰

‘it’s like a football club. If you want to be a member of a football club, you pay your way. To me, it’s if you want to be in a union you be in a union, but you pay to be in that union and you be proud to be in that union...’

⁷⁸ Ben Davis, 4/6/15, T:625.44-47, 626.1-12.

⁷⁹ David Broadley, 23/7/15, T:945.25-31.

⁸⁰ David Broadley, 23/7/15, T:945.3-46.

65. The correctness of the views of Mr Davis and Mr Broadley is borne out by an examination of some of the dealings between Winslow and the AWU.

Disclosure to Winslow of material obtained during collective bargaining with a competitor

66. BMD Constructions Pty Ltd (**BMD**) was one of Winslow's competitors. Like Winslow, BMD entered into EBAs with the AWU. In contrast to Winslow, BMD had a workforce with approximately 50% or less union members.

67. BMD and the AWU entered into a collective agreement in 2007 which had a nominal expiry date of 30 September 2010.⁸¹ BMD and the AWU negotiated a further EBA in 2010. That agreement was executed by the AWU and BMD on 8 October 2010 and approved by Fair Work Australia on 2 February 2011 (**2010 BMD EBA**).⁸² On 28 September 2010, Mr Melhem sent Mr Smoljko three emails in fairly quick succession. The first two emails forwarded to Mr Smoljko copies of the EBA that had been or was about to be agreed between the AWU and BMD and a copy of a notice to BMD employees updating them on the EBA negotiations.⁸³ The third email, sent minutes later, attached what Mr Melhem described as 'Final EBA'.⁸⁴

⁸¹ See Clause 3. BMD Bundle, 29/5/15, p 2.

⁸² BMD Bundle, 29/5/15, p 17, 43-44.

⁸³ Melhem MFI-7, 2/6/15, pp 221-226, 261.

⁸⁴ Melhem MFI-7, 2/6/15, p 227.

68. Mr Smoljko forwarded to Mr Strano Mr Melhem's third email. In his email to Mr Strano, Mr Smoljko stated:⁸⁵

Cesar has finally delivered, here is the BMD EBA!!

P.S he had to use the Excel spreadsheet that I developed for you to help drive this outcome!

69. Mr Smoljko also forwarded to Mr Strano the second of Mr Melhem's emails, with the comment 'this should bring a smile to your face!'.⁸⁶

70. Mr Strano did not share Mr Smoljko's enthusiasm. He said in an email in reply:⁸⁷

You don't know me well enough. Replace smile with **horror** because this will make BMD less competitive and for a short time advantage us but you're smart enough to know what's hurtling towards us in 18 months and it could wipe out all our competitive advantage and give all our competitors who the AWU does not cover the biggest boost of all time. Ready yourself for battle and lets develop a strategy on how we will preserve our ability to stay competitive and provide continuity for all our people.

71. Mr Smoljko forwarded his comments to Mr Strano along with the second of Mr Melhem's emails, to Mr Rohan Davidson, the General Manager of Winslow, Mr Davidson responded to Mr Smoljko's email asking 'Peter, from this info, can you please work up what their labour rate would be on a project valued at \$10m'.⁸⁸

72. As previously indicated, the EBA between BMD and the AWU was not signed until 8 October 2010, and was not approved by the Fair

⁸⁵ Melhem MFI-7, 2/6/15, p 227.

⁸⁶ Melhem MFI-7, 2/6/15, p 221.

⁸⁷ Melhem MFI-7, 2/6/15, p 221.

⁸⁸ Melhem MFI-7, 2/6/15, p 218.

Work Commission until 2 February 2011. Mr Andrew Marcos, the Director Human Resources and Administration at BMD, said that he did not authorise Mr Melhem to provide any of the material regarding the BMD EBA process to Winslow.⁸⁹ He did not know, until he heard Mr Melhem's evidence at the Commission, that this material in fact had been provided.⁹⁰ Mr Marcos said that to his knowledge Mr Melhem had never provided BMD with materials of this kind in relation to negotiations at Winslow or any of BMD's other competitors were conducting.⁹¹

73. Mr Gallus, BMD General Manager, gave evidence that he had never received an EBA or a competitor's EBA in the whole time he had been in the industry. He said that only way he had ever received a competitor's EBA was from downloading it from the Fair Work website after it had become a certified document.⁹²

74. Mr Marcos' and Mr Gallus' evidence should be accepted. It is contrary to Mr Melhem's claim that BMD 'would have received material from me about what we're doing with Winslow. So it is not uncommon. So it is not secret information. We share.'⁹³ The evidence of Mr Marcos is also contrary to the general thrust of Mr Melhem's attempt to defend his conduct. That may fairly be described as a claim that it was part of his job to ensure that there was 'a level

⁸⁹ Andy Marcos, 2/6/15, T:409.25-41.

⁹⁰ Andy Marcos, 2/6/15, T:409.43-47, 410.1-28.

⁹¹ Andy Marcos, 2/6/15, T:410.39-46.

⁹² Jeff Gallus, 2/6/15, T:417.32-41.

⁹³ Cesar Melhem, 2/6/15, T:369.20-25.

playing field’ and ‘similar outcomes’ to members in the industry.⁹⁴ Once an enterprise agreement has been approved by Fair Work Australia it becomes publicly available information. Before that time however, the information is not publicly available. Mr Strano accepted that the provision of this information in advance gave Winslow a competitive advantage.⁹⁵ The importance of the information to Winslow is demonstrated to Mr Davidson’s email to Mr Smoljko. It gave Winslow approximately four months advance notice of what BMD’s labour costs would be under its new enterprise agreement. It thus gave Winslow an unfair competitive advantage against BMD in pricing any tenders in that four month period.

75. It is submitted that the Commission should find that disclosure of the BMD EBA material by the AWU to Winslow may have constituted a contravention by the AWU of its obligations to bargain in good faith, and in particular the requirement in section 228(1)(e) of the *Fair Work Act* to refrain from capricious or unfair conduct that undermines collective bargaining.

Comparison of Winslow and BMD EBAs

76. Mr Melhem’s claim that he was delivering a ‘level playing field’ is belied by the palpable excitement in Mr Smoljko’s email to Mr Strano of 28 September 2010. That email strongly suggests that the ‘outcome’ in the new BMD EBA was something that Mr Melhem was providing to Winslow. Mr Smoljko told Mr Strano in this email that

⁹⁴ Cesar Melhem, 2/6/15, T:368.39-47, 369.1-18.

⁹⁵ Dino Strano, 3/6/15, T:555.29-33.

‘Cesar has finally delivered’ and said that Mr Melhem used a spreadsheet that Mr Smoljko developed to ‘help drive this outcome’. It is submitted that the ‘outcome’ was a set of wages and conditions that gave Winslow a competitive advantage over BMD.

77. A comparison of the wage rates in the 2010 BMD EBA with the rates in the Winslow EBA in force at the time suggests that the ‘outcome’ of the BMD EBA negotiations was indeed a good one for Winslow. That is apparent from the following matters:

- (a) At the time of the disclosure in September 2010, Winslow employees in Victoria were covered by the *Winslow Constructors AWU Agreement 2009-2012* (**2009 Winslow EBA**) which commenced on 20 November 2009 and had a nominal expiry date of 30 June 2012.⁹⁶ It was signed by Cesar Melhem on behalf of the AWU and Dino Strano on behalf of Winslow.⁹⁷
- (b) The 2009 Winslow EBA and the new BMD EBA can be compared by using the most junior classification under each agreement as an example. Under the 2009 Winslow EBA, a ‘new entrant to the industry’ is classified at ‘TCW’ or ‘Trainee Construction worker’.⁹⁸ Under the 2010 BMD EBA, a new entrant to the industry is classified as ‘Level 1’ which

⁹⁶ *Winslow Constructors AWU Agreement 2009-2012*,

⁹⁷ *Winslow Constructors AWU Agreement 2009-2012*, p 20.

⁹⁸ *Winslow Constructors AWU Agreement 2009-2012*, pp 10-11.

is defined as ‘An employee who has not previously worked within the Industry Classifications defined herein.’⁹⁹

- (c) At the time the disclosure was made in September 2010, the 2010 BMD EBA provided a new entrant to the industry in Victoria with an hourly rate of \$20.95 per hour. This increased by 2% to \$21.36 from 1 April 2011.¹⁰⁰
- (d) At the same time, the 2009 Winslow EBA provided a new entrant to the industry in Victoria with an hourly rate of \$16.19. This increased to \$16.67 from 1 July 2011.¹⁰¹
- (e) A comparison of the position for a more senior employee produces similar results. Under the 2010 BMD EBA a backhoe operator is classified as a ‘Level 5’ and in September 2010 was entitled to \$24.67 per hour increasing by 2% to \$25.16 from 1 April 2011. Under the 2009 Winslow EBA a backhoe operator is classified as ‘PO2’ and in September 2010 was entitled to \$20.51 increasing to \$21.13 from 1 July 2011.¹⁰²

78. Mr Smoljko said that the Excel spreadsheet that he referred to in his email was a document that compared Winslow’s rates to other enterprise agreements in the industry.¹⁰³ Mr Smoljko did not accept

⁹⁹ BMD Bundle, 29/5/15, p 26.

¹⁰⁰ BMD Bundle, 29/5/15, pp 27-28.

¹⁰¹ *Winslow Constructors AWU Agreement 2009-2012*, p 10.

¹⁰² BMD Bundle, 29/5/15, pp 27-28; *Winslow Constructors AWU Agreement 2009-2012*, p 10.

¹⁰³ Peter Smoljko, 4/6/15, T:594.45-47, 595.1-6.

that he meant to tell Mr Strano that Cesar had delivered in the sense that he had driven up what BMD had to pay its workforce. He said:¹⁰⁴

No, he had delivered an enterprise agreement. That's what that would have been about, because you can drive up rates without certifying the agreement. You don't need to do it through an agreement.

79. That is an unconvincing explanation. The exclamation marks used by Mr Smojlko in his email, and his other comments to Mr Strano indicate that he was obviously pleased, not merely by the fact of there being an EBA, but with what was in that EBA. The only thing conceivably exciting about what was in the EBA from Winslow's point of view was the labour rates and conditions contained in it.
80. It is no doubt true that different rates of pay may be explained by different conditions of employment, different company circumstances and different timing of EBA negotiations. However the result of the two agreements was that Winslow employees were paid significantly less than employees of one of its competitors. Looked at another way, a company with what for practical purposes can be described as a 100% unionised work force obtained an EBA with lower pay rates than a company with a workforce of approximately 50% AWU members.
81. Because the Commission did not receive detailed evidence concerning the 2009 Winslow and 2010 BMD EBA negotiations, it is not, it is submitted, appropriate to make any finding on the question of whether the course of the Winslow negotiations was influenced by the membership arrangement between the AWU and the company. However, it will be rarely, if ever, that one can with confidence

¹⁰⁴ Peter Smojlko, 4/6/15, T:596.29-32.

exclude such influence in the face of arrangements such as existed between Winslow and the AWU. That was the concern expressed in oral evidence by Mr Davis and Mr Bradley.

F CONCLUSIONS

82. Conclusions concerning particular contraventions of statutory provisions have been set out in the body of these submissions.

83. The Winslow case study raises an important policy issue, namely whether membership arrangements of this kind should be prohibited by legislation. Presently, there is no statutory prohibition against employers making payments of union fees on behalf of employees, although it is open to registered organisations to include such a prohibition in their rules. It is submitted that consideration should be given by the Commission in the final report to recommending the statutory abolition of such arrangements.