

ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION

SUBMISSIONS OF COUNSEL ASSISTING

AWU: CHAPTER 10

DOWNER EDI

Subject	Paragraph
A INTRODUCTION	1
B THE PROJECT	2
C THE PICKET	11
D THE MEETING ON 10 AUGUST 2012	18
E FAIR WORK AUSTRALIA APPLICATIONS	39
Commencement of proceedings	39
The conduct of proceedings	48
F INVOICE AND PAYMENT	62
G THE REPLACEMENT INVOICE	70
H CONCLUSIONS	82
False Invoice	82

Subject	Paragraph
Why was the invoice falsified?	92
False accounting offences	95
Abuse of Process?	100

A INTRODUCTION

1. This case study concerns the payment by Downer EDI Engineering Power Pty Ltd (**Downer**) of an invoice issued by the Victorian Branch of the Australian Workers Union (**AWU**) on 2 October 2012 (although dated 18 September 2012). The invoice was for \$25,000 plus GST and was described as being for ‘Provide Occupational Health and Safety Training for 8 delegates and 8 OH&S representatives for 5 days on the Yolla project.’¹ The invoice, for the reasons set out below, was false. In fact Downer had agreed in August 2012 to pay \$25,000 for the purposes of putting an end to a picket that was interrupting work performed by Downer.

B THE PROJECT

2. In 2011 and 2012 Downer was engaged in a refurbishment project (**the project**) at the Yolla offshore gas platform, in Bass Strait.² The Yolla platform is owned by Origin Energy Ltd and AWE Limited, and operated by Origin.³ The platform pipes gas back to Lang Lang where it is processed for domestic use.⁴ The refurbishment project involved demolition of some existing parts of the platform and installation of new processing and accommodation modules.⁵ The workers engaged on the project were transported to the platform by helicopter from Essendon airport, working 12-hour shifts, over 14 days.⁶

¹ Anthony Sirsen, witness statement, 2/6/15, para 44.

² Anthony Sirsen, witness statement, 2/6/15, paras 7, 11-13.

³ Anthony Sirsen, witness statement, 2/6/15, para 8.

⁴ Anthony Sirsen, 2/6/15, T:309.1-7.

⁵ Anthony Sirsen, 2/6/15, T:309.10-15.

⁶ Anthony Sirsen, 2/6/15, T:309.34-43.

3. Prior to the commencement of the project Downer engaged with three unions, the AWU, AMWU and ETU to negotiate a project agreement.⁷ The participants in the negotiations for Downer were Bill McGuire, Executive GM Industrial Relations, who took the lead in negotiations, and Anthony Sirsen, Project Sponsor.⁸ The negotiators for the unions were Terry Lee for AWU, Peter Mooney for ETU and Steve Dodd for AMWU.⁹
4. The negotiations produced two agreements:
 - (a) The Yolla Mid-Life Enhancement Multi-Enterprise (Employers, AMWU, AWU, ETU) Greenfields Agreement (**2011 EBA**) approved by Fair Work Australia on 19 August 2011.¹⁰
 - (b) A memorandum of understanding between the employers and unions executed on or about 29 July 2011 (**MOU**). The purpose of the MOU was to consolidate all agreements reached between the Parties in relation to the employment of construction personnel for the Project subject to the 2011 EBA.¹¹
5. Clause 10 of the MOU provided for training allowances.¹² It provided that employees required by Downer to attend training (including safety training) were entitled to a flat rate of \$487.60 for each training day, increasing by 6% from 1 July 2012, as well as travel and meal allowances for interstate employees.
6. Work commenced on the project in about December 2011.¹³
7. The demobilisation of labour on the project commenced in August 2012.¹⁴ Downer made a number of positions redundant during this process. In doing so, Downer communicated to the AWU and other unions at a meeting on 2 May 2012 that there

⁷ Anthony Sirsen, witness statement, 2/6/15, para 16.

⁸ Anthony Sirsen, witness statement, 2/6/15, paras 7, 15.

⁹ Anthony Sirsen, witness statement, 2/6/15, para 18.

¹⁰ Anthony Sirsen, witness statement, 2/6/15, para 17.

¹¹ Anthony Sirsen, witness statement, 2/6/15, paras 19-20; Sirsen MFI-1, 2/6/15, p 2.

¹² Sirsen MFI-1, 2/6/15, p 4.

¹³ Anthony Sirsen, 2/6/15, T:310.8.

¹⁴ Anthony Sirsen, witness statement, 2/6/15, paras 12, 22.

would be a rolling reduction in manning levels for the project. Between that meeting and early July 2012, Downer made 35 workers on the project redundant.¹⁵

8. Mr Sirsen's evidence was that redundancy decisions were based on a review conducted by Downer which focussed on the skills and competencies of the workers.¹⁶ He described that process as the application of a 'skills matrix', involving assessment of safety attitudes, ability to work unsupervised, time-keeping, ability to work within a team, and the like. The assessment was undertaken by direct supervisors and verified by superintendents on the project.¹⁷
9. As at 6 July 2012, Downer had selected a number of employees for redundancy, including Mr Jamie Spencer.¹⁸ The AWU organiser then responsible for the project was Mr Terry Lee. Mr Lee disputed the entitlement of Downer to make Mr Spencer (amongst others) redundant. On 8 July 2012 Downer agreed to review the process pursuant to which Mr Spencer and others were made redundant.¹⁹
10. Following the above review, on about 2 August 2012 Mr Spencer, Mr Predrag Susa and other employees were made redundant. Mr Spencer and Mr Susa were both AWU delegates, and otherwise had worked as a rigger-scaffolder and rigger respectively.²⁰

C THE PICKET

11. On Monday 6 August 2012 and Tuesday 7 August 2012, a picket was established at Essendon Heliport, from where the workers at the Yolla platform were transported to

¹⁵ Sirsen MFI-1, 2/6/2015, p 11.

¹⁶ Anthony Sirsen, witness statement, 2/6/15, para 22.

¹⁷ Anthony Sirsen, 2/6/2015, T:311.22-41.

¹⁸ Sirsen MFI-1, 2/6/2015, p 11; Anthony Sirsen, 2/6/15, T:312.21-37.

¹⁹ Sirsen MFI-1, 2/6/2015, p 12.

²⁰ Sirsen MFI-1, 2/6/15, pp 11-12; Anthony Sirsen, 2/6/2015, T:312.21-37; Anthony Sirsen, witness statement, 2/6/15, paras 23-24; James Spencer, witness statement, 15/10/15, paras 2-6; Predrag Susa, 15/10/15, paras 6, 8, 21.

their shifts.²¹ The effect of the picket was that employees unwilling to cross the line were unable to be transported to work on the platform for their 14-day shifts.²²

12. The picket was organised by Mr Lee, with the assistance of Mr Spencer and Mr Susa. Mr Lee had ceased his employment as an AWU organiser prior to the picket, on 31 July 2012.²³ Downer representatives knew, at the time of the picket, that Mr Lee was no longer an AWU organiser.²⁴ They believed that the picket was not supported by the AWU. Mr McGuire gave evidence that he contacted Mr Melhem on the day of the picket and said that Mr Melhem seemed genuinely surprised that there was a picket.²⁵ An email sent by Mr French, who reported to Mr McGuire, to Downer employees on 6 August 2012 recorded Mr McGuire's impression of Mr Melhem's reaction and described Mr Lee as a 'former AWU organiser'.²⁶
13. On 6 August 2012, Downer made an urgent application to Fair Work Australia for orders under s 418 of the *Fair Work Act* 2009 (Cth) in substance requiring the employees to return to work. The respondents to that application were the employees and subcontractors who did not return to work that day, Mr Lee, Mr Spencer and Mr Susa. After the establishment of the second picket on 7 August 2012, a second application to similar effect was filed on that day. Mr Lee, Mr Spencer and Mr Susa were also respondents to this application, together with the employees and subcontractors who failed to board the helicopter transport on that day.²⁷
14. The first application was heard on the morning of 8 August 2012. A legal representative for the AWU, the AMWU and the ETU appeared on the hearing, but there was no appearance for any of the respondents. The Commissioner was told, without opposition

²¹ Anthony Sirsen, witness statement, 2/6/15, para 25; Anthony Sirsen, 2/6/15, T:309.34-37.

²² Anthony Sirsen, witness statement, 2/6/15, para 27.

²³ Terrence Lee, 15/10/15, T:440.47.

²⁴ Anthony Sirsen, 23/10/15, T:1017.40-41; William McGuire, 16/10/15, T:465.36-41.

²⁵ William McGuire, 16/10/15, T:466.16.

²⁶ Downer MFI-1, 15/10/15, p 22.

²⁷ Downer MFI-1, 15/10/15, pp 28-32.

from counsel for the unions, that Mr Lee was not an officer of the AWU any longer, and by counsel for the unions, that the picket was not authorised by any of them.²⁸

15. Following brief oral submissions, Fair Work Australia made an order, expressly on the basis that the picket was not supported nor endorsed by the AWU, AMWU or CEPU, directing the employee respondents to cease industrial action and enter the Essendon Heliport and board the flight for the platform.²⁹ An order in the same terms was made on the hearing of the second application against 10 further employees on 9 August 2012.³⁰
16. It would seem that no orders on either day (other than orders for substituted service) were made against Mr Lee, Mr Susa or Mr Spencer.
17. The next helicopter transport was due to leave on Friday 10 August 2012.³¹ Mr Bill McGuire, on 9 August 2012, arranged a meeting between Downer representatives and representatives of the ETU and AMWU for the morning of 10 August 2012.³² By this time, it was known that none of the unions supported the picket, and that all of the employees had been ordered by Fair Work Australia to return to work. The purpose of the meeting was to ensure that that occurred on the 10th. It is not clear why Mr Melhem was not invited to this meeting, although nothing relevantly turns on that issue.³³

D THE MEETING ON 10 AUGUST 2012

18. Mr Sirsen, who had been on leave from 6 August 2012 until 9 August 2012, did not attend the meeting organised by Mr McGuire. Instead, he arranged a meeting on 10 August 2012 with Terry Lee at the Essendon Heliport, at about 5:30am.³⁴ Mr Sirsen

²⁸ Downer MFI-1, 15/10/15, pp 44-45.

²⁹ Downer MFI-1, 15/10/15, pp 47-50.

³⁰ Downer MFI-1, 15/10/15, pp 57-6,57-9.

³¹ McGuire MFI-1, T:11.11-16.

³² William McGuire, 16/10/15, T:465.11-30; Anthony Sirsen, witness statement, 2/6/15, para 31.

³³ Mr McGuire's explanation appears at William McGuire, 16/10/15, T:465.32-466.37.

³⁴ Anthony Sirsen, witness statement, 2/6/15, paras 29, 32.

had dealt with Mr Lee on a number of occasions since about 2001-2002 and knew him reasonably well.³⁵

19. Mr Sirsen's purpose in arranging the meeting was to convince Mr Lee to have the picket removed. He was concerned that Downer was not replenishing the workers on the platform and the workers were therefore being required to work past their 14-day shifts. He was also concerned about loss of production and costs consequences for late completion of the project, to as much as \$1 million per day.³⁶
20. Mr Sirsen's account of the meeting (which took place with Terry Lee, Predrag Susa and Jamie Spencer) is as follows:³⁷

At this meeting Mr Lee said words to the effect that the picket was related to the redundancies of Mr Susa and Mr Spencer who were two of the AWU employee representatives on the Project. I said words to the effect to Mr Lee that the only appropriate course of action was for the employees' representative, the AWU, to notify FWA of a dispute and to have it properly determined and that if the picket was not disbursed Downer would have no option but to seek an injunction from the Federal Court. Mr Lee responded with words to the effect that Mr Susa and Mr Spencer were employee representatives and should be the last to leave the Project. He added that Downer had not met its obligations under the MOU in relation to employee occupational health and safety (OHS) training and that it was not right for Downer to dismiss employees on the basis of not having the appropriate skills in circumstances where Downer had not provided them with appropriate training.

Mr Lee said words to the effect that all delegates should receive OHS training. He sought agreement from me for Downer to pay OHS training for all 32 delegates and OHS representatives (and deputies) on the Project. The 32 included representatives from all unions on the Project. Based on the rates in clause 10 of the MOU, this would have cost more than \$100,000.

In response to Mr Lee's request, I said words to the effect that this was not possible (because of the effect on manning) but that subject to obtaining approval from Origin (as Downer's contract was cost reimbursable and the training would ultimately be paid by Origin), Downer would provide funding for the training of 8 OHS representatives/delegates over a 5 day period.

21. Mr Sirsen's evidence was that Terry Lee then spoke with Predrag Susa and Jamie Spencer, returned to Mr Sirsen and told him that the AWU would accept the training of 8 representatives.³⁸

³⁵ Anthony Sirsen, 2/6/15, T:320.8-40.

³⁶ Anthony Sirsen, 2/6/15, T:316.29-42.

³⁷ Anthony Sirsen, witness statement, 2/6/15, paras 33-35; Anthony Sirsen, 2/6/15, T:317.37.

³⁸ Anthony Sirsen, witness statement, 2/6/15, para 36.

22. According to Mr Sirsen, there was no discussion of the identity of the eight representatives who would receive training in accordance with this arrangement and no discussion of the precise figure that would be paid. His intention was that Predrag Susa and Jamie Spencer were to be made redundant and would not be receiving any training.³⁹ He said he did not discuss with Terry Lee whether any of the payment would go to Predrag Susa or Jamie Spencer.⁴⁰
23. The picketers left the heliport at about 7 am on 10 August 2012.⁴¹
24. Mr Sirsen returned to Downer's offices. About an hour later, the attendees at the meeting organised by Mr McGuire arrived at the heliport and supervised the employees' disembarkation.
25. Mr Lee, Mr Spencer and Mr Susa all gave evidence.⁴² They gave a different account of this meeting. In substance they all accepted that there was a meeting at about 5.30 am on 10 August. Each said that that meeting took place in Mr Sirsen's car. In substance, all three witnesses said that the discussion in the car was about 'what it would take to fix' the dispute about Mr Spencer's and Mr Susa's redundancy. All three witnesses said that, in substance, a suggestion was made that Mr Susa and Mr Sirsen be paid for the two week swing that they had been about to commence when they were made redundant. That, according to these three witnesses, would amount to about \$12,500 each, although there was no discussion of a precise dollar amount. Mr Sirsen asked whether a payment of this nature would 'fix the issue'. According to these three witnesses, they then got out of the car and discussed it and decided to accept it. That was conveyed to Mr Sirsen. The other protesters were then told that the dispute was settled and the picket disbursed.

³⁹ Anthony Sirsen, 2/6/15, T:319.21-36, 321.4-8.

⁴⁰ Anthony Sirsen, 2/6/15, T:324.30.

⁴¹ Anthony Sirsen, witness statement, 2/6/15, paras 36-37; Anthony Sirsen, 2/6/2015, T:319.15-19.

⁴² The evidence in this paragraph appears at: Terrence Lee, witness statement, 15/10/15, paras 15-16; Terrence Lee, 15/10/15, T:433.18-437.7; James Spencer, witness statement, 15/10/15, paras 23-24; James Spencer, 15/10/15, T:453.19-456.10; Predrag Susa, witness statement, 15/10/15, paras 29-30; Predrag Susa, 15/10/15, T:444.1-447.29.

26. Mr Lee and Mr Spencer were adamant that there was no discussion on 10 August 2012 about training.⁴³ Mr Susa said that he could not recollect any such discussion, and that the discussion in the car was about paying him and Mr Spencer for the swing.⁴⁴ Mr Susa and Mr Spencer had in fact received training earlier in the life of the project.⁴⁵
27. None of Mr Lee, Mr Susa or Mr Spencer was cross-examined by Downer. Even putting that to one side, there are many objective reasons for preferring the accounts of Mr Lee, Mr Susa and Mr Spencer to that of Mr Sirsen.
28. *First*, the purpose of the meeting on 10 August 2012 was to discuss ending the picket. The picket had nothing to do with training: it was a protest in support of the claims of Mr Susa and Mr Spencer claim that they had been wrongfully terminated. It defies common sense to think that Mr Susa and Mr Spencer would agree to disband the picket on the basis that training was provided to other employees. It defies common sense to think that Mr Lee or Mr Sirsen would discuss the training of other employees in this context.
29. *Secondly*, according to Mr Sirsen the dispute about training was about what he said was Downer's obligation under clause 10 of the MOU.⁴⁶ Even to a non-lawyer, it is obvious that that clause does not require Downer to provide training. Clause 10 provides that if Downer requires employees to attend training, it must pay those employees while they are being trained. Further, even to a non-lawyer, it is obvious that Downer's obligation under that clause is not to pay the AWU (as ultimately occurred) but rather to pay the employees in question.
30. *Thirdly*, Mr Lee, to Mr Sirsen's knowledge, was no longer employed by the AWU at this time. If in truth there had been a dispute about clause 10, it would not have been raised by Mr Lee. Mr Sirsen must have known that, and must also have known that any agreement with Mr Lee could not have bound the AWU.

⁴³ Terrence Lee, witness statement, 15/10/15, para 18; Terrence Lee, 15/10/15, T:434.32- 435.30, 436.37-437.7; James Spencer, witness statement, 15/10/15, para 25; James Spencer, 15/10/15, T:454.4-455.5.

⁴⁴ Predrag Susa, witness statement, 15/10/15, para 31; Predrag Susa, 15/10/2015, T:445.33 - 446.3.

⁴⁵ Terrence Lee, 15/10/15, T:435.1-6; Predrag Susa, 15/10/15, T:445.14 -24; James Spencer, 15/10/15, T:454.11-19.

⁴⁶ Sirsen MFI-1, 2/6/15, p 4.

31. *Fourthly*, as will be seen, the monies which, according to Mr Sirsen, ultimately were paid by Downer to the AWU pursuant to the agreement on 10 August 2015 were paid immediately by the AWU to Mr Susa and Mr Spencer. Had the payment in fact been for training, that would not have occurred.
32. *Fifthly*, no training was sought by Mr Sirsen and his evidence was that he was unaware of any training ever having been provided.⁴⁷ The AWU's internal investigations performed this year (referred to below) indicate that no training was provided. No training could have been necessary: the project was in a demobilisation stage and reached practical completion in October 2012.⁴⁸
33. *Sixthly*, Mr Sirsen's evidence was that he obtained approval for the payment of a 'training expense' from the Origin contract representative for the project, Joe McCormick, at about 8am on 10 August 2012.⁴⁹ Mr McCormick provided a witness statement to the Commission and was not required for cross-examination. Mr McCormick denied having a discussion with Mr Sirsen in which he requested that Origin approve OHS training that was in any way connected with the ending of the picket. Mr McCormick said that in the conversation he had with Mr Sirsen about the ending of the picket on the morning of 10 August, Mr Sirsen told him that he had shown Mr Lee a show cause notice issued by Origin to Downer in connection with the picket and that that was an important factor in bringing the picket to an end.⁵⁰ Mr McCormick also gave evidence that it was not necessary for Downer to seek Origin's approval before engaging a training provider. He said that a search of Origin's files did not reveal a copy of the invoice ultimately paid by Downer for 'training' or any indication that that invoice was reimbursed by Origin.⁵¹
34. There is the following additional consideration. Fair Work Building and Construction (FWBC) began investigating the picket soon after 6 August 2012. Mr McGuire said that it was normal company practice to inform the FWBC in these circumstances.⁵² Mr

⁴⁷ Anthony Sirsen, witness statement, 2/6/15, para 46.

⁴⁸ Anthony Sirsen, witness statement, 2/6/15, para 13.

⁴⁹ Anthony Sirsen, witness statement, 2/6/15, para 38; Anthony Sirsen, 2/6/2015, T:319.44-47; 320.2-6.

⁵⁰ Joe McCormick, witness statement, 23/10/15, paras 14-16.

⁵¹ Joe McCormick, witness statement, 23/10/15, paras 22-25.

⁵² William McGuire, 16/10/15, T:468.23-26.

Sirsen was interviewed by FWBC representatives on 27 August 2012. Preliminary questions put to Mr Sirsen at the interview included warnings that anything he said might be used against him in court and that to knowingly provide false or misleading information was a criminal offence.⁵³

35. In the FWBC interview, Mr Sirsen gave the following account of the meeting on 10 August 2012:⁵⁴

‘When I got to the helipad probably at about, say, quarter to, 10 to 6, there was – there was a couple of people standing around and there as Terry Lee and Predrag Susa and Jamie Spencer, who obviously was expecting me because I had called at 5:30 and said I’m on my way. So I just – I just – they were standing around as well, so I just went up to them and had a conversation. Yeah. “What was this about? You know, there’s a better way of doing this. You know, why – why are you – why are we – why are we taking this action when you guys are aware of the fact that this job is now coming to an end? And if you think Mr Spencer and Mr Susa was unduly treated, then there’s a process to follow”. **That was the conversation**’.
(emphasis added)

36. Mr Sirsen gave other similar accounts of this conversation during the interview.⁵⁵ At one point he said:⁵⁶

the only thing that’s come out of that – that – the sequence of events for that week [*that is, the week ending 10 August 2012*] was an adverse action claim by the AWU, which is listed as a conference in the Fair Work Australia this Wednesday’

37. At no point in the interview did Mr Sirsen say anything to the effect that there was any discussion or agreement about training on this day. His accounts of the meeting on the 10 August 2012, and in particular the two quoted passages above, suggest that all that occurred was that he told Mr Lee, Mr Susa and Mr Spencer that they should take proceedings in Fair Work Australia if they wanted to pursue the dispute about wrongful termination, and that they accepted his advice and disbanded the picket. This account is inconsistent with the evidence that Mr Sirsen gave to the Commission. It is also inconsistent with Mr Lee’s, Mr Susa’s and Mr Spencer’s evidence to the Commission.

⁵³ Sirsen MFI-1, 23/10/15, p3.30-43.

⁵⁴ Sirsen MFI-1, 23/10/15, p19.35-47.

⁵⁵ Sirsen MFI-1, 23/10/15, p 15.42-16.22, p 23.5-18

⁵⁶ Sirsen MFI-1, 23/10/15, p 22.11-15.

On any view of the evidence before the Commission, Mr Sirsen was misleading the FWBC at the interview.

38. All of the above matters support acceptance of Mr Lee's, Mr Susa's and Mr Spencer's accounts of the meeting of 10 August 2012. However, there is one matter that requires further consideration. That is the commencement of proceedings in the Fair Work Australia by the AWU on behalf of Mr Susa and Mr Spencer. That is the topic of the next section of these submissions.

E FAIR WORK AUSTRALIA APPLICATIONS

Commencement of Proceedings

39. Applications were filed by AWU in Fair Work Australia on 17 August 2012 seeking resolution of a general protections dispute in respect of Predrag Susa and Jamie Spencer.⁵⁷ The applications alleged that the termination of the employees was due to their activities as a Health and Safety Representative (in the case of Predrag Susa) and as site delegates on the project.⁵⁸ The AWU, and not Messrs Susa or Spencer, was the named applicant, as permitted under s 365 of the *Fair Work Act 2009* (Cth).
40. Under s 366 of the *Fair Work Act*, applications in respect of general protections disputes involving a dismissal were required to be filed within 21 days after the dismissal took effect. Thus, any general protections dispute in respect of the terminations of Mr Susa and Mr Spencer had to be commenced by about 23 August 2012.
41. None of Mr Lee, Mr Susa and Mr Spencer knew precisely how the proceedings came to be commenced. Mr Lee said that after he had reached an agreement with Mr Sirsen on 10 August 2012, Mr Sirsen said to him that he would have to work out how to make the payments to Mr Susa and Mr Spencer. Mr Lee said that he told Mr Sirsen that he would have to work that out with the union.⁵⁹ Mr Lee gave evidence that he definitely

⁵⁷ Downer MFI-1, 15/10/215, pp 80-89.

⁵⁸ Sirsen MFI-1, 2/06/15, pp 15, 16, 19.

⁵⁹ Terrence Lee, witness statement, 15/10/15, para 17.

remembered telling Jeff Sharp on 10 August 2015 that the dispute had been resolved⁶⁰ and that he could not recall talking to Mr Melhem about it. Mr Lee said that he did not tell anyone at the union that the matter had been resolved on the basis that eight OH&S representatives would be trained.⁶¹ Otherwise, Mr Lee said that he was not able to shed any light about the commencement of these proceedings, and that he had no role in their institution.⁶²

42. Mr Susa said that he could not recall whether he told anyone at the AWU that he wanted proceedings commenced, but that there was discussion at some point that there was going to be proceedings. He could not recall when that discussion was.⁶³ Mr Susa said that at one point he spoke to Jeff Sharp (who replaced Mr Lee as the AWU organiser responsible for the job) about the picket but could not recall if he spoke about an application to the Fair Work Commission. He said that at the time of the picket, he did not know whether or not the AWU had made an application to Fair Work Australia about his dismissal, but he assumed that an application would be made.⁶⁴
43. Mr Spencer said that he spoke to Mr Sharp shortly after he had been notified of his termination (that is, on 5 August 2012). According to Mr Spencer, Mr Sharp said that he would go ahead and get an unfair dismissal claim lodged.⁶⁵
44. Mr Sharp gave evidence that he was informed on 10 August 2012, either by Mr Lee, Mr Spencer or Mr Susa, that an agreement had been reached on the basis that Mr Spencer and Mr Susa would be paid for a two week swing. He said that he had no recollection of the circumstances in which the general protections applications were filed and no knowledge either of the issue of the invoice to Mr Sirsen.⁶⁶ Mr Sharp did say that it was possible that one of Mr Spencer or Mr Susa asked him to arrange for the commencement of the proceedings and that it was possible that he may have spoken to someone in the AWU office about it. However he said that he could not recall either circumstance.

⁶⁰ Terrence Lee, 15/10/15, T:440.35-40.

⁶¹ Terrence Lee, 15/10/15, T:441.20-28.

⁶² Terrence Lee, 15/10/15, T:438.13-31.

⁶³ Predrag Susa, 15/10/15, T:448.15-23.

⁶⁴ Predrag Susa, witness statement, 15/10/15, paras 25, 27.

⁶⁵ James Spencer, witness statement, 15/10/15, paras 15, 17.

⁶⁶ Jeffrey Sharp, witness statement, 22/10/15, paras 5-7.

45. The applications were signed by Mr Winter on behalf of the AWU. Mr Winter said that he brought the applications on the instructions of Mr Melhem. He said that he was instructed to put the matters that appeared in the applications by Mr Melhem, and that he did not recall any dealings with Mr Sharp, Mr Lee, Mr Susa, or Mr Spencer.⁶⁷ He claimed that at the time the proceedings were commenced, he knew nothing about the picket and nothing about any agreement to terminate it.⁶⁸ Mr Winter's evidence must, it is submitted, be treated with some caution. He was anxious to avoid any responsibility for the commencement of proceedings. His demeanour was poor. So was his general approach to the task of giving evidence to a Royal Commission. It is unlikely that the institution of the proceedings would have been the kind of robotic exercise he described.
46. Mr Melhem said that he would have rung Mr Sharp and asked him how the dispute had been resolved and that Mr Sharp told him that it had been resolved on the basis that Mr Susa and Mr Spencer were paid for one swing. He could not recall exactly when this occurred.⁶⁹ Mr Melhem said that the applications would have needed his approval and that he assumed he had approved them.⁷⁰ The substance of Mr Melhem's explanation for the commencement of the proceedings was that there was some doubt about whether Downer was going to honour the agreement to pay Mr Susa and Mr Spencer.⁷¹
47. Mr Susa gave evidence to the effect that on 10 August 2012 Mr Sirsen indicated to them that there may be a delay in payment as a result of investigations that he said were under way at that time by the FWBC into the picket.⁷² Mr Spencer's evidence was that he had a discussion to this effect with Mr Lee about a week after the meeting on the 10 August.⁷³ Mr Lee said that he and Mr Sirsen had a discussion in which Mr Sirsen told him that Mr Sirsen was going to work out a way to pay the money so that Downer could

⁶⁷ Craig Winter, 20/10/15, T:706.42-707.19, 708.19-25.

⁶⁸ Craig Winter, 20/10/15, T:707.33-708.13.

⁶⁹ Cesar Melhem, 22/10/15, T:992.12-36.

⁷⁰ Cesar Melhem, 22/10/15, T:992.38-44.

⁷¹ Cesar Melhem, 22/10/15, T:993.1-7, 994.8-37.

⁷² Predrag Susa, witness statement, 15/10/15, para 30.

⁷³ James Spencer, witness statement, 15/10/15, para 27.

get reimbursed by Origin. Mr Lee said that he told Mr Sirsen to work that out with the AWU.⁷⁴ Mr Sirsen denied there was any discussion to this effect.⁷⁵

The Conduct of the Proceedings

48. The only step taken in the proceedings occurred on 10 September 2012, when Mr Winter sent an email to the chambers of Commissioner Blair at Fair Work Australia. The email was copied to Mr McGuire and to the solicitors for the AWU.⁷⁶ The email attached a letter dated 24 August 2012.⁷⁷ The discrepancy between the date of the letter and the date of the email was not explained in the evidence. The letter requested an adjournment of both of the applications on the basis that ‘the parties have been making progress in trying to resolve these two matters’. The letter stated ‘the AWU will advise you on the outcome of our discussions shortly.’
49. Precisely what, if any, discussions took place is not apparent. Mr Winter’s evidence was that the discussions that he referred to were discussions that Mr Melhem told him were going on. He said that he had no more knowledge than that.⁷⁸
50. Mr Melhem’s evidence was that he assumed that these negotiations were between Mr Lee and Mr Winter. He said that he could not recall any involvement in the negotiations apart from one phone call from Mr McGuire to notify him of the community picket.⁷⁹ He said that to his knowledge the discussions were about the question of whether the termination of Mr Spencer and Mr Susa was a genuine redundancy.⁸⁰
51. Mr McGuire had carried on the proceedings on behalf of Downer. He said that he did not receive any letter of demand prior to the commencement of the proceedings, or offers (written or oral) of settlement during the course of the proceedings.⁸¹ Mr

⁷⁴ Terrence Lee, witness statement, 15/10/15, para 17.

⁷⁵ Anthony Sirsen, 23/10/15, T:1032.4-42.

⁷⁶ Downer MFI-1, 15/10/215, p 119.

⁷⁷ Downer MFI-1, 15/10/15, p 120.

⁷⁸ Craig Winter, 20/10/15, T:709.1-9.

⁷⁹ Cesar Melhem, 2/6/15, T:332.8-28.

⁸⁰ Cesar Melhem, 2/6/15, T:334.28-31.

⁸¹ William McGuire, 16/10/15, T:473.6-20.

McGuire was asked whether he had any negotiations at all with anyone from the AWU about the proceedings during their course. His evidence was that he ‘may have spoken to Mr Winter’ but that he did not remember either way. He claimed that he ‘would have vigorously defended the position of the termination of these two employees’. However, he could not say what if anything he actually did in that regard and ultimately he accepted that it could have been the position that in fact he did nothing.⁸²

52. The position on the evidence is thus that Mr Winter assumed that negotiations were going on between Mr Melhem and Downer, Mr Melhem assumed negotiations were going on between Mr Winter and Mr McGuire, and Mr McGuire had no recollection.
53. The Commission sought production from Downer of all communications between the AWU and Downer from 1 March 2012 to 28 February 2013 (Notice to Produce 1763 paragraph 4). Apart from the letter of Mr Winter dated 24 August 2012, there is no suggestion in anything produced in answer to this document that there were any discussions during the course of these proceedings. The Commission also sought production from the AWU of all documents referring to or concerning the invoice issued on 2 October 2012 (Notice to Produce 1134 paragraph 1, and Notice to Produce 1973 paragraph 4). As discussed below, the AWU’s position was that this was an invoice for settlement of the two proceedings. Again, the only document produced suggesting any negotiations occurred was the letter of Mr Winter dated 24 August 2012, referred to above.
54. The circumstances in which those proceedings ultimately terminated are not clear. No witness, however, was able to shed light on precisely when, how and on what terms the dispute was resolved. Mr Winter’s evidence was that he did not even know if the proceedings did come to an end. He said that he did not recall filing a notice of discontinuance and that he did not obtain any understanding himself about any settlement that was reached. He said that his role in the proceedings was confined to following instructions to lodge two general protection matters and seek to have them adjourned when he was requested to do so.⁸³ Mr Winter said that he had no knowledge

⁸² William McGuire, 16/10/15, T:473.22-474.46.

⁸³ Craig Winter, 20/10/2015, T:709.11-29.

about the arrangement in relation to the payment of the \$25,000 until he heard about it in the Royal Commission.⁸⁴

55. Mr McGuire, who had carriage of the proceedings for Downer, was unable to give any account of how they had terminated. The substance of his evidence was that the AWU accepted his position that the claims had no merit. He suggested that the AWU must have put an end to them in some way.⁸⁵
56. No further correspondence was sent to Fair Work Australia after Mr Winter's letter of 24 August 2012. On 5 February 2013, Fair Work Australia by email sought clarification as to the status of the matter.⁸⁶ Mr Sirsen on the same day forwarded that email to Mr McGuire and Mr French and asked them to 'close the communicate with Craig and advise him to notify Commissioner Blair that this issue is now resolved'.⁸⁷
57. The likely position is that there were no negotiations at all during the course of the proceedings and that the parties simply forgot about them. From the point of view of the AWU, any such negotiations would have needed to have been conducted on the basis of instructions from Mr Susa and Mr Spencer. However, their evidence was that there was nothing to negotiate: an arrangement had already been made on 10 August for the payment to them of money in settlement of the dispute. Following Mr Winter's letter dated 24 August 2012, the parties simply forgot about the applications until reminded by the associate to Commissioner Blair. They forgot about them because the dispute that they purported to concern had been settled prior to their institution and the monies the subject of that settlement had been paid on 4 October 2012. It is convenient to turn to the circumstances in which those monies were paid.
58. The above analysis indicates that the commencement of the general protections disputes on 17 August 2012 is not inconsistent with Mr Lee's Mr Susa's and Mr Spencer's account of the meeting of 10 August 2012. There are really two possible explanations for the commencement of the proceedings. The first is Mr Melhem's: that there was some concern about whether Downer would honour the agreement to pay Mr Susa and

⁸⁴ Craig Winter, 20/10/15, T:710.24-27.

⁸⁵ McGuire MFI-1, 16/10/15, p19.45-21.20.

⁸⁶ Downer MFI-1, 15/10/15, pp 297-298.

⁸⁷ Downer MFI-1, 15/10/15, pp 294.

Mr Spencer. As indicated at the outset, the prescribed period for the commencement of the proceedings expired on 23 August 2012 and so, if there were such concerns, it would explain the commencement of the proceedings relatively shortly after 10 August 2012.

59. The other possible explanation is that Mr Sirsen and the AWU agreed that the proceedings would be commenced for the purposes of avoiding FWBC scrutiny into the arrangement to pay Mr Susa and Mr Spencer. This is not inconsistent with Mr Melhem's explanation. Each of Mr Lee, Mr Susa and Mr Spencer gave evidence that Mr Sirsen expressed concerns about FWBC scrutiny. Such concerns may have prompted Mr Sirsen to ask the AWU to commence the proceedings for that purpose.
60. It is sufficient for present purposes to say that on either view the above analysis indicates that the commencement of the general protections disputes on 16 August 2012 is not inconsistent with Mr Lee's Mr Susa's and Mr Spencer's account of the meeting of 10 August 2012. It is submitted that, for the reasons identified in section D, above, that account should be preferred.
61. The next issue is how an invoice for 'training' came to be issued by the AWU.

F INVOICE AND PAYMENT

62. On 18 September 2012 Ms Lin sent an email to Mr Sirsen, copying Mr Melhem, and attaching an invoice numbered 023931 in the amount of \$27,500.00.⁸⁸ The invoice description was 'Provide Occupational Health and Safety Training.'
63. Mr Sirsen gave evidence that he called Duc Vu on about 2 October 2012 and asked that the invoice be amended to 'to accurately reflect the specific OHS training that was to be provided'.⁸⁹ On Mr Sirsen's evidence that was training for 8 persons for 5 days.⁹⁰ The invoice, however was amended to include the words '...for 8 delegates and 8 OH&S

⁸⁸ Sirsen MFI-1, 2/6/15, pp 24-25.

⁸⁹ Anthony Sirsen, witness statement, 2/6/15, para 44.

⁹⁰ Anthony Sirsen, 2/06/15, T:321.45-322.10.

representatives for 5 days on the Yolla project.’⁹¹ Mr Vu sent the amended invoice, bearing the same number, to Mr Sirsen on the same day.⁹²

64. Mr Vu then sent an email to Mr Melhem on 2 October 2012 confirming that the request had been made and that he had amended the invoice accordingly. Mr Melhem responded on the same day, stating ‘ok’.⁹³
65. Mr Vu followed up with an email sent to Cesar Melhem on 4 October 2012, stating ‘Tony told Mei yesterday that payment will be paid this Friday.’⁹⁴
66. It is apparent that the AWU obtained Mr Susa’s and Mr Spencer’s bank account details at around this time.⁹⁵ Mr Spencer sent an email to Mr Melhem with his details on 4 October 2012, which concluded ‘thank you Cesar’.⁹⁶ On 8 October 2012 Duc Vu sent an email to Cesar Melhem stating ‘Downer have paid.’⁹⁷
67. Cesar Melhem responded on the same day stating ‘Can you pay the guys today 50/50 each.’⁹⁸
68. Mr Sirsen’s evidence was that he approved payment of the invoice on the understanding that training would be provided.⁹⁹ He knew that training had not, at that stage, been provided.¹⁰⁰ He noted that the invoice appeared to refer to training for 16 workers, but approved it on the basis that the invoice appeared to be in the range of the rate for training for 8 persons as provided for in the MOU.¹⁰¹

⁹¹ Anthony Sirsen, witness statement, 2/6/15, para 44.

⁹² Sirsen MFI-1, 2/6/15, pp 27-28.

⁹³ Sirsen MFI-1, 2/6/15, p 26.

⁹⁴ Downer MFI-1, 15/10/15, p 233-1.

⁹⁵ Downer MFI-1, 15/10/15, p 233-2.

⁹⁶ Downer MFI-1, 15/10/15, pp 233-4.

⁹⁷ Melhem MFI-5, 2/6/15.

⁹⁸ Melham MFI-5, 2/6/15.

⁹⁹ Anthony Sirsen, witness statement, 2/6/15, para 45.

¹⁰⁰ Anthony Sirsen, 2/6/15, T:323.15.

¹⁰¹ Anthony Sirsen, 2/6/15, T:323.1-4.

69. The General Ledger for the AWU records two payments from the account 'Lost time & Exp' in the amount of \$12,500 each, dated 8 October 2012. The payment references are described as 'LOST TIME – JAMES SPENCER For lost time' and 'LOST TIME – PREDRAG SUSAN for lost time.'¹⁰²

G THE REPLACEMENT INVOICE

70. On about 5 March 2015, Downer received a letter from the AWU, addressed to Mr McGuire and from the secretary, Ben Davis.¹⁰³ The letter stated:

Re: Invoice 023931

On 18 September 2012 we sent you one invoice for the settlement of employees' claims. However after reviewing our accounts, some mistakes on the original invoice have been picked up. We have amended the description for the above invoice.

71. The letter enclosed an invoice, numbered 023931 and dated 18 September 2012, in the amount of \$27,500.00 but with the amended description 'settlement of employees' claims.' The item code on the invoice was changed from the original and amended invoices from 'OHS COURSE' to 'OHS.'¹⁰⁴
72. Mr Sirsen stated that he investigated the invoice and was told that it had already been paid. He then obtained a copy of the amended invoice and noted his approval signature on it.¹⁰⁵ Mr Sirsen says that he explained to Mr McGuire that the invoice he approved was for the provision of OHS training for employee representatives in accordance with the MOU. He suggested that Mr McGuire make enquiries of Ben Davis as to the reasons for the change.¹⁰⁶ Mr McGuire told him that due to the completion of the project and the age of the invoice, he did not make any inquiry of Ben Davis.¹⁰⁷
73. Mr Davis's evidence was that he directed the amendment of the invoice on 27 February 2015 on the basis that the AWU had 'invoiced for training as settlement.'¹⁰⁸ Mr Davis

¹⁰² Melham MFI-6, 2/6/15.

¹⁰³ Sirsen MFI-1, 2/6/15, p 30.

¹⁰⁴ Sirsen MFI-1, 2/6/15 p 31.

¹⁰⁵ Anthony Sirsen, witness statement, 2/6/15, para 48.

¹⁰⁶ Anthony Sirsen, witness statement, 2/6/15, para 49.

¹⁰⁷ Anthony Sirsen, witness statement, 2/6/15, para 50.

¹⁰⁸ Melhem MFI-7, p 97.

said that he had directed amendment of the invoices because he spent an extended period investigating various AWU invoices and concluded that some should be reissued.¹⁰⁹ Mr Davis's evidence as to the reasons for the amendment to the invoice was to the following effect:¹¹⁰

You referred earlier in the week in evidence to EDI Downer, the \$25,000 that they paid to us to settle two general protections disputes that we lodged on behalf of our shop steward and our occ health and safety rep, and that was described as "Training" - I am given to understand at the request of the company. But it shouldn't have been. It wasn't. It was the settlement of two general protections claims. Hence, when we reissued the invoice, we said, "Settlement of employee claims".

74. Mr Melhem's evidence about the circumstances in which Mr Davis caused the amendments to be made gives rise to considerable concerns about his credibility. In giving evidence on 22 October 2015, Mr Melhem said that he was contacted about the invoice by Mr Davis in early 2015 or late 2014 and that he told Mr Davis that the invoice was for the payment of delegates.¹¹¹ In other words Mr Melhem's position was that Mr Davis made the changes to the invoices on advice from him.
75. However Mr Davis, in giving his evidence about the investigations he undertook, made no reference to any discussions with Mr Melhem¹¹² and nothing of that nature was put to him by Mr Melhem's counsel.¹¹³
76. Further, the evidence that Mr Melhem gave on 2 June 2015 about this invoice included no suggestion that he had had any discussions with Mr Davis. Mr Melhem gave evidence on 2 June 2015 after Mr Sirsen (who was interposed during Mr Melhem's oral examination) had been asked about Mr Davis' letter of 3 March 2015.¹¹⁴ Mr Melhem was asked on 2 June 2015 whether, at the time he received Mr Vu's email of 2 October 2012, he gave any consideration to whether any money should be paid to Mr Susa or Mr Spencer. Mr Melhem said he did not recall but went on to say: 'obviously, Mr Davis

¹⁰⁹ Ben Davis, 4/6/15, T:638.42-46.

¹¹⁰ Ben Davis, 4/6/15, T:642.2-11.

¹¹¹ Cesar Melhem, 22/10/15, T:996.20-25.

¹¹² Ben Davis, 4/6/15, T:632.4-645.46.

¹¹³ Ben Davis, 4/6/015, T:657.22-46.

¹¹⁴ See Anthony Sirsen, 2/6/15, T:324.41-326.17.

has checked the record and there's some suggestion that's got to happen – could have happened, sorry'.¹¹⁵

77. Later on 2 June 2015 Mr Melhem was shown his email to Mr Vu instructing him to pay Mr Spencer and Mr Susa. It was put to Mr Melhem that he gave that instruction because he knew the invoice sent to Mr Sirsen was a sham invoice purportedly seeking money for training. Mr Melhem's answer was:¹¹⁶

Well, Mr Stoljar, I don't accept your description. The settlement between the AWU, Mr Lee and Downer – I wasn't party to the details of it. In relation to my knowledge, my knowledge was in relation to a settlement was reached as a result of the Fair Work Commission application, and hence, now, what Mr Davis' letter dated 3 March 2015 makes sense to me about in relation to the invoice probably was incorrect, but the suggestion that I drafted the invoice for health and safety training for something else – I dispute that, because it wasn't raised under my instruction. I wasn't aware of the details of it. But – and that's why I said to you if I would be able to be of more assistance; so that makes sense now what Mr Davis was saying on 3 March 2015.

78. In giving the above evidence on 2 June 2015 Mr Melhem was suggesting that it was only sitting there in the witness box ('now') that Mr Davis' letter made sense to him. This is directly contrary to the position he took on 22 October 2015, where he claimed that Mr Davis had amended the invoices after consulting with him.
79. The inconsistency in Mr Melhem's position is emphasised by the following evidence that he gave on 2 June 2015. He said on that occasion that as far as he knew on 18 September 2012, the invoice issued by Mei Lin was for health and safety training. He went on to give the following evidence:¹¹⁷

Q. Is that really your sworn evidence?

A. I did not know the health and safety training was – as far as I knew at the time, that was – the invoice was for the health and safety training. Later that was changed.

Q. When was it changed, Mr Melhem, on your evidence?

A. When the – when I was advised by the organiser about that that was a settlement for Mr Spencer and – it would have been for Mr Spencer and Mr Susa in October.

Q. And which organiser told you that?

A. Probably Mr Lee, Terry Lee.

¹¹⁵ Cesar Melhem, 2/6/15, T:337.16-.17-39.

¹¹⁶ Cesar Melhem, 2/6/15, T:341.4-18.

¹¹⁷ Cesar Melhem, 2/6/15, T:343.18.

Q. And how did he tell you that? Was it at a meeting or - -

A. It would have been at a meeting or on the phone or - -

Q. You are just really speculating, aren't you?

A. I'm not speculating; that's my recollection.

Q. Why didn't you immediately issue a corrected invoice, fixing the record?

A. Well, I didn't – it didn't cross my mind to do it.

80. If Mr Melhem truly had discussed the amendment of this invoice with Mr Davis, he would have referred to this on 2 June 2015. Moreover, if he had had this discussion it is inconceivable that he would have professed to have had a recollection, on 2 June 2015, that the invoice 'would have been changed' when he was advised by an organiser that that was a settlement for Mr Susa and Mr Spencer, and inconceivable that Mr Melhem would have given evidence that 'it didn't cross my mind' to change the invoice.

81. These inconsistencies between Mr Melhem's evidence on 2 June 2015 and 22 October 2015 tell strongly against his credit.

H CONCLUSIONS

False Invoice

82. One matter is clear: the invoice created by Ms Lin, and as amended by Mr Vu, was false. Whatever the payment was for, it was not for training. That follows from the rejection of Mr Sirsen's evidence of what occurred on 10 August 2012.

83. Why was a false invoice created? The first invoice, for 'Occupational Health and Safety Training' was created by Ms Lin.¹¹⁸ Ms Lin characteristically disclaimed any recollection of how she came to prepare it or who instructed her to. She said she believed it was either Cesar Melhem, Mr Melhem's personal assistant, or Mr Lee.¹¹⁹

¹¹⁸ Sirsen MFI-1, 2/6/15, p25.

¹¹⁹ Mei Lin, witness statement, 4/6/15, para 33.

Ms Lin said she was never told to confirm the training details with the training department of AWU.¹²⁰

84. Mr Lee said that he had no involvement in the issuing of the invoice.¹²¹ Having regard to the fact that he had left the employ of the union by the time the invoice was issued, and to the absence of any documents suggesting he was involved, Mr Lee can safely be discarded as a possible source of instructions for the preparation of the invoice.
85. That, on Ms Lin's evidence, leaves Mr Melhem. More importantly, the documentary record suggests that Mr Melhem was involved in the creation and approval of the invoices. Ms Lin's email of 18 September 2012, attaching an invoice for 'Occupational Health and Safety Training' was copied to Mr Melhem.¹²² In addition, as noted above, Mr Melhem approved Mr Sirsen's request for an amendment of that invoice on 2 October 2012¹²³ and was involved closely in the payment of the monies received from Downer to Mr Susa and Mr Spencer.
86. In giving evidence on 22 October 2015 Mr Melhem said, in substance, that he did not read Ms Lin's email of 18 September 2012 or the invoice attached to it and did not pay attention to Mr Vu's email of 2 October 2012.¹²⁴ When asked about these documents on 2 June 2015, Mr Melhem accepted that he looked at the invoice attached to Ms Lin's email of 18 September 2012 and noted that it said 'Provide Occupational Health and Safety Training'.¹²⁵ Mr Melhem's evidence about Mr Vu's email was '[o]bviously Duc wanted me to, because he's changing an invoice, and our previous invoice was sent, and to advise me the description has changed and I would have said 'Okay'.¹²⁶ Mr Melhem said he did not recall whether he looked at the invoice attached to Mr Vu's email or not.¹²⁷

¹²⁰ Mei Lin, witness statement, 4/6/15, paras 4-5.

¹²¹ Terrence Lee, 15/10/15, T:438.39-439.2.

¹²² Sirsen MFI-1, 2/6/15, p 24.

¹²³ Sirsen MFI-1, 2/6/15, p 26.

¹²⁴ Cesar Melhem, 22/10/15, T:995.19-996.33, 999.39-47.

¹²⁵ Cesar Melhem, 2/6/15, T:335.22-24, 342.33-38.

¹²⁶ Cesar Melhem, 2/6/15, T:337.3-6.

¹²⁷ Cesar Melhem, 2/6/15, T:338.4-6.

87. Notwithstanding the above inconsistencies, Mr Melhem's position on both days was that he had no involvement in the issuing of the invoices. He said on 22 October 2015: 'I played no role in approving these invoices'¹²⁸ and on 2 June 2015 he made a number of statements to similar effect.¹²⁹
88. However the proposition that Mr Melhem had no such involvement is inconsistent with the documentary record. In particular, the email exchanges between Mr Vu and Mr Melhem from 2 October 2012 to 8 October 2012 are revealing. Mr Vu's email of 2 October 2012¹³⁰ is not an email merely copied to Mr Melhem or indeed sent to anyone except Mr Melhem. Mr Vu's email proceeds on the basis that Mr Melhem is familiar with its subject matter. It refers to Mr Sirsen as 'Tony', and refers to 'the invoice' without providing details of what the invoice concerns. The proposed amendments to the invoice are in bold. Mr Melhem did not ignore the email or overlook it or arrange for someone else to respond to it. He responded 10 minutes later with 'Ok'. Two days later, on 4 October 2015, Mr Vu sent another email to Mr Melhem stating 'Tony told Mei yesterday that payment will be paid this Friday'.¹³¹ On 5 October 2015 and again on 8 October 2015, Mr Melhem approved payment out of the \$25,000 received to Mr Susa and Mr Spencer.¹³²
89. On 2 October 2012, it is submitted, Mr Melhem must have known the following. *First*, that an invoice was to be issued to Downer purportedly for training for 8 delegates and 8 OH&S representatives. *Secondly*, that the invoice was issued in those terms at Downer's request. *Thirdly*, that payment being sought from Downer pursuant to that invoice was in fact a payment in connection with the redundancies of Mr Spencer and Susa. *Fourthly*, that as a result the invoice was false.
90. Mr Melhem's explanation for how the invoices came to be issued was, on 2 June 2015, that it must have been the result of a communication between Mr Lee and accounts.¹³³ On 22 October 2015 Mr Melhem indicated that he had thought, at the time of giving

¹²⁸ Cesar Melhem, 22/10/15, T:1002.6.

¹²⁹ Cesar Melhem, 2/6/15, T:338.27-33, 339.12-.18, 339.43-47; 341.11-14.

¹³⁰ Sirsen MFI-1, 2/6/15, p 26.

¹³¹ Downer MFI-1, 15/10/15, pp 233-1.

¹³² Downer MFI-1, 15/10/2015, pp 233-3, 233-5; Melhem MFI-5, 2/6/15.

¹³³ Cesar Melhem, 2/6/15, T:338.29-31, 339.44-47.

evidence on that day, that Mr Lee was a full time organiser at the time of these events.¹³⁴ Mr Melhem's explanation, on 22 October 2015, for the terms on which the invoices were issued was that Mr Sirsen must have contacted the AWU to raise the invoice and then again later to change it.¹³⁵ Mr Melhem's explanation on 22 October 2015 is not inconsistent with the documentary record. Nor is it inconsistent with Mr Melhem himself approving the invoices either before or shortly after they were issued.

91. It may well be that Mr Sirsen had a role in the issuing of the invoice by Ms Lin on 18 September 2015. It is sufficient, however, to state that Mr Sirsen clearly had a role in the issuing of the amended invoice by Mr Vu on 2 October 2012: the amendments were made at his request.

Why was the invoice falsified?

92. It is not necessary for present purposes to come to any particular conclusion as to Mr Sirsen's precise motivation for requesting the AWU to issue a false invoice. One possibility is that Mr Sirsen thought it would assist in extracting money from Origin. Mr Sirsen explained that Downer's contract with Origin was 'cost reimbursable' and that Downer's expenses in connection with training would ultimately be paid by Origin.¹³⁶ Mr Sirsen said in oral evidence that he in fact passed on the AWU invoice to Downer's accounts team to be incorporated into Downer's weekly invoice to Origin.¹³⁷ Mr Sirsen accepted that he did this in circumstances where he did not know whether any training had been done.¹³⁸
93. Mr Sirsen accepted that the purpose of the amended invoice was to procure payment by Origin.¹³⁹ He denied, however, that he requested the AWU to amend the invoice knowing that the description on the invoice was false. However, if, as is submitted, one rejects his account of what occurred on 10 August 2012, then it follows almost

¹³⁴ Cesar Melhem, 22/10/15, T:994.44-995.2.

¹³⁵ Cesar Melhem, 22/10/15, T:996.7-10.

¹³⁶ Anthony Sirsen, 2/6/15, para 35.

¹³⁷ Anthony Sirsen, 23/10/15, T:1033.29-36.

¹³⁸ Anthony Sirsen, 23/10/15, T:1034.24-1035.12.

¹³⁹ Anthony Sirsen, 23/10/15, T:1040.16-19.

automatically that he knew, on 2 October 2012, that the invoice was not for actual or anticipated training. It could not be that between 10 August 2012 and 2 October 2012 Mr Sirsen forgot what had occurred on 10 August 2012.

94. Another possibility is that Mr Sirsen believed that the false invoice would assist in concealing the arrangement that had been struck on 10 August 2012 from Fair Work Building and Construction. These two possibilities are not mutually exclusive and do not exhaust the universe of possibilities. On any view, however, Mr Sirsen must have asked the AWU to falsify the invoice because he believed that it was the best way to ensure that the monies were paid to Mr Susa and Mr Spencer.

False Accounting Offences

95. In the above circumstances, it is submitted that Mr Sirsen, by requesting an amended invoice and then accepting that amendment from the AWU may have 'concurred in' the making of a false account within the meaning of s 83 of the Crimes Act 1958 (Vic). Section 83 provided:

False Accounting

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

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

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

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

(2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material in 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.

96. Mr Sirsen's concurrence in the falsification of the invoice was done with a view to ensuring, at the very least, that Downer paid \$25,000 to the AWU in circumstances where, to his knowledge, there was no obligation to do so. In these circumstances it was done with a view to causing Downer loss. As discussed above, it may also be that Mr

Sirsen's concurrence in the falsification of the invoice was done for other purposes, including causing Origin loss, but the purpose of causing Downer loss in the above sense is sufficient for present purposes.

97. Mr Sirsen's conduct was dishonest because he knew that the description on the invoice was false and because his purpose in requesting that false description was to ensure that monies were paid to the AWU in circumstances where there was no liability to make the payment. In these circumstances, Mr Sirsen may have committed an offence under s 58 of the *Crimes Act 1958* (Vic).
98. There is a question as to whether, in addition, the AWU, or any employee or official of the AWU, may have contravened s 83. Mr Melhem, it is submitted, also 'concurred in' the falsification of the invoice. He did so because he approved Mr Vu's amendment to the invoice with knowledge that that amendment was false. The evidence does not establish that Mr Melhem knew that Mr Sirsen wished to claim recompense from Origin for the \$25,000. However it is submitted that the evidence does establish that Mr Melhem's concurrence in the falsification of the invoice was done dishonestly, with a view to making a gain for Mr Spencer and Mr Susa. He must have known that the falsification would facilitate the payment by Downer of the money that had been promised by Mr Sirsen to Mr Spencer and Mr Susa. It is submitted that, as a result, he may have contravened s 83.
99. In addition, the AWU itself, it is submitted, may have made, or concurred in the making, of the false invoice. Mr Melhem's conduct as secretary of the AWU, as the 'directing mind and will' of that organisation¹⁴⁰ should be imputed to it.

Abuse of Process?

100. As noted above, Mr Davis' evidence was that the \$25,000 payment was for the settlement of the general protections applications. One difficulty with that proposition is that those applications were not terminated at the time the payment was made in October 2012: the parties did nothing about the proceedings at all until February 2013. Because

¹⁴⁰ 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.

of the absence of any apparent connection between the termination of the proceedings and the making of the payment it is more accurate, it is submitted, to say that the payment was made pursuant to the agreement reached by Mr Sirsen with Mr Lee, Mr Spencer and Mr Susa on 10 August 2012.

101. The distinction in the above paragraph matters for the purposes of the question of whether the general protections applications were an abuse of process. It is submitted that the evidence is insufficient to warrant a finding that those applications were an abuse of process (although nor is it sufficient to exclude that possibility). It is a reasonable possibility that it was thought necessary to commence the proceedings because of the existence of a 21 day limitation period in circumstances where Mr Sirsen, because of the scrutiny of Fair Work Building and Construction into the picket, was unwilling to make the payments to which he had agreed on 10 August 2012. It is also reasonably possible that the proceedings were commenced by the AWU at Mr Sirsen's suggestion for the purpose of avoiding that scrutiny. However the evidence does not enable a clear choice to be made between those two competing possibilities.