

## CHAPTER 10.3

### THIESS JOHN HOLLAND

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## **A – INTRODUCTION**

1. The Eastlink project involved the construction of a 39 kilometre roadway connecting Mitcham and Frankston. It cost \$2,500,000. It opened ahead of schedule and on budget on 28 June 2008.<sup>1</sup>
2. The design and construct contract for the road was let to a joint venture. One party was Thiess Pty Ltd (**Thiess**). The other was John Holland Pty Ltd (**John Holland**). The joint venture was called Thiess John Holland (**TJH**). The contract was let in about November 2004. Construction of the roadway commenced in 2005.<sup>2</sup>

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<sup>1</sup> Stephen Sasse, witness statement, 12/10/15, p 1.

<sup>2</sup> Rzesniowiecki MFI-1, 13/10/15, p 4.14-21.

3. This Chapter concerns an arrangement whereby TJH paid to the AWU the sum of \$100,000 per year plus GST per year for the three year life of the project.
4. This Chapter considers the following potential consequences of this arrangement:
  - (a) Whether the arrangement was made and implemented in circumstances where the AWU and its officials owed fiduciary duties and, if so, whether the making and implementation of this arrangement may have involved breach of these duties;
  - (b) Whether the implementation of the arrangement involved the payment of corrupt commissions in such a way that offences may have been committed under s 176 of the *Crimes Act* 1958 (Vic); and
  - (c) Whether the implementation of the arrangement involved false invoices in such a way that offences may have been committed under s 83 of the *Crimes Act* 1958 (Vic).
5. Some of the legal issues involved in the first and second of the above matters have been considered in the previous Chapter in the context of the Cleanevent case study. The potential operation of s 83 of the *Crimes Act* 1958 (Vic) arises in relation to a number of other case studies concerning the AWU, namely, those in relation to ACI, Winslow Constructors, Downer EDI and miscellaneous membership issues. The law applicable to the offence will be considered in this

Chapter. Whether the offence may have been committed in the particular circumstances of each case study will be addressed in other Chapters.

## **B – THE AGREEMENT**

6. TJH and the AWU entered into an enterprise bargaining agreement which came into force on 18 March 2005 (**2005 EBA**).<sup>3</sup> An enterprise bargaining agreement in identical terms was reached between TJH and the Victorian Branch of CFMEU which came into force on 18 March 2005.<sup>4</sup>
7. Negotiations on behalf of the joint venture were conducted in the first instance by Stephen Sasse (for John Holland) and Mike Connell (for Thiess) and later, once the contract was awarded, Julian Rzesniowiecki.<sup>5</sup>
8. For the AWU, initial negotiations were undertaken by Bill Shorten.<sup>6</sup> Later, Cesar Melhem and Craig Winter undertook the negotiations for the 2005 EBA.<sup>7</sup> John Cummins and Tom Watson participated in the negotiations on behalf of the CFMEU.<sup>8</sup>

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<sup>3</sup> Shorten MFI-9, 9/7/15, p 1.

<sup>4</sup> Shorten MFI-9, 9/7/15, p 63.

<sup>5</sup> Rzesniowiecki MFI-1, 13/10/15, p 5.36-47, 6.1-12.

<sup>6</sup> Bill Shorten, 9/7/15, T:113.39-42.

<sup>7</sup> Rzesniowiecki MFI-1, 13/10/15, p 5.29-34.

<sup>8</sup> Rzesniowiecki MFI-1, 13/10/15, p 6.27-31.

9. Following entry into the 2005 EBA, Cesar Melhem was responsible for the day to day administration of the project.<sup>9</sup> The person with day-to-day management of industrial relations and human resources on the project for TJH was Julian Rzesniowiecki. He reported to Chris Herbert, managing director for TJH.<sup>10</sup> From about September 2005, Julian Rzesniowiecki reported to Gordon Ralph who replaced Chris Herbert as project director.<sup>11</sup>
  
10. During the course of the Eastlink project, from early 2005, the AWU invoiced TJH and was paid an amount of \$300,818.17 plus GST.<sup>12</sup> The descriptions on the invoices issued in 2005 and 2006 referred to advertising in the *Australian Worker* magazine, tickets to the AWU Members' Ball, attendance at OH&S training and IR Regulations Seminars, sponsorship for OH&S conferences, and research projects.<sup>13</sup> The details of the various invoices will be outlined further below.
  
11. It is clear, from correspondence and documentation that emerged during the course of the project, that there was an agreement to pay a sum of \$100,000 per year plus GST, and that the payment would be accounted for by the AWU issuing invoices for various services as described above, without many of the services in fact being delivered by the AWU. That an agreement of this kind was reached is, to a large

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<sup>9</sup> Bill Shorten, 9/7/15, T:114.7-8.

<sup>10</sup> Rzesniowiecki MFI-1, 13/10/15, p 10.6-9.

<sup>11</sup> Rzesniowiecki MFI-1, 13/10/15, p 15.18-19.

<sup>12</sup> Shorten MFI-10, 9/7/15 is a summary prepared by the solicitors assisting the Commission reconciling the payments recorded in the general ledgers of the Victorian and National branches of the AWU against the invoices issued to TJH.

<sup>13</sup> Shorten MFI-9, 9/7/15, pp 168A-233.

extent, undisputed by those persons affected who made submissions in relation to the Thiess John Holland case study.<sup>14</sup>

12. The first document evidencing the agreement is an undated handwritten table apparently prepared by someone at the joint venture which contemplates three years of annual payments yielding a total of \$300,000.<sup>15</sup> The payments include three payments for ‘research grants’. The grant for year one is described as ‘attracting employees to civil construction industry’.
13. Because the year one grant is described in these terms it is reasonable to infer that this document was created during 2005 and well before 18 January 2006, the date on which an invoice was issued for ‘research work done on Back Strain in Civil Construction Industry’.<sup>16</sup> By the time this invoice was issued it is reasonable to infer that the initial contemplated ‘research grant’ was no longer under consideration.
14. The next document is another undated handwritten note which appears to have been created in early 2006. The note stated:<sup>17</sup>

\$74K already paid ← **Check JR**

\$26K END of June 2006

\$100K 1/7/06 → 30/6/07

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<sup>14</sup> Cesar Melhem went only so far as to accept that he and Julian Rzensiowiecki had a ‘common understanding’ on behalf of their respective employers that was reflected in the invoices that were issued: Submissions of Cesar Melhem, 20/11/15, ch 3, para 13.

<sup>15</sup> Shorten MFI-9, 9/7/15, p 236.

<sup>16</sup> Shorten MFI-9, 9/7/15, p 186.

<sup>17</sup> Shorten MFI-9, 9/7/15, p 226.

\$100 1/7/07 → 30/6/08

15. The handwriting on the note is Cesar Melhem's, save for the words 'check JR' which is in Julian Rzesniowiecki's handwriting.<sup>18</sup> Julian Rzesniowiecki said that the note was an exercise in which he and Cesar Melhem tried to reconcile what had been paid and what was owing under the arrangement they had entered into. His note referred to his desire to check that \$74,000 was in fact what TJH had paid at the date of the note.<sup>19</sup> This was consistent with a practice he said that he adopted to ensure that TJH was not paying more than the agreed sum.<sup>20</sup> Cesar Melhem, however, denied that the note reflected any agreement.<sup>21</sup>
16. On 12 September 2006 Cesar Melhem emailed Julian Rzesniowiecki as follows:<sup>22</sup>

Julian

AWU Ball 50 @ \$125 = \$6250  
Australian Worker 4 @ 7500 = \$30,000  
Sponsorship of AWU OH&S Conference 12/08/2006 25,000  
OH&S trainig [sic] for HRS reps on eastlink \$38750

Total \$100,000

17. Julian Rzesniowiecki responded on 13 September 2006, as follows:<sup>23</sup>

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<sup>18</sup> Julian Rzesniowiecki, 13/10/15, T:193.22-34; Cesar Melhem, 22/10/15, T:905.39-43.

<sup>19</sup> Julian Rzesniowiecki, 13/10/15, T:193.38-45.

<sup>20</sup> Rzesniowiecki MFI-1, 13/10/15, p 15.41-47.

<sup>21</sup> Cesar Melhem, 22/10/15, T:906.22-27.

<sup>22</sup> Shorten MFI-9, 9/7/15, p 199.

<sup>23</sup> Shorten MFI-9, 9/7/15, p 199.

Cesar

4 separate invoices please and also you need to deduct the \$2K I paid for the AWU calendars and \$500 for the Workchoices conference.

1. AWU ball invoice \$6250 – send now
2. Aus Worker \$30,000 – send now
3. OHS Conference \$25,000 sponsorship – send now
4. HSR training \$38,750 less \$2500 = \$36250 - send in November

18. Cesar Melhem then forwarded that email to Michael Chen, the AWU's financial controller, on 15 September 2009.<sup>24</sup> Michael Chen then wrote on the hard copy of the email 'Mei Lin, pls follow this. Mich.'<sup>25</sup>

19. A number of observations may be made in relation to this email chain. *First*, the email from Cesar Melhem contained a breakdown of services, and prices for those services, that added up to precisely \$100,000. It is highly unlikely that, if the email was referring to genuine services to be delivered, the value of those services would add up to an exact round number, still less the very figure of \$100,000 referred to elsewhere. *Secondly*, Julian Rzesniowiecki's email in response indicated that what was involved was not the implementation of an agreement for the provision of the services referred to in the respective emails but rather an accounting exercise for the purposes of ensuring that a pre-determined amount was paid. In particular, his email asked Cesar Melhem to deduct certain amounts already paid in respect of one service, and directs that invoices be issued at various times. That is not consistent with the invoices being issued in relation to a service that was in fact delivered.

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<sup>24</sup> Shorten MFI-9, 9/7/15, p 201.

<sup>25</sup> Michael Chen, 21/10/15, T:807.7-22.

20. Julian Rzesniowiecki said that he requested the deduction from the amount allocated for HSR training because he did not believe it had been provided.<sup>26</sup> Cesar Melhem, on the other hand, insisted that the services described in the emails were delivered. He said that the deduction from the amount attributed to the cost of HSR training was ‘negotiated... to absorb that part of the invoice.’<sup>27</sup>

21. On 16 April 2007 Julian Rzesniowiecki sent a letter to Cesar Melhem stating the following:<sup>28</sup>

Re: Invoices

- a. *Instalments* 1 & 2 will be paid.
- b. Please ask Michael to withdraw *instalment* 3. It will be covered by the ads in Australian Worker, attendance at the ball etc.
- c. If we don’t reach the *agreed* sum we can address at end of year. (emphasis added)

22. Cesar Melhem did not write back contesting that an agreement had been reached. The reference in this letter to ‘instalments’ (and in an email below to ‘\$37,000 1<sup>st</sup>’ and \$37,000 2<sup>nd</sup>’) is to invoices issued on 28 February 2007 with the description ‘Services – First Instalment As per Cesar Melhem’ and ‘Services – Second Instalment As per Cesar Melhem.’<sup>29</sup> Further reference will be made to those invoices later in this Chapter. They are an example of false invoices issued in connection with the implementation of the arrangement.

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<sup>26</sup> Julian Rzesniowiecki, 13/10/15, T:184.31-44.

<sup>27</sup> Cesar Melhem, 22/10/15, T:910.23-27.

<sup>28</sup> Shorten MFI-9, 9/7/15, p 222.

<sup>29</sup> Shorten MFI-9, 9/7/15, pp 217-218.

23. Also in evidence is a handwritten note in Julian Rzesniowiecki's handwriting<sup>30</sup> which was undated but appeared to have been created in 2007 or 2008.<sup>31</sup> The note recorded the following calculation:

*Agreed* amount \$100,000 plus GST = revised *agreed* amount of \$110,000.

For 2007 TJH has paid:

\$37,000 1st

\$37,000 2nd

\$5000 AWU Ball

\$5,500 Australian Worker

\$10,083.00 Red Card Training

\$94,583

∴ balance ... \$15,416.5 (emphasis added)

24. On 31 March 2008 Julian Rzesniowiecki wrote to Cesar Melhem stating:<sup>32</sup>

On our breakdown the *agreed amount* is \$110,000 inc GST

We have paid 2X \$37,000 = \$74,000. We have also paid \$5000 ball tickets, \$5500 Australian Worker and \$10,083 Red card. (Red card otherwise would have cost us nothing because John Holland run it).

Therefore we believe that the *outstanding amount* is \$15,416.50 inc GST. (emphasis added)

25. Each of the documents referred to above indicated clearly that there was an agreement that \$100,000 plus GST each year would be paid and that money would be accounted for by way of invoices issued by the

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<sup>30</sup> Julian Rzesniowiecki, 13/10/15, T:175.44-45, 176.1-2.

<sup>31</sup> Shorten MFI-9, 9/7/15, p 237.

<sup>32</sup> Shorten MFI-9, 9/7/15, p 231.

AWU describing various services. The references by Julian Rzesniowiecki in his emails to Cesar Melhem to ‘the agreed sum’, ‘the agreed amount’, ‘the outstanding amount’ and ‘Instalments’, are not rationally capable of any other meaning. Faced with these documents, Cesar Melhem continued to deny the existence of an agreement. He responded, at one point: ‘show me a copy of it.’<sup>33</sup> This was another example of his unsatisfactory evidence. It is rejected. His submissions that there was merely a ‘common understanding’ are also rejected. They underplay what, plainly, was an agreement for the payment of a precise sum.

26. It is convenient at this point to mention two matters of detail that emerge from the above documents. The first is that the ‘agreed sum’ was \$110,000 inclusive of GST. Julian Rzesniowiecki said that in the second year of the project, TJH paid an additional sum to account for the GST that had been omitted in the first year of the project.<sup>34</sup> The second matter is that two of the above documents refer to red card training for which \$10,083 was paid. Julian Rzesniowiecki said that the training was provided at a facility at Morwell, but that the amount was used to offset the agreed amount because John Holland would otherwise have provided the service.<sup>35</sup> This was an example of the arrangement being implemented through an invoice which would have been genuine but for the fact that it referred to services which, but for the arrangement, would not have been required or sought. There were other such examples.

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<sup>33</sup> Cesar Melhem, 22/10/15, T:895.37-47, 896.1-13.

<sup>34</sup> Julian Rzesniowiecki, 13/10/15, T:176.16-19.

<sup>35</sup> Julian Rzesniowiecki, 13/10/15, T:194.14-42, see also Cesar Melhem, 22/10/15, T:899.23-34.

27. The next section addresses the questions of the genesis of the above agreement, when it was reached and by whom.

### **C – HOW WAS THE AGREEMENT REACHED?**

28. Practically the only contemporaneous documents that have been made available and which shed light on how the agreement was reached are the diaries of Julian Rzesniowiecki. Otherwise, it is necessary to rely on accounts given by participants in discussions largely unsupported by any contemporaneous documents.

29. Evaluating this evidence is difficult. A lot of time has passed since the events in question. The persons involved have done much else in that time. It is unsurprising that accounts of recollections differ. That does not make the assessment of those accounts any easier. The other difficulty is that, in at least some instances, documents that may have shed light on the process through which the agreement was reached are no longer available. For reasons explained further below, the extensive efforts that have been made to obtain the diaries of Stephen Sasse strongly suggest that they have (quite innocently) been destroyed. The result of that is not merely a gap in the evidence. It is also to create a risk that the few written records that are available will be given a significance that they otherwise would not have. In some respects, that seems to have occurred with Julian Rzesniowiecki's diary notes, for reasons that will become apparent.

30. What follows sets out the evidence, largely by reference to the submissions of counsel assisting. There then follows an evaluation of that evidence. The negotiations need to be considered as a whole. But

it is convenient, bearing that in mind, to deal separately with events up to December 2004 and events after that date.

#### **Negotiations to December 2004**

31. The early negotiations took the form of preliminary discussions for the purpose of Thiess and John Holland preparing for tender. The participants in the early negotiations included Stephen Sasse and Bill Shorten, and to a lesser extent, Mike Connell.

#### *Stephen Sasse's account*

32. Stephen Sasse said that the TJH bid for the Eastlink project was undertaken against a background of several major construction projects in Melbourne that had suffered serious delays as a result of industrial intervention by the CFMEU. This caused labour productivity problems. Examples included the Spencer Street Station, the Geelong Road, and Federation Square projects.<sup>36</sup>
33. Stephen Sasse was given authority by John Holland to look at alternative labour practices that would create greater flexibility among the workforce. Some of the limitations that he proposed to include in the EBA for the project included removal of lockdown weekends (weekends on which all workers are on set rostered days off), inclement weather practices that stopped work across the labour line,

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<sup>36</sup> Stephen Sasse, witness statement, 12/10/15, p 1.

the presence of non-working delegates, and head contractor protections for subcontract labour.<sup>37</sup>

34. Stephen Sasse said that he prepared a strategy paper which was presented to Leighton Holdings, the parent company for the joint venture participants. The paper set out the process for negotiating an EBA that achieved labour efficiencies by eliminating the limitations identified above, as follows:<sup>38</sup>

- (a) Provoke the CFMEU into taking unlawful industrial action at worksites of Leighton Group companies (which included Thiess and John Holland);
- (b) Put to the CFMEU representatives that TJH intended to seek an agreement that removed rostered days off and non-working delegates, in the expectation that they would refuse to engage in negotiations; and
- (c) Put to the AWU that entry into an EBA as the principal union would reinstate it as the principal union for civil construction,

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<sup>37</sup> Stephen Sasse, witness statement, 12/10/15, pp 1-2; Stephen Sasse, 12/10/15, T:39.33-46, 40.10-47. Cesar Melhem's submissions take issue with the characterisation of these matters as 'limitations' or 'removal of beneficial conditions,': Submissions of Cesar Melhem, 20/11/15, ch 3, para 2. It does not matter, for the purposes of this case study, whether they were, due to the ultimate conclusion that the EBA that was ultimately reached in relation to the project was of benefit to the workers on the project (see Section F below). However, it is accepted that the lockdown and inclement weather conditions were generous to workers in the sense that they provided guarantees as to when work would be stopped on the project.

<sup>38</sup> Stephen Sasse, witness statement, 12/10/15, pp 2-3; Stephen Sasse, 12/10/15, T:41.2-15.

and also put that unless it agreed to TJH's terms, the site would be resourced on Australian Workplace Agreements.<sup>39</sup>

35. Stephen Sasse negotiated with Bill Shorten on behalf of AWU to achieve an EBA that restricted the labour practices identified above, in exchange for high pay rates and the exclusion of the CFMEU from the Eastlink project. The initial meetings between him and Bill Shorten occurred between September and October.<sup>40</sup> Stephen Sasse said that the high level aspects of the agreement were agreed to by Bill Shorten almost immediately.<sup>41</sup>
36. There is some inconsistency in Stephen Sasse's evidence about the discussions he had with Bill Shorten in late 2004. In his statement, Stephen Sasse said that there was a proposal in relation to an organiser discussed between him Bill Shorten, but that there was no agreement to that effect.<sup>42</sup>

There was some limited discussion in relation to how the AWU would ensure that the workforce on EastLink would become members of the AWU. These discussions included the possibility that the project might directly fund the costs of an organiser (salary plus car equating to approximately \$100K per annum) but this was not finalised, and the idea did not form part of the in-principle agreement. Secondly, within days of the in-principle agreement being reached, Shorten had unilaterally 'invited' the CFMEU to become party to the industrial agreement for the project. When I questioned him as to why he had reneged on our agreement, and on such a fundamental component of that agreement, he replied that there were 'political' imperatives which I 'would not understand'.

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<sup>39</sup> Stephen Sasse, 12/10/15, T:39.33-46, 42.15-46.

<sup>40</sup> Stephen Sasse, 12/10/15, T:41.34-43.

<sup>41</sup> Stephen Sasse, witness statement, 12/10/15, pp 2-3.

<sup>42</sup> Stephen Sasse, witness statement, 12/10/15, pp 3-4.

...

... there was a very broad discussion about supporting the AWU in organising the Project through the JV funding or part funding an organiser who would be largely dedicated to the Project. I was deliberately vague in discussing this issue as I felt that the only value that could be extracted from the AWU was the Greenfield EA in the terms discussed.

... at no stage was there any claim by Shorten that the JV should 'pay' for the EA.

37. What is said in Stephen Sasse's statement is broadly consistent with an earlier informal interview in which Stephen Sasse made reference to the idea that the \$100,000 per year was equivalent to the salary of an organiser plus a car.<sup>43</sup> However, Stephen Sasse said that Bill Shorten did not mention a specific number and that the figure was his estimate by putting two and two together in relation to the numbers.<sup>44</sup> He said that 'the payment issue was never, ever agreed at the Shorten level at all.'<sup>45</sup>

38. The account given in Stephen Sasse's private hearing, which is also in evidence, was different. In that hearing, Stephen Sasse gave the following evidence:<sup>46</sup>

Q. Were these matters that were actually discussed by Bill Shorten and yourself?

A. Yes, they were.

Q. Was there any discussion of the salary that the organiser might receive?

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<sup>43</sup> Sasse MFI-3, 12/10/15, p 11.9-22.

<sup>44</sup> Sasse MFI-3, 12/10/15, p 12.15-24.

<sup>45</sup> Sasse MFI-3, 12/10/15, p 13.46-47.

<sup>46</sup> Sasse MFI-4, 12/10/15, T:27.1-12.

A. Yes. The number that was worked with was, you know, cost of a Union official, plus car, is 100 grand a year.

Q. Over the life of the project?

A. Over the life of the project.

39. Stephen Sasse said in his private hearing that there was a high level agreement as to the primary terms of the EBA, but that this did not include the reference to an organiser.<sup>47</sup>

40. In his oral evidence at the public hearing, Stephen Sasse said that Bill Shorten suggested that an organiser should be appointed full-time to the project and funded by the joint venture.<sup>48</sup> Of significance is the description of the rationale that Bill Shorten gave for that commitment, according to Stephen Sasse:<sup>49</sup>

From the Union's perspective, their income is, essentially, the Union dues that members pay, so it's an important business imperative, if you like, for unions to attract and retain financial members. ... The unions look for opportunities to capture that workforce as members, so they might want to - they have the right to present at an induction, for example, to sell their wares to prospective members who are employees of the company. One of the discussions that came out of the negotiation I had with Bill Shorten was that if the AWU had a dedicated organiser on the project then that would enhance the Union's ability to maximise the proportion of employees who were members of the Union...

41. That rationale is very similar to Cesar Melhem's evidence of the services that he told Julian Rzesniowiecki the union could provide in exchange for payment, namely, attending inductions.<sup>50</sup>

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<sup>47</sup> Sasse MFI-4, 12/10/15, T:28.2-37.

<sup>48</sup> Stephen Sasse, 12/10/15, T:45.26-36.

<sup>49</sup> Stephen Sasse, 12/10/15, T:45.7-24.

<sup>50</sup> Cesar Melhem, 22/10/15, T:904.1-8, 937.28-42.

42. Stephen Sasse said that he was deliberately non-committal about Bill Shorten's proposal.<sup>51</sup> He also said that a figure was mentioned during the course of the negotiations, being \$75,000 a year plus a car.<sup>52</sup> Faced with the content of his interview at the public hearing, Stephen Sasse maintained that there was a discussion regarding a figure. He said that he could not remember who raised the figure but he was sure that it was discussed.<sup>53</sup> He said that he left the meeting with Bill Shorten with a specific figure in mind, and said that he must have had some information from Bill Shorten in order to reach that figure.<sup>54</sup>
43. Following the entry of the CFMEU into the negotiations, the parties engaged in conciliation in the Australian Industrial Relations Commission (**AIRC**). Stephen Sasse said that, shortly after the conciliation process commenced, he handed over primary responsibilities for the EBA negotiations to Julian Rzesniowiecki. As he understood it, Bill Shorten also handed over responsibility for the project to Cesar Melhem.<sup>55</sup>
44. Stephen Sasse's evidence is that he told Julian Rzesniowiecki about the arrangement at the time he was recruiting him for the project, including the proposal in relation to funding of an organiser.<sup>56</sup> Significantly, Stephen Sasse also said that the discussion regarding an organiser 'may

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<sup>51</sup> Stephen Sasse, 12/10/15, T:47.6-7.

<sup>52</sup> Stephen Sasse, 12/10/15, T:47.33-42.

<sup>53</sup> Stephen Sasse, 12/10/15, T:49.10-14.

<sup>54</sup> Stephen Sasse, 12/10/15, T:50.43-47, 51.1-2.

<sup>55</sup> Stephen Sasse, witness statement, 12/10/15, p 3; Stephen Sasse, 12/10/15, T:44.1-9.

<sup>56</sup> Sasse MFI-4, 9/7/15, T:33.34-47, 34.1-13.

have come up in a handover meeting at some stage' which Cesar Melhem and Mike Connell also attended.<sup>57</sup>

45. Stephen Sasse was tested on his differing versions. He said that, at the time of his interview, he did not have any documents available to him and gave the best recollection he had at the time.<sup>58</sup> He said that, prior to his interview, he assumed that documentation might be available to assist his memory.<sup>59</sup> Following the interview, he sat down and prepared a statement after carefully considering his memory of events.<sup>60</sup> Ultimately, he repeated his evidence that the proposal for payment in relation to an organiser was not agreed with Bill Shorten.<sup>61</sup> Stephen Sasse accepted that the figure of \$100,000 per year was possibly a figure that he had surmised himself.<sup>62</sup> It was not put to him in cross-examination that he gave false evidence or a false answer in relation to any of the evidence that he gave. No submissions were made by any affected person that he should be disbelieved.
46. Some of the difficulties with his competing accounts are explained by the fact that he has not had access to the notes and records of his negotiations. His evidence is that he maintained extensive notes of meetings in notebooks, and that there was significant email traffic and correspondence documenting the negotiations as they proceeded. None of that documentation has been produced by John Holland

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<sup>57</sup> Stephen Sasse, 12/10/15, T:44.41-45.

<sup>58</sup> Stephen Sasse, 12/10/15, T:82.22-24, 97.25-35.

<sup>59</sup> Stephen Sasse, 12/10/15, T:79.17-24.

<sup>60</sup> Stephen Sasse, 12/10/15, T:82.15-19.

<sup>61</sup> Stephen Sasse, 12/10/15, T:89.20-43.

<sup>62</sup> Stephen Sasse, 12/10/15, T:91.32-47.

despite detailed information being provided by Stephen Sasse and his former assistant as to where the documentation was stored and how it was archived.<sup>63</sup> A statement of Christopher Burton, group general counsel for the John Holland Group, which has been provided to the Commission details, in an uncontroversial fashion, the searches undertaken in response to the requests for documents and notices to produce issued by the Commission to John Holland. In short, the email records were deleted in the ordinary course of the information management processes of John Holland, and despite an exhaustive search of the hard copy documents in archive storage, none of Stephen Sasse's notebooks or correspondence in relation to the negotiations have been found.

*Bill Shorten's account*

47. Bill Shorten said that he does not recall discussing an arrangement with Stephen Sasse pursuant to which TJH would pay three instalments of \$100,000 a year plus GST for the life of the Eastlink project.<sup>64</sup> Bill Shorten gave evidence that he did not believe that there was any such agreement.<sup>65</sup>
48. Bill Shorten stated that in his negotiations with Stephen Sasse the latter drove 'a hard bargain' and threatened, in response to Bill Shorten's bargaining position, to engage with the CFMEU.<sup>66</sup> Bill Shorten said that he was open to exchanges about improvements in productivity,

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<sup>63</sup> Stephen Sasse, 12/10/15, T:51.43-47; Sasse MFI-5, 13/10/15.

<sup>64</sup> Bill Shorten, 9/7/15, T:116.31-36, 118.20-28, 133.46-47.

<sup>65</sup> Bill Shorten, 9/7/15, T:118.14, 133.46-47.

<sup>66</sup> Bill Shorten, 9/7/15, T:128.45-47,129.1-3.

and stated that in exchange he would have committed to active organisation of the work site:<sup>67</sup>

I would have made it clear that the Union will take an active role in organising this and that will involve training and the other work which unions legitimately do every day.

49. Following questioning about whether he discussed payments being made by TJH on an annual basis, Bill Shorten said the following:<sup>68</sup>

I would have had discussions about the EBA and how the AWU would organise, after the EBA, to make sure we had an active presence. That would and could have involved services being delivered by the AWU to make sure we had an engaged membership of the site.

50. To Bill Shorten's knowledge, those discussions were not recorded in writing. Bill Shorten stated that it was standard practice for unions to seek payments from employers for services that unions provide to members.<sup>69</sup> He said in relation to the Eastlink site in particular:<sup>70</sup>

I am very confident that in my time as leader of the AWU in Victoria, that if we were sending out invoices for services, it's my expectation that work would be done consistent with what would be the invoices rendered and employers wanted – this employer wanted the AWU engaged. There had been rocky industrial relations with a range of more militant unions. This project, I have to say, was different and there was more cooperation than there had previously been, and I do think - I do think - that the company saw a value to having the AWU as signatory to this civil construction project and that we were servicing our members regularly...

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<sup>67</sup> Bill Shorten, 9/7/15, T:134.40-46, 128.45-47, 129.1-10.

<sup>68</sup> Bill Shorten, 9/7/15, T:137.40-45.

<sup>69</sup> Bill Shorten, 9/7/15, T:138.14-17.

<sup>70</sup> Bill Shorten, 9/7/15, T:127.35-46.

51. Bill Shorten stated in response to a question of whether the services agreed amounted to \$110,000 per year:<sup>71</sup>

Well, I don't recall and I don't believe I would have said a specific amount and also it would have been for services, so - you know, I believe in user pays.

52. A few observations may be made in relation to this evidence.

53. *First*, Bill Shorten did not deny discussions regarding the arrangement. Rather he said that he did not recall any such discussion.

54. *Secondly*, Bill Shorten said that there were discussions during the course of negotiations with Stephen Sasse about dedicating organisers to the site and providing various services.

55. *Thirdly*, Bill Shorten's understanding of the benefits of the above exercise was that it would play a role in achieving industrial stability on a site that might otherwise be at risk of problems caused by more militant unions.

*Julian Rzesniowiecki's account*

56. Julian Rzesniowiecki also gave different accounts of the genesis of the agreement.

57. In his private hearing he gave the following account. Before he joined the Eastlink Project, he understood from conversations with Stephen Sasse that there had been some preliminary industrial relations discussions between the AWU and the representatives for Thiess and

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<sup>71</sup> Bill Shorten, 9/7/15, T:138.20-22.

John Holland, respectively Mike Connell and Stephen Sasse, General Manager for Human Resources, Industrial Relations and Safety.<sup>72</sup> Upon joining the project Julian Rzesniowiecki initially attended meetings with the AWU together with Stephen Sasse, and subsequently undertook the negotiations with Don Johnson, reporting to Stephen Sasse and Mike Connell.<sup>73</sup>

58. Julian Rzesniowiecki's evidence was that TJH proceeded with negotiations on the basis that AWU was the preferred union. At some point in the negotiations, Bill Shorten expressed discomfort at an approach that excluded the CFMEU. Bill Shorten then invited the CFMEU to join the negotiations. TJH was not able to reach an agreement acceptable to both the AWU and CFMEU, so a dispute was notified to the AIRC and resolved by conciliation.<sup>74</sup>

59. Julian Rzesniowiecki gave evidence at his private hearing that, before he joined the Eastlink project, TJH reached agreement with the AWU to provide full time organisers to the Eastlink project.<sup>75</sup> The agreement was to provide a nominal \$100,000 per year plus GST to cover the annual salary of an organiser plus provision of a vehicle, over the 3 years for which the 2005 EBA was in force in relation to the Eastlink project.<sup>76</sup>

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<sup>72</sup> Rzesniowiecki MFI-1, 13/10/15, p 5.4-8, 36-42; Sasse MFI-3, 12/10/15, p 8.32-34.

<sup>73</sup> Rzesniowiecki MFI-1, 13/10/15, p 6.1-15.

<sup>74</sup> Rzesniowiecki MFI-1, 13/10/15, p 7.1-30; Sasse MFI-3, 12/10/15, p 6.42-47.

<sup>75</sup> Rzesniowiecki MFI-1, 13/10/15, p 8.20-30.

<sup>76</sup> Rzesniowiecki MFI-1, 13/10/15, p 9.29-34, 11.22-36.

60. Julian Rzesniowiecki said that he was informed of the details of this agreement by Stephen Sasse or Mike Connell.<sup>77</sup> His understanding was that an agreement had been reached to this effect.<sup>78</sup> He believed that the agreement was reached prior to December 2004 between Bill Shorten, Cesar Melhem and Stephen Sasse. He was not sure whether Mike Connell was also involved.<sup>79</sup>

61. On about 13 October 2015 Julian Rzesniowiecki put forward a statement that changed his account in some respects. It was based on his review of diary notes not previously available to him, and of the AWU invoices that had been produced.<sup>80</sup> He said:<sup>81</sup>

It appears from a review of my diaries that although by December 2004 there was an understanding with the AWU regarding the provision of support for the Project, the dollar value of the support was not settled at that time. The level of support that was to be provided to the AWU to assist in the provision of organisers to the Project, and the composition of the organiser team, was the subject of discussions within the JV and between the JV and the AWU during the period from early December 2004 to March 2005 when the Greenfields Agreement was finalised. The agreed composition of the organiser team is not recorded in my Project diaries...

62. It is apparent that while there were some departures in Julian Rzesniowiecki's statement from the version he gave during his private hearing, he did not depart from his understanding that at the time he joined the Project team, there was, at least, an arrangement pursuant to which financial support would be given by TJH to support an organiser or organisers. Where he departed from his previous evidence was in

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<sup>77</sup> Rzesniowiecki MFI-1, 13/10/15, p 8.39-41.

<sup>78</sup> Rzesniowiecki MFI-1, 13/10/15, p 9.2-5.

<sup>79</sup> Rzesniowiecki MFI-1, 13/10/15, p 9.12-16.

<sup>80</sup> Julian Rzesniowiecki, witness statement, 13/10/15, paras 12-13.

<sup>81</sup> Julian Rzesniowiecki, witness statement, 13/10/15, paras 12-13.

relation to whether a figure, and the nature of the support provided, was agreed at the time that he joined TJH.

63. In his evidence at the public hearing Julian Rzesniowiecki said the following by way of explanation:<sup>82</sup>

...my understanding or recollection about the events was informed by those diaries and I believe that there was an agreement in principle around providing some sort of support or dealing with that issue of organiser representation on the project, and then during the negotiations and the discussions, before the agreement was developed or finalised, then that arrangement firmed up.

64. In response to Stephen Sasse's version of events, Julian Rzesniowiecki said that he recalled a discussion about the concept of providing support to the AWU to commit officials to the job, but he did not believe the figure of \$100,000 was settled at that time. He understood that there was no firm value for the financial support that would be committed at that time.<sup>83</sup> He characterised the position as there being agreement around providing assistance, but the terms of the agreement and the level of support were yet to be finalised.<sup>84</sup>

*Mike Connell's account*

65. Mike Connell was the Executive General Manager for Health and Safety at Thiess. He was involved in formulating the strategy for

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<sup>82</sup> Julian Rzesniowiecki, 13/10/15, T:153.14-20.

<sup>83</sup> Julian Rzesniowiecki, 13/10/15, T:165.17-35.

<sup>84</sup> Julian Rzesniowiecki, 13/10/15, T:166.30-34.

industrial relations for the Eastlink project and was involved in negotiations, effectively at the same level as Stephen Sasse.<sup>85</sup>

66. Mike Connell had no memory of a discussion about a proposal pursuant to which TJH would make a payment to the AWU each year.<sup>86</sup> He did not have any discussions about the possibility of TJH defraying the cost of an organiser.<sup>87</sup> He said that concept was surprising to him, because it was not consistent with the joint venture's industrial relations strategy and commitment not to take non-working delegates on the project.<sup>88</sup> Mike Connell said that such a concept would create a conflict of interest between the project, the organiser and the Union.<sup>89</sup> No such proposal was brought to Thiess or to the joint venture for agreement.<sup>90</sup>

67. He said that it would not have surprised him if payments were made to the AWU at the time that the project commenced recruitment of employees, as significant resources were dedicated to that task.<sup>91</sup>

### *Conclusions*

68. Bill Shorten in late 2004 made a proposal to Stephen Sasse that TJH fund an organiser for the Project. No submissions were made by any affected person that this did not occur. Stephen Sasse was consistent in

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<sup>85</sup> Mike Connell, 13/10/15, T:136.1-14.

<sup>86</sup> Mike Connell, 13/10/15, T:136.35-46.

<sup>87</sup> Mike Connell, 13/10/15, T:137.39-42.

<sup>88</sup> Mike Connell, 13/10/15, T:138.2-28.

<sup>89</sup> Mike Connell, 13/10/15, T:139.17-21.

<sup>90</sup> Mike Connell, 13/10/15, T:144.15-24.

<sup>91</sup> Mike Connell, 13/10/15, T:137.4-25.

this aspect of his evidence. Bill Shorten could not recollect discussing any such proposal, but he accepted that there were discussions regarding an organiser and a presence for the AWU on the site for the purpose of, in effect, maintaining industrial peace in the face of the potential involvement of the CFMEU.

69. It is possible that during discussions about the about proposal a specific amount of money was mentioned. On balance, however, the evidence before the Commission does not suggest that it was a probability. That was Stephen Sasse's ultimate position in his public hearing.
70. On balance, the evidence supports the proposition that there was no concluded agreement as at December 2004 about the above proposal. That is suggested by the fact that the CFMEU became involved at about this time and, as a result, subsequently conciliation commenced in the Australian Industrial Relations Commission. As a result, it is unlikely that at this time either the AWU or the Joint Venture would have regarded any aspect of the negotiations to be set in stone. That, in substance, was the effect of Stephen Sasse's evidence on this point.
71. To some extent this conclusion is inconsistent with Julian Rzesniowiecki's evidence. However the difference should not be overstated. His final position, after having the benefit of his examining his diaries, was that at the time he joined the Project there was an 'agreement in principle around providing some sort of support' which was 'firmed up' in subsequent negotiations. This was his understanding and as a description of his understanding it may reflect some of the difficulties in giving precise labels to the state of fluid

negotiations at any particular point in time. More is said about his evidence below.

### **Negotiations from December 2004**

72. The persons involved in the negotiation and conciliation process from December 2004 were more numerous than were involved in the initial investigations. Additionally, there is some documentation of these discussions, in the form of Julian Rzesniowiecki's diary notes.<sup>92</sup> During the hearing the whole of his diaries were produced and those referred to in the evidence were tendered to the Commission.<sup>93</sup>

#### *Julian Rzesniowiecki's account*

73. Julian Rzesniowiecki's statement addressed a number of notes of meetings held between 10 December 2004 and 15 March 2015. A number of people are listed as having attended those meetings, including, on the joint venture side, Stephen Sasse, Don Johnson, Mike Connell, Chris Herbert, and Greg Sparkman, and on the AWU side, Bill Shorten, Cesar Melhem and Craig Winter.<sup>94</sup>

74. The substance of Julian Rzesniowiecki's statement was that, having reviewed his notes, he interpreted some references to organisers and other union officers to be notes of discussions concerning the number of AWU officers to be dedicated to the project, and the cost of providing financial support for that dedication. Julian Rzesniowiecki

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<sup>92</sup> Sasse MFI-2, 12/10/15, pp 23-27; Rzesniowiecki MFI-3, 13/10/15.

<sup>93</sup> Rzesniowiecki MFI-3, 13/10/15.

<sup>94</sup> Julian Rzesniowiecki, witness statement, 13/10/15, para 6.

said that the discussions therefore related to the agreement he had referred to in his previous evidence.<sup>95</sup> The substance of the evidence can be best summarised in the following exchange:<sup>96</sup>

Q. ... There were discussions between, as you understood it back then, Stephen Sasse, Bill Shorten?

A. Correct.

Q. And on page 9 you say "probably Cesar Melhem" but, anyway, there were discussions between at least the first two gentlemen I have mentioned and possibly also Cesar Melhem. It was about providing resources to the AWU to assist them to provide organisers to the project?

A. That's correct.

Q. But you think now from having read your diary notes that there was no certainty around the number of positions at that stage?

A. Yes, I'd say that there was an agreement around providing assistance, but the terms of that agreement, the level of support, you know, the way in which the arrangement was going to be delivered, had not been settled between them.

Q. And then in these discussions it was put to you that the support should, in fact, be in respect of four positions?

A. That's correct.

Q. And then you negotiated that down to one?

A. Yes, that's probably - that's correct.

Q. How do you say that that process was gone through, that it went from the four down to the one?

A. Well –

Q. Who was involved? Was it you?

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<sup>95</sup> Julian Rzesniowiecki, witness statement, 13/10/15, paras 7-11.

<sup>96</sup> Julian Rzesniowiecki, 13/10/15, T:166.13-46, 167.1-12.

A. I think it was myself and Cesar Melhem. I think during all these negotiations there were discussions about, you know, who the people might be, how many, and so forth, and then in the conciliation process before Ian Ross, Ian Ross indicated to me at that stage that Cesar Melhem was looking for six organisers and I indicated to Ian Ross that that would have to be dealt with outside the AIRC process, we weren't in a position to deal with it here, and that we'd come to an understanding with Cesar Melhem and my recollection is that Cesar Melhem and I had a discussion at some point where we settled on the deal.

75. The submissions of Bill Shorten at one point described Julian Rzesniowiecki's evidence as 'disingenuous'. But there were otherwise no attacks on his credit in a general sense. To the extent the submissions of Bill Shorten endeavour to suggest that Julian Rzesniowiecki was attempting to do other than give his best and honest recollection of events, those submissions are rejected. Much of his evidence was given against his own interest. He was attempting to give honest evidence. He was an outstandingly capable, calm and responsible witness.

76. The above conclusions do not compel acceptance of Julian Rzesniowiecki's evidence. The evidence he gave interpreting some of his diary notes cannot be accepted. One difficulty is that, as will be seen, Julian Rzesniowiecki gave evidence that he attempted to conceal the arrangement from Thiess representatives, including Don Johnson and Mike Connell. Consistently with this, Don Johnson and Mike Connell gave evidence that they knew nothing about the arrangement.<sup>97</sup> However if Julian Rzesniowiecki's interpretation of his notes is to be accepted, then Don Johnson and Mike Connell were present for discussions in relation to the funding of an organiser. That suggests his interpretation is wrong.

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<sup>97</sup> Don Johnson, 13/10/15, T:234.17-46; Michael Connell, 13/10/15, T:142.47, 143.1-9.

77. Another difficulty is that, on Julian Rzesniowiecki's interpretation, the negotiation commenced with the idea of committing to a single organiser with a salary and benefits of \$100,000, and proceeded with proposals of four and as many as six organisers with a corresponding escalation in price, and then reduced back to one organiser again. There is no evidence which would explain such excessive fluctuation in the negotiations.
78. The content of the notes does not compel acceptance of Julian Rzesniowiecki's interpretation. For example, the notes of a meeting dated 10 December 2004 refer to '2 convenors employed by MFP',<sup>98</sup> which is said to relate to a proposal for employment of two organisers by the joint venture. However, that arrangement (direct employment, rather than funding of an organiser employed by the AWU) is not a term of the agreement that Julian Rzesniowiecki said was reached at this time. It is inconsistent with the evidence of Stephen Sasse and Mike Connell that non-working delegates were unacceptable to the project. Nor do any of the notes actually say anything to the effect that they are references to an arrangement for which the joint venture would have to pay. There are, for example, no notations to the effect 'JV to pay'. The notes could equally well be recording what resources the AWU was able to make available to the joint venture. This in fact was in substance how Don Johnson and Mike Connell explained them.<sup>99</sup>

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<sup>98</sup> Sasse MFI-2, 12/10/15, p 23. The 'MFP' refers to the Mitcham-Frankston Project.

<sup>99</sup> Don Johnson, 13/10/15, T:232.21-47; T:251.37-41; Mike Connell, 13/10/15, T:146.1-38, 147.9-19.

79. It is not necessary to review the terms of every note. It is sufficient to say that they do not shed any significant light on the nature of the negotiation of the arrangement at which, ultimately, Cesar Melhem and Julian Rzesniowiecki arrived. It is necessary to consider the balance of the oral evidence on that issue.

80. Julian Rzesniowiecki said that the ultimate agreement that was reached occurred during a discussion he had with Cesar Melhem:<sup>100</sup>

The gist of what was said was that, you know, the AWU had worked with us to deliver on all the aspects of the agreement that we were looking for, such as the flexible working calendar, drug and alcohol testing, sensible demarc with the CFMEU, congruent subcontractor arrangements and the like, and that there was also this understanding about providing assistance and that we should deliver on that and we haggled over it and we came to an understanding.

81. The figure ultimately settled on was \$100,000 being referable to an organiser plus vehicle plus on-costs.<sup>101</sup>

82. Julian Rzesniowiecki gave the following evidence.

(a) The arrangement was set up to ensure that the Eastlink project was delivered successfully. The view within TJH was that if AWU was not proactive in managing the worksite, the CFMEU would come in and fill the gap and cause problems.<sup>102</sup>

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<sup>100</sup> Julian Rzesniowiecki, 13/10/15, T:167.45-47, 168.1-5.

<sup>101</sup> Julian Rzesniowiecki, 13/10/15, T:168.7-11.

<sup>102</sup> Rzesniowiecki MFI-1, 13/10/15, p 14.2-13.

- (b) The existence and terms of the agreement were not common knowledge within TJH. The project director for the Eastlink project was Chris Herbert and he was told of the agreement by Julian Rzesniowiecki.<sup>103</sup> Chris Herbert said that he had no recollection of being told of the arrangement,<sup>104</sup> or of a proposal that the joint venture fund an organiser.<sup>105</sup> Chris Herbert's successor to that position was Gordon Ralph. Julian Rzesniowiecki told Gordon Ralph of the arrangement and, as will be seen, Gordon Ralph accepted this. Julian Rzesniowiecki does not recall the agreement being discussed openly with the board of TJH.<sup>106</sup>
- (c) The arrangement was not disclosed by Julian Rzesniowiecki to Don Johnson<sup>107</sup> or Mike Connell,<sup>108</sup> because he understood that Thiess employees took a different view of such arrangements.<sup>109</sup>

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<sup>103</sup> Rzesniowiecki MFI-1, 13/10/15, p 10.15-18.

<sup>104</sup> Chris Herbert, 12/10/15, T:129.33-45.

<sup>105</sup> Chris Herbert, 12/10/15, T:130.20-26.

<sup>106</sup> Rzesniowiecki MFI-1, 13/10/15, p 23.11-12.

<sup>107</sup> Julian Rzesniowiecki, 14/10/15, T:267.10-16.

<sup>108</sup> Julian Rzesniowiecki, 14/10/15, T:267.44-47, 268.1.

<sup>109</sup> Julian Rzesniowiecki, 14/10/15, T:267.30-34.

*Don Johnson's account*

83. Don Johnson said that he did not attend many meetings with Stephen Sasse. He was involved in the negotiations with Julian Rzesniowiecki, Bill Shorten, Cesar Melhem and Craig Winter.<sup>110</sup>
84. Don Johnson had no recollection of a proposal for TJH to pay to the AWU \$100,000 plus GST per year,<sup>111</sup> or to make a payment to defray the cost of an organiser.<sup>112</sup> He had some recollection of there being a discussion between Julian Rzesniowiecki, Bill Shorten and Cesar Melhem in relation to organisers.<sup>113</sup> That included discussions as to how the AWU would manage the site as the principal construction union.<sup>114</sup> He had no knowledge that the arrangement was implemented by the joint venture.<sup>115</sup>

*Mike Connell's account*

85. Mike Connell said that the references to organisers and representatives in Julian Rzesniowiecki's notes<sup>116</sup> related to discussions with the AWU as to how it was going to represent members on the project, to ensure that the AWU would maintain an adequate presence on a large-scale project.<sup>117</sup> He described the suggestion that the notes referred to the

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<sup>110</sup> Don Johnson, 13/10/15, T:231.21-32.

<sup>111</sup> Don Johnson, 13/10/15, T:231.41-44.

<sup>112</sup> Don Johnson, 13/10/15, T:232.1-2.

<sup>113</sup> Don Johnson, 13/10/15, T:232.21-47.

<sup>114</sup> Don Johnson, 13/10/15, T:251.37-41.

<sup>115</sup> Don Johnson, 13/10/15, T:233.44-47, 234.1-7.

<sup>116</sup> See Sasse MFI-2, 13/10/15, pp 23, 25.

<sup>117</sup> Mike Connell, 13/10/15, T:146.1-38, 147.9-19.

arrangements to defray the costs of an organiser as ‘a piece of fiction.’<sup>118</sup>

*Cesar Melhem’s account*

86. Cesar Melhem said that he had very little contact with Stephen Sasse during the course of negotiations for the 2005 EBA. He said that Bill Shorten took the lead in those negotiations and told Cesar Melhem about those discussions from time to time.<sup>119</sup> He denied being told by Bill Shorten about discussions regarding the possibility of the joint venture providing funds to the AWU, or paying for an organiser.<sup>120</sup> Cesar Melhem confirmed that, during the discussions in which he participated, there was discussion about the organiser resources that the AWU could dedicate to the site.<sup>121</sup> He said the nature of the discussions recorded in Julian Rzesniowiecki’s note related to convincing the joint venture that the AWU could service the job.<sup>122</sup> He described the suggestion that the notes refer to proposals that the AWU pay for 4 or 6 organisers as ‘laughable.’<sup>123</sup>
87. As referred to above, Cesar Melhem denied that there was any agreement. He said that the genesis of the payments was as follows:<sup>124</sup>

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<sup>118</sup> Mike Connell, 13/10/15, T:146.25-26.

<sup>119</sup> Cesar Melhem, 22/10/15, T:941.8-15.

<sup>120</sup> Cesar Melhem, 22/10/15, T:941.17-24.

<sup>121</sup> Cesar Melhem, 22/10/15, T:942.1-20.

<sup>122</sup> Cesar Melhem, 22/10/15, T:947.1-9.

<sup>123</sup> Cesar Melhem, 22/10/15, T:947.28-39.

<sup>124</sup> Cesar Melhem, 22/10/15, T:894.3-12.

...There was a discussion after the EBA, as I recall, with Julian in relation to the AWU providing services and the joint venture to support and sponsor various AWU activities during the life of the project and later on, part of their internal budgeting, the 100,000 issue came up. That was after the EBA was done and about providing services. What I've heard in this Commission in the last week or so about an agreement about an organiser, 100,000 during the negotiations, I don't recall any of that.

88. Cesar Melhem said that the abovementioned discussion took place in about May 2005.<sup>125</sup> He denied that the arrangement had anything to do with the provision of an organiser.<sup>126</sup> Cesar Melhem's evidence is that in the discussion in May 2005, he and Julian Rzesniowiecki discussed the services that the AWU could provide and sponsorship that TJH could provide, however he said that at that time, no fixed amount was agreed.<sup>127</sup>
89. On this point (and on some others), it is somewhat difficult to reconcile Cesar Melhem's evidence with his submissions. Although he 'absolutely' denied in his evidence that the arrangement was for the provision of an organiser,<sup>128</sup> it was submitted on his behalf that he had consistently adopted the position that the substance of the arrangement was that 'the union was prepared to provide an organiser as and when needed to the project equivalent to one full time organiser, that the organiser would be paid for by the union, not the Joint Venture, but that the revenue generated by the services and other activities provided by the union and paid for by the Joint Venture would enable the union to provide that organiser'<sup>129</sup>. The submission in fact is not supported

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<sup>125</sup> Cesar Melhem, 22/10/15, T:894.28-29.

<sup>126</sup> Cesar Melhem, 22/10/15, T:898.1-5.

<sup>127</sup> Cesar Melhem, 22/10/15, T:900.19-32.

<sup>128</sup> Cesar Melhem, 22/10/15, T:897.33-898.5.

<sup>129</sup> Submissions of Cesar Melhem, 20/11/15, para 12.

by the evidence of any witness about the arrangement. The submission cannot be accepted. It is no more than an attempt, after the event, to justify the many false invoices that were issued for the purpose of concealing the arrangement.

*Craig Winter's account*

90. Craig Winter was an industrial officer at the AWU and participated in the negotiations for the 2005 EBA.<sup>130</sup> He remembered participating in discussions about who was going to work on the project and look after the project. But he did not recall the particular discussion referred to in Julian Rzesniowiecki's note of a meeting on 14 December 2014, at which he is recorded as being in attendance.<sup>131</sup>
91. Craig Winter stated that an arrangement for the joint venture to pay to the AWU a sum of money for the purpose of funding organisers was never discussed at a meeting he attended, and he had no knowledge of such an arrangement.<sup>132</sup> He stated that there were discussions about the resources that the AWU was going to put on the project, and he recalled putting forward names of organisers, but he otherwise stated emphatically that there was never a discussion about payment.<sup>133</sup> Craig Winter said that he never had a discussion with Cesar Melhem about that matter.<sup>134</sup>

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<sup>130</sup> Craig Winter, 20/10/15, T:711.10-11.

<sup>131</sup> Rzesniowiecki MFI-3, 13/10/15, p 45; Craig Winter, 20/10/15, T:712.12-14.

<sup>132</sup> Craig Winter, 20/10/15, T:712.16-34.

<sup>133</sup> Craig Winter, 20/10/15, T:713.7-13.

<sup>134</sup> Craig Winter, 20/10/15, T:715.27-34.

*Resolving the differing accounts*

92. For the reasons already given, Julian Rzesniowiecki's interpretation of his diary notes is rejected as mistaken. Ultimately, those notes are of little utility for present purposes other than as an objective record of the dates of meetings and the persons in attendance at those meetings.
93. Plainly, however, the arrangement that came to be implemented by Cesar Melhem and Julian Rzesniowiecki was negotiated at some point. But when and how? It is likely that the matter was the subject of ongoing discussion between Cesar Melhem and Julian Rzesniowiecki during EBA negotiations. The matter was first raised by Bill Shorten with Stephen Sasse in the context of discussions about a proposed EBA. The objective probabilities are that the arrangement was further discussed and finalised by Cesar Melhem and Julian Rzesniowiecki in the same context.
94. Julian Rzesniowiecki's evidence was that the agreement was reached 'in principle' by the time the EBA had been certified, but that '[t]he finalisation' of the agreement had not occurred by that time.<sup>135</sup> The effect of this evidence, properly understood, was that agreement was reached at around this time to pay \$100,000 per year to the AWU, but the mechanism by which those payments were to be made had not been finalised. As will be seen, the first invoice issued as part of the arrangement was issued on 15 February 2005, prior to certification of the EBA.<sup>136</sup>

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<sup>135</sup> Julian Rzesniowiecki, 13/10/15, T:181.43-182.2.

<sup>136</sup> Shorten MFI-9, 9/7/15, p 168A.

95. Cesar Melhem, in the evidence set out above, said that an agreement was reached after EBA negotiations had concluded.<sup>137</sup> However this was in the context of his seeking to say that all that was involved was an agreement about the provision of services that were actually provided. That was not the agreement and this evidence cannot be accepted.
96. The most likely position on the evidence is that an agreement was reached at about the time that EBA negotiations concluded that \$100,000 year would be paid to the AWU.
97. There is a question as to how to describe the arrangement. What was it actually for? Cesar Melhem persisted in describing the arrangement as one for the provision of ‘services’ that, ultimately, were rendered. This description is manifestly inaccurate because, as will be seen, many of the services described on the invoices were not rendered. The arrangement was referred to by Julian Rzesniowiecki as an arrangement for ‘[f]or organising resources’<sup>138</sup> or for the payment of the cost of an organiser. There is no dispute that the Project did not in fact receive a dedicated organiser. Rather, a range of organisers worked on the project at various stages of the construction, including an organiser who regularly attended the pre-cast concrete facility servicing the Eastlink project at Morwell.<sup>139</sup>

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<sup>137</sup> Cesar Melhem, 22/10/15, T:894.3-12.

<sup>138</sup> Julian Rzesniowiecki, 13/10/15, T:170.20.

<sup>139</sup> Rzesniowiecki MFI-1, 13/10/15, p 11.42-47; Julian Rzesniowiecki, 13/10/15, T:177.41-42; Gordon Ralph, 12/10/15, T:104.37-46.

98. Gordon Ralph said that Julian Rzesniowiecki explained to him that the expenditure in implementing the arrangement related to an amount of money being paid to the AWU in consideration for the EBA that had been reached with the AWU.<sup>140</sup> Julian Rzesniowiecki said he did not believe he told Gordon Ralph this.<sup>141</sup> Whether or not Julian Rzesniowiecki said this to Gordon Ralph, it is as accurate as a description of the arrangement as one to provide ‘resources’ or to provide an organiser. The ‘resources’ and personnel that the AWU provided in connection with the Project were (or at least ought to have been) services to its members, not the Joint Venture.

#### **D – IMPLEMENTATION OF THE AGREEMENT**

99. Julian Rzesniowiecki said that his understanding of the initial arrangement was that the invoices would be sent to John Holland. However, at some point the invoices were redirected from John Holland to the joint venture, at which time he and Cesar Melhem reached an arrangement as to how the invoices would be described so that they could be processed through the joint venture,<sup>142</sup> by describing the services as matters such as advertising, sponsorship, and other matters that would be approved by the joint venture.<sup>143</sup> Julian Rzesniowiecki said that the reason why the invoices were not described as being for the provision of an organiser to the project was that the AWU, and TJH, did not wish that to become public

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<sup>140</sup> Gordon Ralph, 12/10/15, T:105.45-106.7.

<sup>141</sup> Julian Rzesniowiecki, 13/10/15, T:181.2 - .8.

<sup>142</sup> Julian Rzesniowiecki, 13/10/15, T:168.37-44.

<sup>143</sup> Julian Rzesniowiecki, 13/10/15, T:169.1-5.

information<sup>144</sup> because it might have had an impact on the other unions involved in the project.<sup>145</sup>

### **Joint venture accounting practices**

100. It is now necessary to discuss the joint venture accounting practices. These practices shed some light on the implementation of the arrangement and in particular on why false invoices were created.

101. Mike Minnotti gave evidence as to the proper procedure for raising expenditures and approving payment on the project. In summary, his evidence was as follows:

(a) Following the award of the contract for the project TJH developed a delegation of authority matrix for expense approval and a detailed budget based on cost analysis of the project as it progressed.<sup>146</sup>

(b) On a monthly basis, the general manager commercial (Rob Johnson) and the finance manager (Michael Minotti) prepared a transaction ledger of the costs for each cost centre and met the head of that centre to undertake a costs and budgeting review. Julian Rzesniowiecki was one of the managers that

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<sup>144</sup> Julian Rzesniowiecki, 13/10/15, T:169.34-38.

<sup>145</sup> Julian Rzesniowiecki, 13/10/15, T:169.40-45.

<sup>146</sup> Michael Minotti, 19/10/15, T:575.7-33.

participated in the costs review for the HR/IR department, which had its own costs centre and budget.<sup>147</sup>

- (c) The transaction ledger for each costs centre was provided to the Project Director (first Chris Herbert, then Gordon Ralph<sup>148</sup>) for review on a monthly basis.<sup>149</sup>
- (d) The project used JD Edwards enterprise accounting software (**JDE**).<sup>150</sup>
- (e) The JDE system included approval authorities that allowed expense approval to be automated. The payment approval process was that Julian Rzesniowiecki could authorise invoices for an amount that was within his delegation limit, and anything above that limit would be escalated to the project director.<sup>151</sup> Michael Minotti guesses that Julian Rzesniowiecki's approval limit would have been \$50,000 to \$75,000.<sup>152</sup>
- (f) While the usual practice was for invoices to be raised against a commitment, such as a contract or purchase order which was raised before the service was provided and the invoice

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<sup>147</sup> Michael Minotti, 19/10/15, T:574.17-29, 576.34-41.

<sup>148</sup> Gordon Ralph, 12/10/15, T:105.21-27.

<sup>149</sup> Michael Minotti, 19/10/15, T:575.1-5.

<sup>150</sup> Michael Minotti, 19/10/15, T:575.35-39.

<sup>151</sup> Rzesniowiecki MFI-1, 13/10/15, p 15.8-22.

<sup>152</sup> Michael Minotti, 19/10/15, T:576.11-14.

issued,<sup>153</sup> it was possible to raise an invoice without such a commitment in the JDE system.<sup>154</sup>

- (g) Where a purchase order had been raised and approved, there was no need for payment approval of the invoice, however Michael Minotti and other personnel in his department would approve payment of the invoice through the JDE system. Part of the approval was verifying that the work to which the invoice referred was done.<sup>155</sup>
- (h) Where the invoice did not refer to a purchase order or other reference to a pre-approved payment, supporting material such as a scope of work or evidence of delivery of the service would be required.<sup>156</sup>

102. Deborah Swinley was Human Resources Administrator on the project from about April 2005.<sup>157</sup> Her role included processing Human Resources related invoices for payment. The usual practice was for those invoices to be authorised by Julian Rzesniowiecki.<sup>158</sup> His practice was to hand her an invoice or to give a verbal or written instruction as to what he wanted done with them. Julian Rzesniowiecki indicated approval of invoices for payment by signing them. Deborah Swinley processed the invoice by entering the details of

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<sup>153</sup> Michael Minotti, 19/10/15, T:577.32-40.

<sup>154</sup> Michael Minotti, 19/10/15, T:577.1-13.

<sup>155</sup> Michael Minotti, 19/10/15, T:578.2-12, 582.45-583.26.

<sup>156</sup> Michael Minotti, 19/10/15, T:582.1-22.

<sup>157</sup> Deborah Swinley, witness statement, 13/10/15, para 6.

<sup>158</sup> Deborah Swinley, witness statement, 13/10/15, para 8.

it into the JDE system, including the invoice number, amount and the party issuing the invoice. Her practice was to enter a series of accounting codes on the face of the invoice to correspond to the account codes within the JDE system.<sup>159</sup> Deborah Swinley then delivered the invoice to the accounting department and on occasion attached other supporting documentation to the invoice.<sup>160</sup> Deborah Swinley processed a number of the invoices that are considered in these submissions. She does not have a particular memory of any of them.<sup>161</sup> The invoices that she processed are identified in extracts from the JDE system showing the electronic approval of payment by members of the accounts department.<sup>162</sup>

103. A number of observations may be made about the accounting processes adopted by TJH.
  
104. *First*, the Human Resources department had a budgetary allocation that should have placed limits on unauthorised expenditure. Michael Minotti said that if there had been an arrangement for employment of an organiser or the commitment of costs to defray the costs of an organiser, he would expect that there would have been approval at JV Board level, and a direction to allow for the expenditure within the forecasts for the project.<sup>163</sup> There is no evidence of a resolution for this expenditure by the JV Board or any direction to make an allowance for it.

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<sup>159</sup> Deborah Swinley, witness statement, 13/10/15, paras 9-10.

<sup>160</sup> Deborah Swinley, witness statement, 13/10/15, para 11.

<sup>161</sup> Deborah Swinley, witness statement, 13/10/15, paras 13-15.

<sup>162</sup> Deborah Swinley, witness statement, 13/10/15, Annexure A.

<sup>163</sup> Michael Minotti, 19/10/15, T:663.6-664.1-29.

105. *Secondly*, Michael Minotti said that he recalled a discussion with Julian Rzesniowiecki and Rob Johnson at the commencement of the project in which he raised the possibility of technical training or recruitment services being obtained from the AWU, and requested that an allowance be made for the expenditure in his forecasting.<sup>164</sup> Michael Minotti said that this request was not followed up in writing, but that the ordinary practice would be that the budget would have been developed on the basis of the discussion.<sup>165</sup> He said that the discussion took place in about the middle of 2005 when cost forecasting was commencing.<sup>166</sup> Julian Rzesniowiecki gave evidence that he had a discussion with Gordon Ralph, and possibly Michael Minotti and Rob Johnston in which he ‘explained the arrangement’ and the budgetary allocation for it.<sup>167</sup> Michael Minotti’s description of what he had been told differed from that of Julian Rzesniowiecki, but the similarity in their accounts is sufficient to support a finding that there was a budgetary allocation for the expenditure. The fact that the invoices that were issued pursuant to the agreement did not describe the services as ‘providing support for an organiser’ suggests that Michael Minotti’s account of what he was told should be preferred. Moreover, the timing of the conversation also suggests that it occurred as described by Michael Minotti: Gordon Ralph did not join the project until September 2005 when the project was underway and budget allocations were presumably set.<sup>168</sup> The above evidence indicates that

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<sup>164</sup> Michael Minotti, 19/10/15, T:579.1-18.

<sup>165</sup> Michael Minotti, 19/10/15, T:581.1-14.

<sup>166</sup> Michael Minotti, 19/10/15, T:659.43-47.

<sup>167</sup> Julian Rzesniowiecki, 13/10/15, T:185.23-41.

<sup>168</sup> Cesar Melhem submitted on the basis of the evidence of Julian Rzesniowiecki that the discussion with Michael Minotti showed that he was not concealing the arrangement: Submissions of Cesar Melhem, 20/11/15, ch 3, para 64. The submission does not address

provision was made within the TJH budget for expenditure pursuant to the arrangement to pay \$100,000 per year. However, for the purposes of that budgetary allocation, that expenditure was treated as expenditure for various services to be provided by the AWU, and not the provision of ‘resources’ to the Project or the costs of providing support by means of an organiser.

106. Gordon Ralph says that he became aware of the arrangement when he was reviewing the cost ledgers for the Human Resources department and observed a large expenditure (he recalled in the amount of \$100,000, about 3-5 months into the project) which caused him to enquire about what the payment involved.<sup>169</sup> Gordon Ralph said that Julian Rzesniowiecki explained to him that the costs related to an amount of money being paid to the AWU in consideration for the EBA that had been reached with the AWU.<sup>170</sup> Gordon Ralph said that he considered that he had no option but to honour the agreement that had been made.<sup>171</sup> He thought that the arrangement was consistent with other arrangements he had heard about pursuant to which a sum of money was paid to a union in exchange for settling industrial disputes or negotiations, and he understood that such arrangements were not typically found in writing.<sup>172</sup> He assented to the arrangement, despite

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the matters referred to in this paragraph. The conclusion is addressed further in section F below, in relation to possible criminal offences.

<sup>169</sup> Gordon Ralph, 12/10/15, T:105.1-35.

<sup>170</sup> Gordon Ralph, 12/10/15, T:105.45-106.7.

<sup>171</sup> Gordon Ralph, 12/10/15, T:106.31-36.

<sup>172</sup> Gordon Ralph, 12/10/15, T:107.4-23.

considering it to be inappropriate, because he wished to maintain industrial peace on the project:<sup>173</sup>

I wanted to ensure that industrial peace was maintained and the same lack of industrial disputation that had been, you know, the case on the project for the preceding 12 months remained in place and for, you know, the next - for the duration of the project. Now, if that was - if that was all consequent of the payments that had been made, or the payment that was being made, and that agreement had previously been made, then I was happy to go along with that agreement, or willing to go along with that agreement.

107. *Thirdly*, there were processes in place for monitoring the costs of the project as it progressed. There were monthly costs reviews by the accounts department and, additionally, the project director. That process enabled the project director to detect the arrangement, but it does not appear that the accounts department did. That may be explained by the fact that the costs records, reflecting the invoices that were issued, did not on their face give cause for concern.
108. *Fourthly*, there were two mechanisms for expenditure approval within the JDE system. The first was at the time the expenditure was raised, by way of purchase order and the like, and the second was at the time of payment. That would ordinarily provide sufficient controls to enable unusual or unjustifiable expenses to be detected. However, in the present case the approval of invoices for the HR department was under the control of Julian Rzesniowiecki. There was no independent review of the expenditures that he approved at the time he approved them, and it was possible to obtain payment of an invoice without raising a purchase order prior to the services described in the invoices

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<sup>173</sup> Gordon Ralph, 12/10/15, T:108.28-37.

being delivered. That increased the likelihood of invoices being approved for payment without close scrutiny.

### **Preliminary comments on TJH invoices and payments**

109. What follows is an account of all of the invoices that have been produced by the AWU in relation to the Eastlink project. Counsel assisting made submissions as to the findings that they contended should be made in relation to them. Some of the affected persons, and in particular Cesar Melhem, have also made submissions as to the findings that should be made in respect of the invoices.

110. One preliminary observation may be made in relation to the evidence and submissions of Cesar Melhem. In a witness statement, he stated that:<sup>174</sup>

The services invoiced by the AWU to the JV (advertising, the Ball, training, attending at all site inductions, etc) were provided by the AWU. The Union made a profit on those services which allowed it to provide more resources to the site without diminishing other services. All invoices were drawn up after consultation between me and Julian Rzesniowiecki.

111. Cesar Melhem adhered to this position in his oral evidence. He denied categorically that the services that were the subject of the invoices were for an organiser.<sup>175</sup> He said, in relation to each of the invoices, that the services described in them were provided.<sup>176</sup>

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<sup>174</sup> Cesar Melhem, witness statement, 22/10/15, para 10.

<sup>175</sup> Cesar Melhem, 22/10/15, T:898.1-5.

<sup>176</sup> Cesar Melhem, 22/10/15, T:898.45-46; T:910.45-47, T:911.1-11.

112. The submissions put on behalf of Cesar Melhem do not appear to put the matter in such unequivocal terms. Paragraph 12 of the submissions contends:

Mr Melhem's position has been consistent. He says that the union was prepared to provide an organiser as and when needed to the project equivalent to one full time organiser, that the organiser would be paid for by the union, not the Joint Venture, but that the revenue generated by the services and other activities provided by the union and paid for by the Joint Venture would enable the union to provide that organiser.

113. That was not Cesar Melhem's evidence in his statement.<sup>177</sup> Nor was it his evidence at the public hearing. It is not clear from the submissions whether Cesar Melhem maintained his evidence that each of the invoices issued by the AWU represented services that were in fact delivered. He did not seek to justify every invoice in his written submissions, including some that counsel assisting submitted were false invoices. In any event, Cesar Melhem made submissions in respect of some of the invoices or classes of invoices. Those submissions are addressed, where relevant, in the following section.

### **The 2005 payments**

114. The following invoices were issued by the AWU in 2005.<sup>178</sup>
115. The first invoice, numbered 009304, was issued by AWU National Office on 15 February 2005, in the amount of \$5,000 exclusive of GST.<sup>179</sup> The invoice description was 'Advertising in the summer

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<sup>177</sup> Cesar Melhem, witness statement, 22/10/15, para 9.

<sup>178</sup> Omitting invoices for which credit notes were subsequently issued.

<sup>179</sup> Shorten MFI-9, 9/7/15, p 168A.

edition of The Australian Worker Magazine.’ The General Ledger for the AWU National Office records this income as ‘Advertising Income AWU Journals.’<sup>180</sup> The amounts recorded in this account for the financial years between 2005 and 2008 are between \$2,500 and \$10,000.

116. The second invoice, numbered 010249, was issued by AWU Victorian Branch on 27 May 2005, in the amount of \$750 exclusive of GST.<sup>181</sup> The invoice description was ‘AWU OH&S 5 Day Representatives Training Course from Monday 23<sup>rd</sup> to Friday 27<sup>th</sup> May 2005. Attendee: Jason Morgan.’ It is stamped as having been paid in July 2005, by EFT to State Funds.

#### *AWU Population Forum*

117. The third invoice, numbered 010410, was issued by AWU Victorian Branch on 9 June 2005, in the amount of \$9,000 exclusive of GST.<sup>182</sup> The invoice description was ‘Booking for twenty tickets to the 2005 AWU POPULATION FORUM: ‘Growing Australia – Population challenges for the future.’ It is stamped as having been paid in August 2005, by EFT to State Funds. A booking form for the conference, signed by Julian Rzesniowiecki, is in evidence.<sup>183</sup> The General Ledger for the AWU Victorian Branch records this income as ‘seminar income.’<sup>184</sup> The most commonly recorded amount for this income

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<sup>180</sup> Shorten MFI-9, 9/7/15, p 263.

<sup>181</sup> Shorten MFI-9, 9/7/15, p 169.

<sup>182</sup> Shorten MFI-9, 9/7/15, p 170.

<sup>183</sup> Shorten MFI-9, 9/7/15, p 171.

<sup>184</sup> Shorten MFI-9, 9/7/15, p 242.

code is \$450. The amount for this invoice was one of the highest credited to the seminar income account of the general ledger for May and June 2006.

118. Julian Rzesniowiecki did not recall attending the forum.<sup>185</sup> He did not know whether other employees of TJH attended the forum. He said that TJH did not supply 20 people to attend the forum, it simply bought 20 tickets.<sup>186</sup> He said that ‘the basis of the agreement was to provide funds to the Union to support the project and I guess that would be fair to say that we weren’t particularly troubled by what was described in the invoice.’<sup>187</sup> He accepted that he was happy to make payment on the invoices, consistently with the agreement, regardless of whether TJH had received the services described in the invoice,<sup>188</sup> provided that the invoices did not make plain that they were for the provision of an organiser.<sup>189</sup> Later, in his evidence before the Commission, Julian Rzesniowiecki described the payment as making a ‘donation’ of 20 places for the forum.<sup>190</sup>
119. A number of other TJH personnel agreed that it was unlikely to have been of any benefit for the employees of TJH working on the project to take a day from work to attend a forum on population growth.<sup>191</sup>

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<sup>185</sup> Rzesniowiecki MFI-1, 13/10/15, p 14.34-43, 15.1-3.

<sup>186</sup> Julian Rzesniowiecki, 13/10/15, T:171.24-26.

<sup>187</sup> Rzesniowiecki MFI-1, 13/10/15, p 15.24-33.

<sup>188</sup> Rzesniowiecki MFI-1, 13/10/15, p 15.35-38.

<sup>189</sup> Julian Rzesniowiecki, 13/10/15, T:170.39-47.

<sup>190</sup> Julian Rzesniowiecki, 13/10/15, T:170.22-31.

<sup>191</sup> Stephen Sasse, 12/10/15, T:58.43-47, 59.6-14; Gordon Ralph, 12/10/15, T:112.20-24.

Gordon Ralph, the Project Director, said that the forum had ‘no relevance to the project at all.’<sup>192</sup>

120. Counsel assisting submitted that the invoice numbered 010410 dated 9 June 2005 was a false invoice in that it described services that were not in fact received by TJH, and was created with the intention of concealing the true purpose of the payment it sought.

121. Cesar Melhem submitted that, ‘from a disinterested point of view,’ civil construction companies might be interested to know about predicted centres of population growth and construction and construction opportunities arising from it.<sup>193</sup> That submission is speculative, both as to the subject matter of the forum,<sup>194</sup> and the interest of any construction company in such a forum. It stands against the evidence of TJH personnel outlined above, and the evidence of Julian Rzesniowiecki. Counsel assisting’s submission is accepted in respect of this invoice.

122. The fourth invoice, numbered 011235, was issued by the AWU National Office on 1 July 2005, in the amount of \$5000 exclusive of GST.<sup>195</sup> The invoice description was ‘Full page advertisement in The Australian Worker Issue 6, Winter 05.’

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<sup>192</sup> Gordon Ralph, 12/10/15, T:113.1-5.

<sup>193</sup> Submissions of Cesar Melhem, 20/11/15, para 9.

<sup>194</sup> The booking form at Shorten MFI-9, 9/7/15 p 171 said nothing to this effect.

<sup>195</sup> Shorten MFI-9, 9/7/15, p 171A.

123. The fifth invoice, numbered 011173, was issued by AWU Victorian Branch on 5 August 2005, in the amount of \$750 exclusive of GST.<sup>196</sup> The invoice description was ‘AWU OH&S 5 Day Representatives Training in HASTINGS from Monday 1<sup>st</sup> to Friday 5<sup>th</sup> August 2005. Attendee: Robert Johnston.’ It is stamped as having been paid on 9 September 2005, by EFT to State Funds.
124. The sixth invoice, numbered 011505, was issued by AWU Victorian Branch on 9 September 2005, in the amount of \$750 exclusive of GST.<sup>197</sup> The invoice description was ‘AWU OH&S 5 Day Representatives Training from Monday 5<sup>th</sup> to Friday 9<sup>th</sup> September 2005. Attendee: Mark Brennan.’ It is stamped as having been paid in October 2005, by EFT to State Funds.
125. The seventh invoice, numbered 011908, was issued by AWU Victorian Branch on 11 October 2005, in the amount of \$954.55 exclusive of GST.<sup>198</sup> The invoice description was ‘Booking for ONE Table to the 7<sup>th</sup> ANNUAL AWU MEMBERS’ BALL on Saturday 22 October 2005.’ It is stamped as having been paid by EFT to State Funds.
126. The eighth invoice, numbered 012438, was issued by the AWU National Office on 16 November 2005, in the amount of \$5000 exclusive of GST.<sup>199</sup> The invoice description was ‘Full Page advertisement in ‘The Australian Worker’ Issue 7, Spring 05 Edition.’

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<sup>196</sup> Shorten MFI-9, 9/7/15, p 174.

<sup>197</sup> Shorten MFI-9, 9/7/15, p 176.

<sup>198</sup> Shorten MFI-9, 9/7/15, p 177.

<sup>199</sup> Shorten MFI-9, 9/7/15, p 180A.

127. The majority of the invoices issued in 2005 were in relation to the placing of advertising in the Australian Worker magazine, and the provision of training to named employees of the joint venture. There is evidence that advertisements relating to the Eastlink project were placed in the corresponding issues of the Australian Worker described in the above invoices,<sup>200</sup> and that the amounts charged for advertising, and for training, were in the range of what the AWU typically charged for such services as recorded in the general ledgers of the AWU Vic Branch and National Office.<sup>201</sup>

### **The 2006 payments**

128. The following invoices were issued by the AWU in 2006.

#### *The Australian Worker \$10,000 invoice*

129. The first invoice, numbered 013041, was issued by the AWU Vic Branch on 18 January 2006, in the amount of \$10,000 exclusive of GST.<sup>202</sup> The invoice description was ‘Advertising in ‘The Australian Worker’ magazine, Summer 05 and Autumn 05 edition.’ Counsel assisting submitted that this invoice was not a genuine invoice. The reasons for that conclusion are that (a) the invoice was issued by the Victorian Branch and paid into Victorian State Funds account, whereas advertising in the *Australian Worker* is invoiced by and paid to the

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<sup>200</sup> Melhem MFI-1, 22/10/15.

<sup>201</sup> Shorten MFI-9, 9/7/15, pp 241-246, 263-265.

<sup>202</sup> Shorten MFI-9, 9/7/15, p 185. The invoice was then reversed by a credit note and reissued by the National Office, after having been paid into the Vic Branch State Funds account: Shorten MFI-9, 9/7/15, pp 184-184A.

National Office;<sup>203</sup> (b) in respect of advertising for the Summer 2005 edition, one advertisement was placed that was invoiced and paid for in February 2005;<sup>204</sup> and (c) there was no advertisement for the Eastlink project in the Autumn 2005 edition of the Australian Worker.<sup>205</sup> Cesar Melhem's submissions in respect of the advertising invoices, including this invoice, are addressed further below.

### *Back Strain Research*

130. The second invoice, numbered 013042, was issued by the AWU Victorian Branch on 18 January 2006 (the same day as the preceding invoice), in the amount of \$30,000 exclusive of GST.<sup>206</sup> The invoice description was 'Research work done on Back Strain in Civil Construction Industry.' The item code for the invoice is 'VIC OTHER.' It is stamped as having been paid by EFT to State Funds on 2 March 2006.
  
131. The invoice requisition form for this payment was completed by Michael Chen on 18 January 2006, with the annotation 'per Cesar's instruction.'<sup>207</sup> Michael Chen confirmed that this annotation confirmed that he had raised the invoice on the instructions of Cesar Melhem.

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<sup>203</sup> Bill Shorten, 9/7/2015, T:121.5-12.

<sup>204</sup> Shorten MFI-9, 9/7/15, p 168A (see above); Melhem MFI-1, 22/10/15, Summer 2005 issue, p 62.

<sup>205</sup> Melhem MFI-1, 22/10/15, comparative table, Autumn 2005 issue. However, an advertisement was placed in the Summer 2005 issue for John Holland which may cover a service being performed by the AWU, although this service was not for Thiess John Holland or the Eastlink project. There was also an advertisement placed in issue 8 of the Australian Worker with no corresponding invoice, so invoice numbered 013511 may cover a service that was performed by the AWU. It does not, however, do so on the face of the invoice.

<sup>206</sup> Shorten MFI-9, 9/7/15, p 186.

<sup>207</sup> Shorten MFI-9, 9/7/15, p 187.

There were no supporting documents attached to the requisition form.<sup>208</sup>

132. The General Ledger for the AWU Victorian Branch recorded this income as ‘other income.’<sup>209</sup> No additional description was entered into the journal to describe the payment. The amount for this invoice was the highest credited to the ‘other income’ account for 2006 by a significant margin. It was also one of the only credits that was recorded in the ‘other income’ account in a round figure.
133. There was no evidence that research was undertaken in relation to back strain by AWU for the purposes of the Eastlink project. None of the TJH personnel recalled such a report being commissioned. None of them recalled receiving a report concerning back strain during the project.<sup>210</sup> Stephen Sasse described the notion that the AWU would be commissioned by TJH to undertake health and safety research as ‘unorthodox.’<sup>211</sup>
134. Stephen Sasse and Michael Minotti agreed that, if the research was to be commissioned by the joint venture, a detailed scope of works and tender would be required before the expenditure was authorised.<sup>212</sup>

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<sup>208</sup> Michael Chen, 21/10/15, T:814.5-13.

<sup>209</sup> Shorten MFI-9, 9/7/15, p 251.

<sup>210</sup> Julian Rzesniowiecki, 13/10/15, T:173.38-44; Stephen Sasse, 12/10/15, T:59.16-37; Gordon Ralph, 12/10/15, T:127.8-15; Michael Minotti, 19/10/15, T:587.9-12; Sparkman MFI-1, 13/10/15, T:14.10-18; Johnson MFI-1, 13/10/15, T:14.38-40.

<sup>211</sup> Stephen Sasse, 12/10/15, T:59.25-31.

<sup>212</sup> Stephen Sasse, 12/10/15, T:60.30-61.31; Michael Minotti, 19/10/15, T:586.16-587.12; Minotti MFI-1, 19/10/15, T:24.22-47, 28.22-46.

135. Julian Rzesniowiecki treated the payment as an instalment on the \$100,000 payable pursuant to the agreement with the AWU.<sup>213</sup> He said that he had some discussion with Cesar Melhem in relation to research that was being done with one of the Universities but he has no memory of the detail of it.<sup>214</sup> Julian Rzesniowiecki accepted in his evidence that the invoice for back strain research was a false invoice.<sup>215</sup>
136. Cesar Melhem confirmed that he had given the instruction to Michael Chen to raise the invoice with the description that it bore.<sup>216</sup> It was suggested by counsel for Cesar Melhem to Julian Rzesniowiecki that the relevant research consisted of a study undertaken in collaboration with the Victorian Workcover Authority with an apparent title ‘Flips and Flops in Manual Handling in the Civil Construction Industry.’<sup>217</sup> No documents were produced in answer to a notice to produce addressed to the AWU seeking copies of the research relating to the invoice for back strain.<sup>218</sup> Following the questioning of Julian Rzesniowiecki on this issue, the AWU produced a copy of a report dated May 2005 and entitled ‘Sprains, Strains And Fatalities In The Civil Construction Industry’.<sup>219</sup> Later it produced further documentation relating to its communications with third parties in

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<sup>213</sup> Julian Rzesniowiecki, 13/10/15, T:173.46-47, 174.9.

<sup>214</sup> Rzesniowiecki MFI-1, 13/10/15, p 16.36-44.

<sup>215</sup> Julian Rzesniowiecki, 13/10/15, T:189.32-190.20.

<sup>216</sup> Cesar Melhem, 22/10/15, T:924.28-33.

<sup>217</sup> Julian Rzesniowiecki, 13/10/15, T:221.18-30.

<sup>218</sup> Melhem MFI-2, 22/10/15.

<sup>219</sup> Melhem MFI-2, 22/10/15, p 1 of the report titled ‘Sprains, Strains And Fatalities In The Civil Construction Industry’ dated May 2005.

relation to the research detailed in the report.<sup>220</sup> The author of the report was said to be Gavin Merriman of the AWU.

137. The report had nothing to do with the Eastlink project. It was completed in May of 2005, some seven months before the invoice was issued. The report was described as a ‘Worksafe (Vic) Safety Development Fund Project,’ pursuant to a Safety Development Funding Agreement between Worksafe Victoria and the AWU.<sup>221</sup> That was a funding initiative undertaken by the State Authority, which on 18 April 2002 agreed to fund the report in the amount of \$300,000.<sup>222</sup> The invoices issued to the Workcover Authority to recover funding are coded ‘OHS’ and describe the project by the name of the report.<sup>223</sup> On page 4 of the report a number of companies were thanked for the time and resources dedicated to the project. The list does not include Thiess, John Holland or TJH. The report was a fully funded project that was completed with the input of a number of companies, but not TJH. Finally, the report contained only one reference to back injury.<sup>224</sup> It is apparent that the research undertaken in relation to the report was not focused on back strain.

138. Cesar Melhem contended that the research project continued beyond the publication date of the report in 2005, implementing the

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<sup>220</sup> Melhem MFI-2, 22/10/15.

<sup>221</sup> Melhem MFI-2, 22/10/15, p 2 of the report titled ‘Sprains, Strains And Fatalities In The Civil Construction Industry’ dated May 2005.

<sup>222</sup> Melhem MFI-2, 22/10/15.

<sup>223</sup> Melhem MFI-2, 22/10/15 (invoice dated 5 May 2005, numbered 010023).

<sup>224</sup> Melhem MFI-2, 22/10/15, p 37 of the report titled ‘Sprains, Strains And Fatalities In The Civil Construction Industry’ dated May 2005.

recommendations in the report.<sup>225</sup> He claimed that Gavin Merriman had a number of meetings with the health and safety department of TJH and Cesar Melhem agreed with Julian Rzesniowiecki to support the project.<sup>226</sup>

139. Cesar Melhem adhered to this explanation in his written submissions.<sup>227</sup> He contended that it is ‘neither here nor there’ that the research was complete before payment was sought from TJH, relying on the fact that the invoice refers to ‘research work done,’ and that it was ‘unremarkable’ that the union might have wanted a contribution to the research. Cesar Melhem also submitted that the research was of relevance to the project even if, as appears to be accepted, it had little to do with back strain, because it related to traffic management on civil construction projects, a matter in which the joint venture might be interested both in relation to this project and generally.

140. Cesar Melhem’s explanation is rejected. It is inconsistent with the documents that have been produced and the evidence of the personnel of TJH, none of whom were aware of the research referred to in the invoice, despite evidence that, as a matter of process, they would have been.

141. The fact that the invoice refers to work ‘done’ does not provide compelling support for an inference that TJH was paying for research that had been done, when there is documentary evidence of the substantial funding committed to the research project by the Victorian

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<sup>225</sup> Cesar Melhem, 22/10/15, T:928.27-31.

<sup>226</sup> Cesar Melhem, 22/10/15, T:930.12-16.

<sup>227</sup> Submissions of Cesar Melhem, 20/11/15, ch 3, paras 7-8.

government,<sup>228</sup> and no documentary evidence has been produced by the AWU or TJH suggesting an agreement to fund the research retrospectively. Similarly, the fact that the report relates to traffic management on civil construction sites does not, as a matter of common sense, have anything to do with back strain which is the subject matter of the research for which TJH was invoiced and for which it paid.

142. Moreover, Julian Rzesniowiecki under cross-examination affirmed that he had no knowledge of the arrangements concerning the research project.<sup>229</sup> No records have been produced by the AWU suggesting that the research project continued beyond May 2005, or that TJH was in any way involved.
143. This evidence indicates that the invoice was a false invoice in that it described a research project that did not exist and was not in fact commissioned by TJH, and was created with the intention of concealing or disguising the true purpose of the payment it sought.
144. On 18 January 2006, that is, the day on which the invoices referred to above were issued,<sup>230</sup> Julian Rzesniowiecki emailed Matt Fuller asking for a report of ‘all the payments that were made from my cost codes to the AWU.’<sup>231</sup> Matt Fuller responded on 24 January 2006 and later on 2 February 2006 confirming payments of \$5,000 coded as external

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<sup>228</sup> Melhem MFI-2, 22/10/15.

<sup>229</sup> Julian Rzesniowiecki, 13/10/15, T:221.18-222.46.

<sup>230</sup> Paragraphs 129-130.

<sup>231</sup> Shorten MFI-9, 9/7/15, p 188.

relations, publications and recruitment (being the payments detailed in paragraphs above).<sup>232</sup>

145. The third invoice, numbered 013387, was issued by the AWU Victorian Branch on 16 February 2006, in the amount of \$750 exclusive of GST.<sup>233</sup> The invoice description was ‘AWU OH&S 5 Day Representatives Training from Monday 12th-Friday 16th February 2006. Attendee: Heath Fletcher.’ It was stamped as having been paid by EFT.

#### *IR Regulations Seminar*

146. The fourth invoice, numbered 013882, was issued by the AWU Victorian Branch on 17 May 2006, in the amount of \$25,250 inclusive of GST.<sup>234</sup> The invoice description was ‘Purchase of tickets to the 2006 IR REGULATIONS SEMINAR: ... Wednesday 17th May 2006.’ The quantity described in the invoice is 1. It was stamped as having been paid by EFT to State Funds. The General Ledger for the AWU Victorian Branch recorded this income as ‘seminar income.’<sup>235</sup> The most commonly recorded amount for this income code was \$450. The amount for this invoice was the highest credited to the seminar income account for May and June 2006 by a significant margin.

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<sup>232</sup> Shorten MFI-9, 9/7/15, pp 188-190. See paras 115, 122, 126 above.

<sup>233</sup> Shorten MFI-9, 9/7/15, p 191.

<sup>234</sup> Shorten MFI-9, 9/7/15, p 196.

<sup>235</sup> Shorten MFI-9, 9/7/15, p 243.

147. A handwritten note in Cesar Melhem's handwriting<sup>236</sup> directed an amount of \$25,250 to be drawn, attention to Julian, with the description 'Seminar 17 May 2006 re: Workchoices.'<sup>237</sup> Cesar Melhem did not remember how many people attended the seminar.<sup>238</sup> Stephen Sasse, Gordon Ralph and Julian Rzesniowiecki agreed that TJH would not have used the AWU to obtain information on the operation of the new industrial relations laws, it would have had recourse to its lawyers.<sup>239</sup> Julian Rzesniowiecki said that he attended the seminar but he could not recall whether anyone else did. It was possible that he was the only person in attendance.<sup>240</sup> The invoice was for the purpose of finding ways to provide money in accordance with the agreement with the AWU.<sup>241</sup>
148. An invitation to the IR Regulations Seminar was in evidence.<sup>242</sup> The seminar took place on 17 May 2006, the date of the invoice. The invitation disclosed that a single ticket was \$450 inclusive of GST. The sum of \$25,250 cannot be divided so as to account for a set number of tickets, but the sum is closest to 56 tickets. Moreover, in his email dated 13 September 2013, Julian Rzesniowiecki referred to the need to deduct \$500 paid for attendance at the Workchoices conference.<sup>243</sup> That suggests that (a) Julian Rzesniowiecki paid

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<sup>236</sup> Michael Chen, 21/10/15, T:814.23; Cesar Melhem, 22/10/15, T:935.17-26.

<sup>237</sup> Shorten MFI-9, 9/7/15, p 195.

<sup>238</sup> Cesar Melhem, 22/10/15, T:936.1-3.

<sup>239</sup> Julian Rzesniowiecki, 13/10/15, T:183.18-22; Stephen Sasse, 12/10/15, T:61.34-46; Gordon Ralph, 12/10/15, T:116.1-3.

<sup>240</sup> Julian Rzesniowiecki, 13/10/15, T:184.6-9.

<sup>241</sup> Julian Rzesniowiecki, 13/10/15, T:183.31-47.

<sup>242</sup> Shorten MFI-12, 9/7/15, p 58.

<sup>243</sup> Shorten MFI-9, 9/7/15, p 199.

separately for the ticket to the conference and was seeking to offset that amount against future payments; and (b) the invoice of 17 May 2006 was a false invoice, issued in relation to services not received by TJH and of no benefit to the Eastlink project, and created with the intention of concealing the true purpose of the payment it sought.

149. Cesar Melhem submitted that the invoice was genuine, because, again, the seminar might be something in which employer representatives have an interest, the evidence is that the seminar occurred, and Julian Rzesniowiecki said that he supported it financially. It was suggested that Stephen Sasse might be interested, because of his evidence as to his strategy for dealing with the CFMEU during negotiations for the 2005 EBA.<sup>244</sup>
150. Counsel assisting submitted that the submissions of Cesar Melhem should be rejected. Supposition as to what might or might not be of interest to the management of civil construction companies or whether it had relevance to the activities of those companies does not support a contention that payments of invoices for those matters were for a genuine purpose, particularly in light of the evidence of several of the personnel engaged on the project (including Stephen Sasse) that the seminar was completely irrelevant to the project.
151. It is plain from the evidence that the invoice was a false invoice in that it described a service not requested and not used by TJH, and was created with the intention of concealing or disguising the true purpose of the payment it sought.

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<sup>244</sup> Submissions of Cesar Melhem, 20/11/15, ch 3, paras 9-11.

152. The fifth invoice numbered 014860 was issued by the AWU Victorian Branch on 23 June 2006, in the amount of \$750.00 exclusive of GST.<sup>245</sup> The invoice description was ‘AWU OH&S 5 Day Representatives Training from Monday 19th-Friday 23rd June 2006. Attendee: Barry Howlett.’ It was stamped as having been paid by EFT to State Funds.
153. The sixth invoice numbered 015169 was issued by the AWU Victorian Branch on 28 July 2006, in the amount of \$750.00 exclusive of GST.<sup>246</sup> The invoice description was ‘AWU OH&S 5 Day Representatives Training from Monday 24th-Friday 28th July 2006. Attendee: Joel Hurst.’ It was stamped as having been paid by EFT to State Funds.
154. The seventh invoice numbered 015624 was issued by the AWU National Branch on 31 July 2006, in the amount of \$5000.00 exclusive of GST.<sup>247</sup> The invoice description was ‘Full Page Advertisement in ‘The Australian Worker’ Issue 9, Autumn 06 edition.’
155. As referred to above, the email exchange between Julian Rzesniowiecki and Cesar Melhem dated 13 September 2006 was forwarded by Michael Chen to Mei Lin with the direction to ‘follow this.’<sup>248</sup> Michael Chen did not recall any discussions in relation to the amounts nominated by Julian Rzesniowiecki in the email.<sup>249</sup>

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<sup>245</sup> Shorten MFI-9, 9/7/15, p 197.

<sup>246</sup> Shorten MFI-9, 9/7/15, p 198.

<sup>247</sup> Shorten MFI-9, 9/7/15, p 198A.

<sup>248</sup> Shorten MFI-9, 9/7/15, p 201, see paras 17, 18.

<sup>249</sup> Michael Chen, 21/10/15, T:808.19-21, 33-40.

156. On 18 September 2006, the AWU Vic Branch issued three invoices to TJH, in accordance with Julian Rzesniowiecki's email of 13 September 2006. Cesar Melhem agreed that the invoices were sent on his instructions.<sup>250</sup>

#### *AWU Members' Ball*

157. The eighth invoice numbered 015701 was issued by the AWU Victorian Branch on 18 September 2006, in the amount of \$6250.00 exclusive of GST.<sup>251</sup> The invoice description was 'Places to the 8TH ANNUAL AWU MEMBERS' BALL on Saturday 28 October 2006.' The quantity in the invoice was 1. The invoice was stamped as having been paid by EFT to State Funds.

158. The previous year, TJH made a booking for one table to the AWU members' ball, at a cost of \$1,050.00.<sup>252</sup> Julian Rzesniowiecki gave evidence that he attended the AWU balls for each year of the project.<sup>253</sup> Gordon Ralph said that TJH may have paid for a booking for one table, as a 'contribution' to the AWU.<sup>254</sup> He did not know whether anyone at TJH in fact attended the ball.<sup>255</sup> It is unlikely in the extreme that 70 employees of TJH attended the AWU ball that year.

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<sup>250</sup> Cesar Melhem, 22/10/15, T:923.9-11.

<sup>251</sup> Shorten MFI-9, 9/7/15, p 204.

<sup>252</sup> Shorten MFI-9, 9/7/15, p 177.

<sup>253</sup> Julian Rzesniowiecki, 13/10/15, T:215.19-25.

<sup>254</sup> Gordon Ralph, 12/10/15, T:113.45-47, 116.1.

<sup>255</sup> Gordon Ralph, 12/10/15, T:118.26-44.

159. Cesar Melhem submitted that the evidence disclosed that many of the joint venture staff had attended the ball.<sup>256</sup> That may be, but evidence that Julian Rzesniowiecki attended the AWU Ball each year does not support a proposition that all of the invoices issued for the AWU Ball represented bookings for tickets that were in fact used by persons at TJH attending the ball. Moreover, there was evidence that purchase of tickets to the AWU ball was not something that was typically done by the joint venture partners.<sup>257</sup>
160. Gordon Ralph did not give evidence that TJH personnel attended the ball, rather that TJH paid for a table as a ‘contribution.’<sup>258</sup> He later said that he did not recall whether a company of representatives from TJH attended the ball and did not change his answer when told that Julian Rzesniowiecki attended the ball each year.<sup>259</sup>
161. For his part, Julian Rzesniowiecki was asked by counsel for Cesar Melhem whether the tickets to the AWU ball was ‘part of what made it possible to defray the cost of the organisers’ and he agreed.<sup>260</sup> He said that there was a table of management-level people and their partners and there were tables dedicated for AWU delegates and their members.<sup>261</sup> Julian Rzesniowiecki did not at any time give evidence that all of the invoices that were issued for the AWU ball represented

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<sup>256</sup> Submissions of Cesar Melhem, 20/11/15, para 4.

<sup>257</sup> Sasse MFI-4, 12/10/15, T:50.20-32.

<sup>258</sup> Gordon Ralph, 12/10/15, T:113.45-114.4.

<sup>259</sup> Gordon Ralph, 12/10/15, T:118.26-44.

<sup>260</sup> Julian Rzesniowiecki, 13/10/15, T:216.2-7.

<sup>261</sup> Rzesniowiecki MFI-1, T:16.17-23.

places that were in fact used.<sup>262</sup> His evidence was that there was an arrangement for payment of an amount for one table for TJH personnel and some further payment for AWU delegates.

162. Counsel assisting submitted that it is patently clear from the correspondence of 12 September 2006<sup>263</sup> and 16 April 2007<sup>264</sup> that sums of money not referable to the purchase of tickets were committed as part of the side deal.<sup>265</sup> That submission is accepted.

*Sponsorship for OHS conference*

163. The ninth invoice, numbered 015703, was issued by the AWU Victorian Branch on 18 September 2006, in the amount of \$25,000.00 exclusive of GST.<sup>266</sup> The invoice description was ‘Sponsorship for OH&S conference – As per agreement with Cesar Melhem.’ The date of the conference was not specified. There was no evidence of what the conference related to and when and where it was held. The invoice was stamped as having been paid by EFT to State Funds.

164. The description the invoice ‘as per agreement with Cesar Melhem’ was understood by Julian Rzesniowiecki to be a reference to the agreement to pay \$100,000 plus GST per year, so that Julian Rzesniowiecki would understand that the invoice was for the purposes of that

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<sup>262</sup> He gave evidence that he used the tickets that he bought: Julian Rzesniowiecki, 13/10/15, T:215.39-40.

<sup>263</sup> Shorten MFI-9, 9/7/15, page 221.

<sup>264</sup> Shorten MFI-9, 9/7/15, page 235.

<sup>265</sup> Submissions of Counsel Assisting, 6/11/15, ch 3, paras 142-143, 188.

<sup>266</sup> Shorten MFI-9, 9/7/15, p 206.

arrangement.<sup>267</sup> Michael Minnotti gave evidence as to the process for approval of sponsorship, namely that it was in the nature of a donation and required approval from the project director.<sup>268</sup> Gordon Ralph said that the project would not have paid out \$25,000 for sponsorship of an AWU conference. He said that he could not recall Julian Rzesniowiecki asking him for approval to donate \$25,000 which he would have been required to do.<sup>269</sup>

165. Julian Rzesniowiecki said that he could not recall whether he obtained approval from Gordon Ralph to pay for the sponsorship. His evidence is that:<sup>270</sup>

What I did do with Gordon Ralph, when he arrived is I explained the arrangement we had and explained what funds would need to be remitted over the life of the project, and we've got a process within the joint venture, or on a lot of projects, called the "cost to complete" where we calculate what expenditure we anticipate to spend between, you know, the current time and the end of the project. All of the commitments that we'd made to the AWU, and all the other budget items that were under my control were included in that and he would have been aware of that.

166. Julian Rzesniowiecki said that the invoice was a method of providing funds to the AWU pursuant to the agreement.<sup>271</sup>
167. The above evidence clearly established that the invoice was a false invoice in that it described sponsorship for an event that did not take place, and was created with the intention of concealing or disguising the true purpose of the payment it sought.

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<sup>267</sup> Julian Rzesniowiecki, 13/10/15, T:18.23-28.

<sup>268</sup> Minotti MFI-1, 19/10/15, T:31.32-40.

<sup>269</sup> Gordon Ralph, 12/10/15, T:119.11-21.

<sup>270</sup> Julian Rzesniowiecki, 13/10/15, T:185.23-32.

<sup>271</sup> Julian Rzesniowiecki, 13/10/15, T:186.6-11.

*Advertising in the Australian Worker*

168. The tenth invoice numbered 016248 was issued by the AWU Victorian Branch on 18 September 2006, in the amount of \$30,000.00 exclusive of GST.<sup>272</sup> The invoice description was ‘Advertising in “The Australian Worker” Magazine. Invoiced mistakenly by National Office before.’ The description made no reference to the issues for which advertising was placed. The invoice had the item code ‘VIC OTHER.’ It was stamped as having been paid by EFT to State Funds. That reference was to an earlier invoice, also dated 18 September 2006 and numbered 015702.<sup>273</sup> That invoice was issued from the National Office, the publisher of the Australian Worker and the proper accounting centre for advertising income, bearing the item code ‘ADVERTISE.’ The copy of the invoice in evidence contained handwritten notes, stating:

Mei Lin, I need to have a look at the supporting documents for this invoice. It may belong to Vic Branch. Thanks, Mich.

It is for Vic not Nat. Need to trf fund internally when receiving payment.

169. Invoice 015702 was then reversed by credit note<sup>274</sup> and reissued from the AWU Vic Branch. The first note was in Michael Chen’s handwriting.<sup>275</sup> Michael Chen did not have a memory of his reasons

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<sup>272</sup> Shorten MFI-9, 9/7/15, p 207.

<sup>273</sup> Shorten MFI-9, 9/7/15, p 205.

<sup>274</sup> Shorten MFI-9, 9/7/15, p 206A.

<sup>275</sup> Michael Chen, 21/10/15, T:808.47.

for making the note. He did not recall examining any supporting documents.<sup>276</sup>

170. The invoice demonstrably did not relate to any advertising placed in the *Australian Worker*. A reconciliation of the issues of the *Australian Worker* containing advertising placed by TJH over the course of the project, and the invoices issued by the National Office, shows that all of the advertising that was placed was paid for pursuant to those invoices.<sup>277</sup>

171. Julian Rzesniowiecki described the invoice as, at best, an inflated price.<sup>278</sup> He agreed that the purpose of describing the invoice as ‘advertising’ was to disguise what it was for.<sup>279</sup>

172. Cesar Melhem did not proffer an explanation as to how this invoice came to be raised. He submitted that the evidence was that there had been many issues of the *Australian Worker* in which TJH had placed advertisements, and that the advertising was an advantage to TJH because it assisted with recruitment.<sup>280</sup> In response, counsel assisting pointed to the schedule accounting for the advertising that was in fact placed, and paid for, by TJH. That evidence is irrefutable. Because of it, a debate as to whether advertising in the *Australian Worker Magazine* was of any commercial benefit to the project is of diminished relevance. Nonetheless, evidence not referred to in Cesar

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<sup>276</sup> Michael Chen, 21/10/15, T:809.18-36.

<sup>277</sup> Melhem MFI-1, 22/10/15.

<sup>278</sup> Julian Rzesniowiecki, 13/10/15, T:186.13-30.

<sup>279</sup> Rzesniowiecki MFI-1, 13/10/15, p 20.8-15.

<sup>280</sup> Submissions of Cesar Melhem, 20/11/15, para 6.

Melhem's submissions provides a sound evidentiary basis for a suggestion that advertising in that publication was of minimal, if any, commercial benefit to the joint venture:

- (a) Steven Sasse, a person of extensive experience in industrial relations for large construction projects,<sup>281</sup> gave evidence that the project might place advertising in a union journal for relationship purposes, but that there would otherwise be minimal commercial benefit for the project.<sup>282</sup>
- (b) Stephen Sasse was not alone in giving this evidence. Don Johnson gave similar evidence as to the purpose for which advertising was typically placed in union publications.<sup>283</sup> Gordon Ralph also gave evidence that '\$30,000 worth of advertising in the AWU magazine is highly unlikely to have occurred and certainly wouldn't have been required by the project.' Chris Herbert also could not see the benefit to the project of placing \$30,000 worth of advertising in 2006.<sup>284</sup>
- (c) Moreover, to the extent a large recruitment campaign was undertaken, the evidence of both Mike Connell and Chris Herbert was that this took place while the 2005 EBA was under negotiation, and involved placing advertising worth

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<sup>281</sup> And it was suggested by Cesar Melhem that great weight should be given to his judgment: Submissions of Cesar Melhem, 20/11/15, ch 3, para 1.

<sup>282</sup> Stephen Sasse, 12/10/15, T:63.19-28; Sasse MFI-3, 12/10/15, T:22.32-47, T:23.2-24; Sasse MFI-4, 12/10/15, T:47.28-47, T:48.1-7. It was Stephen Sasse who gave evidence supportive of the proposition that the market rate would be about \$450-\$500: Sasse MFI-4, 12/10/15, T:50.1-18, Stephen Sasse, 12/10/15, T:63.30-34.

<sup>283</sup> Johnson MFI-1, 13/10/15, T:13.40-47.

<sup>284</sup> Gordon Ralph, 12/10/15, T:117.3-9; Herbert MFI-1, 12/10/15, T:16.35-41.

several hundreds of thousands of dollars in newspapers in capital cities, before the invoices for advertising in the *Australian Worker* post-March 2005.<sup>285</sup>

(d) Julian Rzesniowiecki described the expenditure on advertising in the *Australian Worker* as ‘you know, a way of us making a donation or providing money to the AWU.’<sup>286</sup> To the extent that there was any commercial benefit to TJH in relation to recruitment, Julian Rzesniowiecki said that in the context of the side deal there were ‘other reasons to do it.’<sup>287</sup>

(e) While Julian Rzesniowiecki accepted the suggestion put to him that the advertising placed in the *Australian Worker* was in the nature of a recruitment advertisement, in reality the majority of the advertisements do not fit this description.<sup>288</sup> With the exception of the advertisement for the Summer 2005 issue, which expressly sought online applications via a dedicated website, none of the advertisements placed in the *Australian Worker* invited applications for employment on the project.<sup>289</sup>

173. The invoice of 18 September 2006 was a false invoice, issued in relation to services not received by TJH, and created with the intention of concealing the true purpose of the payment it sought.

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<sup>285</sup> Mike Connell, 13/10/15, T:137.1-37; Herbert MFI-1, 12/10/15, T:6.24-40; T:16.17-33.

<sup>286</sup> Julian Rzesniowiecki, 13/10/15, T:170.22-31.

<sup>287</sup> Julian Rzesniowiecki, 13/10/15, T:210.30-34.

<sup>288</sup> Julian Rzesniowiecki, 13/10/15, T:207.1-3.

<sup>289</sup> Melhem MFI-1, 22/10/15.

### *OH&S Training*

174. The eleventh invoice numbered 016425 was issued by the AWU Victorian Branch on 6 November 2006, in the amount of \$36,250.00 inclusive of GST.<sup>290</sup> The invoice description was ‘Occupation Health & Safety training course for HRS reps on eastlink – As per Cesar Melhem.’ It is stamped as having been paid by EFT to State Funds.
175. The date of the invoice was consistent with the instruction in Julian Rzesniowiecki’s email of 13 September 2015 to ‘send in November’ an invoice for HSR training in the amount of \$36,250.<sup>291</sup> Typically, invoices for OH&S training issued in respect of the project were in respect of training provided to a named participant and describe the dates and period of the training courses paid for.<sup>292</sup> This practice was consistent with Michael Minotti’s account of the detailed reporting and accounting requirements that the joint venture had in place in respect of training.<sup>293</sup>
176. The General Ledger for the AWU Victorian Branch recorded this income as ‘OH&S Training income.’<sup>294</sup> The most commonly recorded amount for this income code is \$750 or multiples thereof. The amount for this invoice was the highest credited to the account for 2006-2007 by a significant margin.

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<sup>290</sup> Shorten MFI-9, 9/7/15, p 210.

<sup>291</sup> Shorten MFI-9, 9/7/15, p 199.

<sup>292</sup> See, for example, Shorten MFI-9, 9/7/15, pp 169, 174, 176, 191, 197, 198.

<sup>293</sup> Michael Minotti, 19/10/15, T:588.2-12.

<sup>294</sup> Shorten MFI-9, 9/7/15, p 254.

177. The twelfth invoice numbered 016485 was issued by the AWU Victorian Branch on 13 November 2006, in the amount of \$3,295.45 exclusive of GST.<sup>295</sup> The invoice description was ‘Occupation Health & Safety training course for HRS reps on eastlink – As per Cesar Melhem – Additional to the inv 016425, bring the total amount of HSR training up to \$36,250 plus GST.’ It is stamped as having been paid by EFT to State Funds. Again, the invoice appears to relate to Julian Rzesniowiecki’s direction of 13 September 2006, with the purpose of this invoice to account for the fact that the \$36,250 agreed on at that time was invoiced exclusive of GST.
178. Julian Rzesniowiecki said that the invoices were false invoices in that training was not provided in respect of those invoices.<sup>296</sup> Gordon Ralph also stated with certainty that the project would not have provided training to the extent of invoicing \$33,000, as training of that scale would have been sourced from an external provider.<sup>297</sup> Cesar Melhem disagreed, stating that the services were provided, but without access to the records he could not verify that this was the case.<sup>298</sup> Notices to the AWU seeking production of records relating to training provided by the AWU to Thiess John Holland, including in respect of the above invoices,<sup>299</sup> did not lead to the production of any records enabling a conclusion that training was provided as referred to in this invoice. In the absence of any documentary evidence supporting Cesar Melhem’s claim, and in light of the admissions of Julian

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<sup>295</sup> Shorten MFI-9, 9/7/15, p 211.

<sup>296</sup> Julian Rzesniowiecki, 13/10/15, T:189.18-40, 190.30-33.

<sup>297</sup> Gordon Ralph, 12/10/15, T:120.14-46, 122.10-18.

<sup>298</sup> Cesar Melhem, 22/10/15, T:936.10-23.

<sup>299</sup> AWU MFI-2, 23/10/15, pp 175-187.

Rzesniowiecki and the evidence of Gordon Ralph, the appropriate conclusion is that these invoices were false invoices.

179. The thirteenth invoice numbered 016838 was issued by the AWU National Office on 30 November 2006, in the amount of \$5,000 exclusive of GST.<sup>300</sup> The invoice description was 'Full Page advertisement in 'The Australian Worker Issue 10, Summer 06 Edition.' It is stamped as having been paid by EFT to State Funds.

### **The 2007 payments**

180. The pattern of invoicing for 2007 was different. It proceeded as follows:

#### *The services invoices*

181. An invoice requisition was raised on 27 February 2007 for \$100,000 plus GST with the description 'services.'<sup>301</sup> The requisition was requested by Michael Chen and authorised by Cesar Melhem. The description 'services' was written in by Cesar Melhem.<sup>302</sup>
182. An invoice 017606 was issued by the AWU Vic Branch on 28 February 2007, in the amount of \$100,000.00 exclusive of GST.<sup>303</sup> The invoice description was 'Services – As per Cesar Melhem.'

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<sup>300</sup> Shorten MFI-9, 9/7/15, p 212A.

<sup>301</sup> Shorten MFI-9, 9/7/15, p 215.

<sup>302</sup> Michael Chen, 21/10/15, T:812.12-20.

<sup>303</sup> Shorten MFI-9, 9/7/15, p 215A.

183. Also 28 February 2007 the invoice was reversed by a credit note numbered 017711, with the description ‘Services – As per Cesar Melhem – REVERSE THIS AS THIESS JOHN HOLLAND WOULD LIKE TO PAY IN INSTALMENTS.’<sup>304</sup>
184. Two invoices were then issued by the Victorian Branch on 28 February 2007, numbered 017713 and 017714, both for \$37,000 inclusive of GST and described respectively as ‘Services – First Instalment – As per Cesar Melhem’ and ‘Services – Second Instalment – As per Cesar Melhem.’ Both invoices were stamped as being paid on the same day, 18 April 2007, by EFT to State Funds.<sup>305</sup>
185. A further invoice was issued by the AWU Vic Branch on 22 March 2007, numbered 017715, in the amount of \$36,000 inclusive of GST and described as ‘Services – Third Instalment – As per Cesar Melhem.’<sup>306</sup>
186. The day before payment of the first two invoices, on 17 April 2007, Julian Rzesniowiecki wrote to Cesar Melhem stating ‘Instalments 1 & 2 will be paid. Please ask Michael to withdraw instalment 3. It will be covered by the ads in Australian Worker, attendance at the ball etc. If we don’t reach the agreed sum we can address at end of year.’<sup>307</sup>
187. Each of the above invoices was recorded in the General Ledger for the AWU Victorian Branch as ‘other income,’ without any description in

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<sup>304</sup> Shorten MFI-9, 9/7/15, p 215B.

<sup>305</sup> Shorten MFI-9, 9/7/15, pp 217-218.

<sup>306</sup> Rzesniowiecki MFI-2, 13/10/15, p 135.

<sup>307</sup> Shorten MFI-9, 9/7/15, p 222.

the journal of the nature of the transactions to which the invoices related.<sup>308</sup>

188. Stephen Sasse provided an explanation of the circumstances in which an invoice of such opacity would be paid:<sup>309</sup>

The invoice should relate to a purchase order or to a contract or to some other document that creates the commercial relationship between the party invoicing and the party paying the invoice. There are very, very rare occasions where you might specifically request an invoice that's not specific or clear about what it's for, in which case most companies and most audit functions require a two-up sign-off process to make sure that everything is above board.

189. There is no evidence of such a process having been adopted in the present case. Michael Minotti described the invoice for \$110,000 as an unacceptable invoice. He said it should not be approved for payment without an understanding of what the scope of the services were and who authorised the services.<sup>310</sup> The invoices for the First and Second instalments retained in TJH's records are in evidence.<sup>311</sup> Each appear to have been approved for payment by Julian Rzesniowiecki.<sup>312</sup>

190. Julian Rzesniowiecki said that he assumed that he asked Cesar Melhem to break the invoice into instalments for cash flow purposes.<sup>313</sup> Julian Rzesniowiecki said that he considered that the services that were described in these invoices were provided: namely, that 'services' described the commitment of organisers to the project. Accepting that

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<sup>308</sup> Shorten MFI-9, 9/7/15, p 259.

<sup>309</sup> Stephen Sasse, 12/10/15, T:64.19-27.

<sup>310</sup> Michael Minotti, 19/10/15, T:589.13-25.

<sup>311</sup> Shorten MFI-9, 9/7/15, pp 216-219.

<sup>312</sup> Compare the signature at Shorten MFI-9, 9/7/15, p 222.

<sup>313</sup> Julian Rzesniowiecki, 13/10/15, T:191.10-21.

he never saw any supporting materials that confirmed what organising services were performed, Julian Rzesniowiecki said.<sup>314</sup>

I mean, you may not agree with the arrangement we entered into, but that was the agreement that was entered into and we weren't concerned to have organisers filling out time sheets and spending a particular time at the project. That wasn't - that wasn't the purpose of what was agreed and it wasn't - it's not reality on an industrial project either, no.

...

...we made an agreement that we would provide funding to assist the AWU to provide organisers to the project. That was the agreement and we honoured our agreement. Now, as I've mentioned to you, we didn't require the organisers to be there for a particular time or duration, or undertake particular activities. It was a general agreement that organisers would be provided, as and when required, in order to make sure the project was delivered successfully and without industrial disruption. So, that's the nature of the arrangement. So, when I was signing off on invoices, I was signing off consistent with the arrangement that we'd entered into. I wasn't checking to see, you know, how much time they'd spent there.

191. Michael Chen described the description on the invoice as 'a bit too short, too brief.'<sup>315</sup> He was otherwise unable to shed light on how the original invoice in the amount of \$110,000 came to be raised in that manner, or why it was broken into instalments.
  
192. Cesar Melhem stated that he caused Michael Chen to raise the original tax invoice for \$100,000.00. Cesar Melhem said that the chain of invoices reflected an agreement between himself and Julian Rzesniowiecki that \$110,000 in services would be provided and that they agreed on the budget and invoices for those services.<sup>316</sup> His

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<sup>314</sup> Julian Rzesniowiecki, 13/10/15, T:192.16-34.

<sup>315</sup> Michael Chen, 21/10/15, T:812.33-36.

<sup>316</sup> Cesar Melhem, 22/10/15, T:898.29-42, 937.7-11.

description of the services that were provided by reference to these invoices was as follows:<sup>317</sup>

The services were where Union officials or officers of the AWU and specialists went to the site on the 45 kilometre project attending inductions on a weekly basis, attending crew meetings on a weekly basis, that was in addition to the other services that were provided by the Union to its members for dispute procedure handling, grievances handling, all those sorts of things, they were separate. That was in addition to the day-to-day representation by the organisers to members, so that's additional services to attend inductions and various other activities.

193. Both Cesar Melhem and Julian Rzesniowiecki gave evidence to the effect that the 'services' invoices reflected the services that were in fact provided pursuant to the agreement, namely, the provision of organiser support for the project. Even if it were assumed that the services were provided in the manner described by Julian Rzesniowiecki, and Cesar Melhem, the invoices do not evidence that they were provided or that they represented any value to the project. To that extent, they are false invoices because they too conceal the true purpose of the payments that they represent.

194. Invoice 018826 was issued by the AWU Victorian Branch on 30 June 2007, in the amount of \$8146.36 exclusive of GST and bearing the description 'On-site OH&S Industry Induction (Red Card) Training.'<sup>318</sup> A detailed breakdown of the courses and the cost per participant was then set out.

195. Invoice 019565 was issued by the AWU Victorian Branch on 1 October 2007, in the amount of \$4,545.45 exclusive of GST and

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<sup>317</sup> Cesar Melhem, 22/10/15, T:937.28-42.

<sup>318</sup> Shorten MFI-9, 9/7/15, p 225.

bearing the description 'FOUR tables to the 9<sup>TH</sup> ANNUAL AWU MEMBERS' BALL on Saturday 27 October 2007.'<sup>319</sup> It is signed as being approved for payment and annotated 'paid'.

*The final services invoice*

196. As described in section A above, Julian Rzesniowiecki and Cesar Melhem corresponded on 31 March 2008 in relation to the final breakdown of the amount owing for that year.<sup>320</sup>

197. The final invoice numbered 020645 was issued on 9 April 2008 from the AWU Victorian Branch in the amount of \$19,015.45 exclusive of GST. It was described as 'Services – third instalment' and then contained a breakdown as follows:

Original amount: \$36000.00

Absorb the payments made from January 2007:

- OHS Training \$825.00
- Red Card Training \$9,258.00
- AWU Ball \$5000.00

198. The breakdown in the invoice was not identical to that in Julian Rzesniowiecki's email of 31 March 2008: it referred to OHS Training rather than the Australian Worker. The invoice also stated 'As per

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<sup>319</sup> Shorten MFI-9, 9/7/15, p 229.

<sup>320</sup> Shorten MFI-9, 9/7/15, p 233.

Cesar Melhem'.<sup>321</sup> The invoice was stamped as having been paid on 15 May 2008 by EFT to State Funds.

199. On 10 April 2008 Julian Rzesniowiecki sent an email to Cesar Melhem stating:<sup>322</sup>

Hi mate,

You haven't deducted the Australian Worker Ad \$5500 paid in May 07.

200. Despite this email, the invoice was paid in full on 15 May 2015.<sup>323</sup>
201. The final services invoice is consistent with the approach to invoicing that was adopted at the commencement of that year: namely, some invoices were issued for 'services' and the balance of the agreed sum was accounted for with services that TJH did not, on many occasions, need. Julian Rzesniowiecki's email of 31 May 2015 made plain that the Red Card Training, even if delivered, was not a cost the joint venture needed to incur because that service could have been delivered by John Holland. Moreover, advertising in the Australian Worker would have been of little commercial utility to TJH towards the end of the project. Indeed, as observed above both Gordon Ralph and Stephen Sasse agreed that there was little if any commercial benefit to placing advertisements in union publications.<sup>324</sup>

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<sup>321</sup> Shorten MFI-9, 9/7/15, p 233.

<sup>322</sup> Shorten MFI-9, 9/7/15, p 234.

<sup>323</sup> Shorten MFI-9, 9/7/15, p 235.

<sup>324</sup> Stephen Sasse, 12/10/15, T:58.27-34; Gordon Ralph, 12/10/15, T:113.22-28, 114.26-29, 117.15-20, 119.3-9.

## Accounting and approval of the invoices

202. Two sets of records from the JDE system are in evidence that relate to the processing of the invoices described above.
203. The first is the purchase orders. Purchase orders have been produced corresponding to each of the invoices described above.<sup>325</sup> However, none of the invoices issued by the AWU made reference to a purchase order number as would ordinarily be expected. An analysis of the purchase orders reveals that, on all but one occasion,<sup>326</sup> the purchase order was raised *after* the invoice was received by TJH. That is not consistent with usual accounting practice.<sup>327</sup> Julian Rzesniowiecki said that he assumed that the purchase order was raised when he approved payment of an invoice.<sup>328</sup> The evidence suggested that the invoices were almost invariably received from the AWU without the expenditure having been approved at the time the services were arranged or agreed to. This fact supports an inference that the services described in the invoices were not provided and is consistent with Julian Rzesniowiecki's frank admissions about them.
204. The second set of records in evidence are approvals records from the JDE system.<sup>329</sup> These records show approvals of invoices, up to a set payment approval threshold, by personnel in the accounts department.

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<sup>325</sup> Rzesniowiecki MFI-2, 13/10/15, pp 136 to 179.

<sup>326</sup> The purchase order relating to purchase of tickets to the IR regulations seminar: Shorten MFI-9, 9/7/15, p 196.

<sup>327</sup> Michael Minotti, 19/10/15, T:577.28-40.

<sup>328</sup> Julian Rzesniowiecki, 13/10/15, T:172.31-33.

<sup>329</sup> Sasse MFI-2, 12/10/15, pp 1-22.

The approvals process was initiated by administrative staff in the human resources department (often either Deborah Swinley or Ms Viles).<sup>330</sup> It then went to the accounts department officer with the relevant approval threshold. Michael Minotti gave evidence that, as co-signer of cheques for the joint venture, he undertook checks on the invoices immediately prior to payment, but that this process did not involve an inquiry as to whether the work described in an invoice was in fact done.<sup>331</sup> Thus, although the Joint Venture had an approvals process in place, it was not such as would have picked up the falsity of the invoices in question.

## **E – WERE THE INVOICES GENUINE?**

205. Cesar Melhem submitted that ‘the approach of those assisting the Commission towards this case study has apparently changed over time.’<sup>332</sup> If correct, that is hardly a surprising proposition. The Commission is a commission of inquiry. Its function is to investigate the matters within the Terms of Reference and pursue various lines of inquiry that emerge in the course of the evidence that emerges. The somewhat contradictory submission that counsel assisting has viewed the evidence through a ‘distorting lens’ of some ‘preoccupation’ is, counsel assisting submitted, misplaced and based on a misapprehension of the evidence.

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<sup>330</sup> Michael Minotti, 19/10/15, T:577.42-47.

<sup>331</sup> Michael Minotti, 19/10/15, T:583.1-29.

<sup>332</sup> Submissions of Cesar Melhem, 20/11/15, ch 3, para 3.

206. As described above, Cesar Melhem asserted that each of the invoices described above related to a service provided by the AWU.<sup>333</sup> Bill Shorten gave evidence that he was satisfied that AWU was providing OH&S training, red card training and HSR training at the Eastlink Project.<sup>334</sup> Bill Shorten said that many of the services that are described in the invoices described above are the standard business of unions.<sup>335</sup> It was, according to Bill Shorten, in the interests of workers to have employers pay for services to union members such as OH&S training and entertainment.<sup>336</sup>
207. It is likely, on the evidence available, that the AWU did provide services in relation to some of the invoices described above. For example, with the exception of the two invoices issued by the AWU Vic branch, it is clear that TJH placed advertising in the Australian Worker, and that according to the general ledgers of the National Office the price charged for the advertising was in the range of what the AWU National Office was able to command for such a service.
208. Moreover, it is clear that (a) personnel from TJH and their partners attended the AWU ball; and (b) some training was conducted by the AWU in the nature of OH&S and Red Card training.
209. The AWU produced a brochure setting out the training courses offered by the Victorian branch, including 5 day OH&S training and Red Card

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<sup>333</sup> Cesar Melhem, witness statement, 22/10/15, para 10.

<sup>334</sup> Bill Shorten, 9/7/15, T:119.17-26.

<sup>335</sup> Bill Shorten, 9/7/15, T:116.24-29.

<sup>336</sup> Bill Shorten, 9/7/15, T:117-118.

training.<sup>337</sup> The prices for those courses were advertised as \$825.00 and \$100.00 respectively, the former of which is consistent with the amounts charged on some of the above invoices. The invoices for OH&S training for individual representatives, and Red Card training in May 2007,<sup>338</sup> described the training provided, to whom and when, and for a verifiable price. There seems little doubt that the AWU provided some services of this kind.

210. That services were provided in connection with some of the invoices has the consequence that some of the invoices are not false and there is no finding that s 83 of the *Crimes Act 1958* (Vic) may have been contravened. Notwithstanding this, it is difficult to describe the invoices in this category as genuine. That is because they were for services which, although actually provided, probably would not have been sought or provided had there been no agreement for the payment of \$100,000 per annum.
211. Julian Rzesniowiecki admitted that the purpose of issuing the invoices was to disguise their true purpose. Taking that evidence and the inferences that can be drawn from the documentary evidence, the proper finding is that a number of the invoices are false invoices, for the reasons described in section D above. In particular, the invoices at Shorten MFI-9, pages 170, 185, 186, 196, 204, 206, 207, 210, 211, 217, 218, 229 and 233 are false invoices in that either they do not describe services that were provided to the project or they describe services that were provided, but at an inflated price, for the purpose of

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<sup>337</sup> Shorten MFI-9, 9/7/15, pp 239-240.

<sup>338</sup> Shorten MFI-9, 9/7/15, p 225.

obscuring the true nature of the payments made to the AWU by TJH in relation to the invoices.

## **F – CONCLUSIONS**

212. The evidence detailed above discloses that there was an agreement that TJH would pay a sum of \$100,000 plus GST to the AWU each year for the duration of the project. Moreover, the evidence also gives rise to the following findings:

- (a) the genesis of the agreement was a proposal by Bill Shorten to Stephen Sasse in late 2004 that the joint venture provide financial support to the AWU in relation to the dedication of an organiser or organisers to the project;
- (b) that proposal was not the subject of a concluded agreement at the time that the contract was let and Julian Rzesniowiecki and Cesar Melhem assumed primary conduct of the negotiations;
- (c) discussions regarding financial support for the provision of an organiser or organisers took place between Julian Rzesniowiecki and Cesar Melhem while the negotiations for the EBA were completed;
- (d) at some point at around the time the 2005 EBA was finalised, Julian Rzesniowiecki and Cesar Melhem agreed on a sum of \$100,000 per year;

(e) shortly thereafter, Julian Rzesniowiecki and Cesar Melhem determined that the payments pursuant to the agreement would be effected by the AWU issuing invoices to TJH described as services that the AWU might provide to the joint venture.

213. As set out in section D above, the agreement was implemented by payment of invoices issued by the AWU, many of which were false invoices.

### **Breach of duty**

214. The 2005 EBA was a radical agreement in the civil construction industry at that time. It involved the removal of a number of provisions beneficial to workers but detrimental to efficiency and productivity, such as provisions relating to fixed rostered days off, inclement weather, and non-working delegates.<sup>339</sup> In exchange, the workers covered by the 2005 EBA were paid handsomely.<sup>340</sup> None of the above matters was in contest on the evidence.

215. Nonetheless, that that result was achieved in circumstances that also involved the negotiation of a substantial payment by TJH to the AWU is troubling. It casts a different light on the high praise heaped on the 2005 EBA by those involved in its negotiation.

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<sup>339</sup> Bill Shorten, 9/7/15, T:133.29-32, 134.3-46.

<sup>340</sup> Cesar Melhem, witness statement, 22/10/15, paras 6, 8.

216. The question presently to be considered is whether the negotiation and implementation of the arrangement involved any breach of fiduciary duty. The question of whether such a duty existed have been discussed in the Chapter 10.2 (Cleavevent). The application of the reasoning in that Chapter leads to the conclusion that both the AWU and Cesar Melhem owed fiduciary duties to the AWU members in connection with the negotiation of the EBA.
217. Counsel assisting submitted that the negotiation and payment of this ‘side deal’ involved a conflict, or a substantial possibility of a conflict, between the interests of the AWU on the one hand and the interests of AWU members on the other. The submission was disputed by affected parties.
218. Plainly, it was in the interests of the AWU to receive the money paid pursuant to the arrangement. Did this give rise to a conflict of interest and duty or a conflict of duty and duty? The payments were in one important respect contrary to the interests of the AWU members. They were no more than large donations made upon the solicitation of Cesar Melhem. They must inevitably have weakened the AWU’s bargaining position, both in relation to the 2005 EBA and in relation to the AWU’s engagement with the workers on the Eastlink site over the life of the project. They compromised the AWU’s capacity to represent the interests of its members when it came to industrial relations issues that may arise on site. That is because the relevant organisers and officials were effectively in the pay of the employers.
219. The fact that the payments were described as being for the purpose of compensation or defraying of expenses involved in maintaining a

presence on the site did not cure the apparent conflict for the reasons stated above. Moreover, the fact that the terms of the 2005 EBA, and the commitment of organisers and other officials to the Eastlink project, may have been of benefit to the workers, is irrelevant to the question of whether negotiation of a side deal produces a conflict of interests. The AWU submitted that, because the 2005 EBA was an agreement containing terms that benefited the workers employed on the Eastlink project, there could be no conflict of interest or potential for such a conflict.<sup>341</sup> Submissions of this kind have been considered and rejected in the Chapter 10.2 (Cleavevent). They ignore that a real and sensible possibility of conflict is sufficient to give rise to a breach of duty. Submissions of this kind also assume without argument or justification that a ‘good result’ is the same as a satisfactory process of negotiation leading to that result. But to say that a result is a good one says nothing about whether the side arrangement influenced the result. As has been discussed, assessment of the relevant counterfactual is very difficult. But equity does not require that assessment in order to establish a breach of duty. It is sufficient to establish a real and sensible possibility of a conflict. That is established here.

220. There is no suggestion that the agreement was disclosed to the AWU members at any stage of the project.<sup>342</sup>

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<sup>341</sup> Submissions of the AWU, 20/11/15, paras 33-34; Submissions of TJH, 20/11/15, paras 36-38. The authority cited in the latter submissions, *Stoelwinder v Southern Health* [2001] FCA 115 at 44-47, does not support the proposition stated, relating as it does to the entitlement of an employee negotiating his own salary package to have regard to his own interests rather than his employer’s.

<sup>342</sup> Gordon Ralph was not aware of arrangement being disclosed to members: Gordon Ralph, 12/10/15, T:109.16-22.

221. Accordingly, the AWU and Cesar Melhem each owed fiduciary duties to members employed by TJH. The AWU, in entering into the arrangement and seeking payments pursuant to it, acted in a position of actual conflict of interest and duty or where there was a real and substantial possibility of such conflict. The AWU's self-interest conflicted with its fiduciary duties to the TJH employees. Cesar Melhem advanced the interests of the AWU in circumstances where those interests conflicted, or where there was a real and substantial possibility of conflict, with his duties to the members of the AWU.

#### **Unlawful commissions: AWU and Cesar Melhem**

222. Section 176 of the *Crimes Act* 1958 (Vic) has been discussed in Chapter 10.2 (Cleavevent). Counsel assisting submitted that the payments may have involved offences under s 176 by Cesar Melhem, the AWU, Julian Rzesniowiecki and TJH.

223. As to the AWU and Cesar Melhem, application of the reasoning in Chapter 10.2 (Cleavevent) leads to the conclusion that, in soliciting and receiving the payments, they were 'agents' within the meaning of this section.

224. It was submitted that the payments fell within either or both paragraphs (a) and (b) of s 176(1). That is, it was submitted that they were actually an inducement or reward for doing or for forbearing to do some act in relation to the affairs of AWU members. It was also submitted that they were payments 'the receipt or any expectation of which would in any way tend to influence' the AWU and Cesar

Melhem to show or to forbear to show favour or disfavour in relation to those affairs.

225. These submissions were partly based on the evidence of Stephen Sasse and Mike Connell about the significance of the 2005 EBA to the project and the ongoing significance of the AWU maintaining a presence on the site (as accepted by Gordon Ralph). It was submitted that it is apparent that:

- (a) the payments agreed to and made by TJH would objectively tend to influence Cesar Melhem and the AWU to show favour to TJH in relation to its attendances on site and its attitude to industrial relations issues arising in the course of the project;
- (b) to make the promised commitments to dedicate organisers to the project would, inter alia, increase the influence of the AWU and reduce that of the CFMEU and promote industrial peace, being a step taken in relation to the business and affairs of the members; and
- (c) the payments agreed to and made by TJH were actually intended by Julian Rzesniowiecki and TJH to influence Cesar Melhem and the Union to do these things.

226. These submissions are accepted. The inference that the payments were of this kind is overwhelming. It is supported by the elaborate scheme of falsification of invoices. It must also be concluded that Cesar Melhem (and through him the AWU) understood that Julian Rzesniowiecki agreed to make and made the payments for the purpose

of AWU officials showing favour towards TJH. Rational employers do not make payments of this size for no reason. This is the only rational reason for making them that is apparent in the present case. As has been explained, for the purposes of an offence against s 176(1)(a) or (b) it does not matter whether Cesar Melhem had any intention to show favour or to act in a particular way.

227. The above matters also indicate that the payments were ‘corrupt’. But if further proof be needed, it is provided by that elaborate scheme which was implemented to disguise the payments as payments for services, and to conceal the arrangement.

228. For the above reasons, counsel assisting’s submission is accepted. Both the AWU and Cesar Melhem may have contravened s 176. The question of whether Cesar Melhem’s conduct should be attributed to the AWU has been dealt with in the Cleanevent Chapter.

### **Unlawful commissions: TJH and Julian Rzesiowiecki**

229. To some extent the above analysis also deals with the position of Julian Rzesniowiecki and TJH. They accept that the invoices arranged and approved by Julian Rzesiowiecki were false. However, they submitted that it was appropriate for an employee of the joint venture to conceal the true nature of the payments for the reasons given by Julian Rzesniowiecki in his evidence, in circumstances where Julian Rzesniowiecki held a genuine view that it was in the interests of TJH, the AWU and its members to withhold the existence of the agreement

from the CFMEU.<sup>343</sup> It may be accepted that Julian Rzesniowiecki genuinely held this view. However this does not deal with the fact that the payments were concealed, not just from the CFMEU, but from many employees of TJH, many employees of the joint venture partners, and officers, employees and members of the AWU.

230. TJH also submitted that the relevant payment in the present case was to the principal (being the AWU) and not the agent (being Cesar Melhem). It put an alternative submission that the AWU had no identified principal.<sup>344</sup> The alternative submission is incorrect. The AWU's principals were its members employed by TJH. The primary submission misconceived the effect of s 176. It does not matter, under s 176, who received the 'valuable consideration'. The section says that it may be solicited 'for himself or for any other person'.

231. On his own evidence, Julian Rzesniowiecki caused the payments to be made for the purposes described above. That evidence is sufficient to justify the conclusion that he gave or offered the payments 'corruptly', either with an actual intention that they be on account of doing or forbearing to do some act in relation to the affairs of the AWU members or in circumstances where their receipt or expectation would in some way tend to influence those affairs.

232. Accordingly, Julian Rzesniowiecki may have committed an offence under s 176(2) of the *Crimes Act 1958* (Vic).

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<sup>343</sup> Submissions of TJH, 20/11/15, para 47; Submissions of Cesar Melhem, 20/11/15, ch 1, paras 45, 53-54.

<sup>344</sup> Submissions of TJH, 20/11/2015, para 51.

233. Whether either joint venture party is liable under s 176 requires consideration. Counsel assisting submitted that the conduct of Julian Rzesniowiecki and Gordon Ralph should be attributed to TJH for the purposes of this section. As indicated at the outset, Gordon Ralph became Project Director in September 2005. It is clear that from at the latest early 2006, Julian Rzesniowiecki had disclosed the nature of the agreement to Gordon Ralph and that the latter had assented to the payment arrangement continuing.<sup>345</sup> Further, it is plain that Julian Rzesniowiecki had authority to cause expenses to be incurred in relation to human resources matters, and that he exercised this authority in approving the invoices that were issued pursuant to the arrangement. In doing so, he acted in accordance with a budgetary allocation that enabled the expenses to be incurred without scrutiny, but on the basis that he was not entirely forthcoming as to the purpose of the payments.<sup>346</sup>
234. TJH submitted that either the joint venture management committee, or the supervisory board, would be the directing mind and will of the joint venture for the purpose of attributing liability to TJH.<sup>347</sup> For the reasons identified in Chapter 10.2 (Cleavevent), it is not necessary for the side deal and the payments made pursuant to it to be approved by executive management or the board for liability to be attributed to TJH in respect of the transactions considered in this case study. It is not disputed that both Julian Rzesniowiecki and Gordon Ralph were authorised to bind TJH to financial obligations in amounts equivalent to the side deal, and were given autonomy and control in relation to (a)

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<sup>345</sup> See paragraph 106 above.

<sup>346</sup> See paragraphs 104-105 above.

<sup>347</sup> Submissions of TJH, 20/11/15, para 56.

the negotiations and dealings with the unions; and (b) financial transactions incurred in relation to the project. In the ordinary business of the project, they did so.

235. In all of the above circumstances, the conduct of Julian Rzesniowiecki and Gordon Ralph is to be attributed to TJH for the purposes of s 176 and as a result TJH itself may have committed an offence under that section. However, TJH was a joint venture. The details of the invoices were kept secret from Thiess Pty Ltd by John Holland Pty Ltd. Hence it is proper to treat only John Holland Pty Ltd as affected by the conduct of the executives.

### **False accounting records**

236. At all relevant times, s 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).

- (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.

237. It is clear that the invoices issued by the AWU to TJH were records or documents made or required for any accounting purpose within the meaning of s 83(1)(a). Moreover, entry of the invoices into the accounting systems of TJH for the purposes of facilitating payment of the invoices (including raising the purchase orders and causing records of approval and payment of the invoices) is the creation of a record or records for an accounting purpose, as well as making use of false accounting records, being the invoices.
238. It is also clear that whoever prepared the invoices, and entered the accounting records into the TJH systems, and whoever concurred in their preparation, falsified them within the meaning of s 83(1)(a). That follows from the terms of s 83(2).
239. The 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 s 83(1). Counsel assisting submit that both Cesar Melhem and Julian Rzesniowiecki did act ‘dishonestly’ in this sense. Several submissions of affected parties disputed that.

#### *Requirement of dishonesty*

240. Cesar Melhem contended, it would seem, in reliance on *R v Salvo*,<sup>348</sup> that proof of the commission of an offence under s 83 required proof

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<sup>348</sup> [1980] VR 410.

that the accused had no subjective belief in an entitlement to the payment or gain obtained.<sup>349</sup> The submission is confused. To see why, it is necessary to examine the decision in *R v Salvo*.<sup>350</sup>

241. That case concerned the offences of obtaining property by deception under s 81 of the *Crimes Act 1958* (Vic). That section requires proof that the accused ‘by any deception dishonestly obtains property belonging to another’. The defendant purchased a car from an acquaintance, Kapaufs, and paid by cheque. At the time he gave the cheque to Kapaufs, the defendant intended to cancel the cheque before presentation and he in fact did so. The defendant admitted that in paying by cheque with this intention he deceived Kapaufs. The defendant however claimed that he was not acting dishonestly because he believed Kapaufs owed him more than the value of the car. He believed this, he said, because Kapaufs had previously sold to him a stolen car which had been repossessed.

242. On these facts, a majority of the Full Court of the Supreme Court of Victoria held that, if the jury had a reasonable doubt as to whether the accused in fact believed he had an entitlement to obtain the car, then the accused was entitled to be acquitted, and the appeal was allowed on the basis that the trial judge’s direction to the jury did not make this clear. A majority of the Full Court held that, in essence, dishonesty under s 81 meant without a belief in a claim of right. That interpretation remains the law in Victoria.<sup>351</sup>

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<sup>349</sup> Submissions of Cesar Melhem, 20/11/15, ch 1, paras 53-62.

<sup>350</sup> [1980] VR 410.

<sup>351</sup> See *SAJ v R* (2012) 36 VR 435 at [47]-[48] and cases there cited.

243. Once the nature of the decision is understood, it is apparent that there is no particular reason to think that the reasoning in it would have any application to s 83. That is because there is no requirement under that section of any proof of deception and no requirement that any property be obtained. Cesar Melhem's submission thus fails at the threshold.
244. But even if *Salvo* were applied by analogy to s 83, it would make no difference to Cesar Melhem's position. At one point<sup>352</sup> Cesar Melhem's submissions attempted to say that application of the *Salvo* test would require proof that Cesar Melhem 'did not believe that he had a legal right to the payment or gain'. However, this submission cannot be accepted. The particular conduct that the offences in *Salvo* required to have been engaged in dishonestly was the obtaining of property.<sup>353</sup> If that case is to be applied by analogy to s 83, then it is necessary to focus on the particular conduct that s 83 requires be engaged in dishonestly. The particular conduct is, relevantly, the falsification of a document made for an accounting purpose. Application of the *Salvo* test to s 83 would mean that it would be necessary to show that the conduct was engaged in without any belief in an entitlement to falsify the document.
245. There is the further point that, in any event, the AWU had no legal entitlement to payments pursuant to the false invoices. For example, the AWU did not do or cause to be done any back strain research for TJH and had no basis on which to seek payment for it. Nor did the AWU have any entitlement to seek the payment of that amount on any basis. It could not have successfully sued Thiess John Holland for any

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<sup>352</sup> Submissions of Cesar Melhem, 20/11/15, ch 1, para 60.

<sup>353</sup> See ss 74 and 81 of the *Crimes Act 1958* (Vic).

part of the \$100,000 per year that was agreed. It is thus impossible to see how Cesar Melhem could have had any belief in any entitlement to falsify these documents.

246. Cesar Melhem also submitted that dishonesty must require proof of something more than knowledge of the falsity of the accounting record. A similar submission was implicit in the submissions of Winslow.<sup>354</sup> However that is not so. If the *Salvo* test is applied, then, as stated above, on the present facts knowledge of the falsity of the accounting record is sufficient.<sup>355</sup> If the *Salvo* test is not applied then the question is simply whether the conduct of the person in question was dishonest as judged by contemporary standards of morality. That, as counsel assisting put it, is a jury question.

247. Cesar Melhem acted dishonestly within the meaning of this section. He protested that all invoices were in relation to services that were in fact delivered. But that is demonstrably not the case. Cesar Melhem must have known this to be the case. Moreover, to the extent that the invoices did reflect a service in fact delivered in whole or in part, Cesar Melhem knew that they concealed an entirely different arrangement, namely, payment for the dedication of organisers to the project. 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.

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<sup>354</sup> Winslow Constructors' Submissions in Reply to Counsel Assisting's Submissions, 20/11/15, para 19.

<sup>355</sup> And nor is there necessarily any substantive difference between 'deception' and 'dishonesty' under s 81. As Murphy J stated in *Salvo* itself [1980] VR 410 at 422: '[t]he very deception practised may, in all the circumstances, demonstrate the accused's dishonesty, that is, show that he makes no claim of right'

248. Julian Rzesniowiecki also acted dishonestly within the meaning of this section. He knew, as he himself frankly admitted, that the purpose of all of the invoices being issued in the form that they were was to conceal their true purpose. He actively concealed the nature of the true arrangement from other personnel at TJV and at Thiess, and the falsification of the invoices was another aspect of this concealment. Julian Rzesniowiecki also acted 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.

249. TJH appeared to submit that Julian Rzesniowiecki did not act dishonestly because he honoured the deal that he made with Cesar Melhem.<sup>356</sup> The submission cannot be accepted. The fact that the side deal was agreed and carried out in accordance with its purpose does not make the conduct of either Julian Rzesniowiecki or Cesar Melhem 'honest' for the purposes of this section. It simply means that the dishonest conduct was carried out as planned. Nor, contrary to what appears to be TJH's position, does the fact that the payments were remunerative in nature mean that they were not a gain. For the purposes of s 83, gain does not equate to a windfall.

*Requirement of deception?*

250. Cesar Melhem submitted that counsel assisting 'concede that no act of deception occurred'.<sup>357</sup> This misstates counsel assisting's position. The submission of Cesar Melhem appears to be a reference to the fact that in a number of case studies involving false invoices both sender

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<sup>356</sup> Submissions of TJH, 20/11/15, paras 59-60.

<sup>357</sup> Submissions of Cesar Melhem, 20/11/15, Ch 1, para 60.

and recipient knew the invoice was false. But, in any event, the fact that sender and recipient know an invoice does not mean that no act of deception occurs. It is in the very nature of false accounting records that they are relied upon by third parties, sometimes to their detriment.<sup>358</sup> The Downer and Winslow case studies are examples of this: see Chapters 10.10 and 10.8 respectively.

251. In any event, this is not the position in the present case. Thiess and its representatives did not know about the arrangement or about the falsity of the invoices issued pursuant to it.
252. There is the further point that the relevant dishonesty, in the present case does not flow merely from the proposition that the creation of the false invoices was for the purpose of deceiving the staff or management of TJH. It is also sufficient to say that the relevant dishonesty flowed from the creation of invoices with the knowledge that they were for services never delivered, or for services that concealed a different arrangement. It is not necessary, for the purposes of s 83 of the *Crimes Act* 1958 (Vic), for there to be any attempt to deceive anyone.
253. It follows from that it is not necessary to show that Cesar Melhem took particular steps to conceal the arrangement from TJH. The ample evidence of the steps he took to arrange for the false invoices to be issued<sup>359</sup> is sufficient to establish the dishonesty element of the offence.

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<sup>358</sup> See, for example, the facts in *R v Ellery* [2012] VSC 349: a s 83 sentencing decision.

<sup>359</sup> Submissions of Counsel Assisting, 6/11/15, ch 3, paras 10-24, 107-190.

254. But, in any event, there is evidence that concealment was part of the purpose of the false invoicing. Julian Rzesniowiecki's evidence was that the arrangement was struck with Cesar Melhem for the very purpose of ensuring that the payments were processed through TJH, John Holland having refused to pay the invoice:<sup>360</sup>

A. ...what I'd arranged with Mr Melhem was that the invoices would be sent to John Holland and they wouldn't come to the project and then at some point they were redirected from Hollands to the project and so Mr Melhem and I sorted out an arrangement as to how those invoices would be struck so they could be processed through the joint venture.

Q. Can you explain that in a bit more detail? What was the arrangement that was sorted out?

A. You know, that the invoices we'd made out for thing such as, you know, advertising, sponsorship of events, other things that were, you know, providing, you know, finances to the AWU that could be approved within the project.

Q. Yes. Do you mean that, in fact, those services had not been provided?

A. No, I don't mean that. I meant --

Q. The invoices were made out --

A. -- that we didn't want to describe them as providing, you know, an organiser, you know, paying funds for an organiser, so --

Q. You didn't want to say that?

A. We didn't want to say that.

255. The evidence indicates that Cesar Melhem actively participated in the creation of false invoices to effect that purpose.

256. For the above reasons, the submissions of Cesar Melhem that the arrangement reflected a common understanding between him and

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<sup>360</sup> Julian Rzesniowiecki, 13/10/15, T:168.38-169.17.

Julian Rzesniowiecki as to what the invoices reflected does not justify a conclusion that the arrangement was one that was open and beyond reproach, but merely subject to confidentiality for reasons of competitive concern.<sup>361</sup>

257. In the above circumstances, Cesar Melhem and Julian Rzesniowiecki may have contravened s 83 of the *Crimes Act 1958* (Vic). No submission was made that Julian Rzesniowiecki's conduct should be attributed to TJH. In those circumstances it is not necessary to pursue that possibility.
258. For the reasons given in the Cleanevent Chapter, Cesar Melhem's conduct should be attributed to the AWU.
259. Pursuant to s 6P of the *Royal Commissions Act 1902* (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Cesar Melhem in relation to possible offences under s 176 of the *Crimes Act 1958* (Vic).
260. Pursuant to s 6P of the *Royal Commissions Act 1902* (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of the Australian Workers' Union in relation to possible offences under s 176 of the *Crimes Act 1958* (Vic).

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<sup>361</sup> Submissions of Cesar Melhem, 20/11/15, ch 3, paras 13-16.

261. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Julian Rzesiowiecki in relation to possible offences under s 176 of the *Crimes Act* 1958 (Vic).
262. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of John Holland Pty Ltd in relation to possible offences under s 176 of the *Crimes Act* 1958 (Vic).
263. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Cesar Melhem in relation to possible offences under s 83 of the *Crimes Act* 1958 (Vic).
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