

THE ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION

SUBMISSIONS OF COUNSEL ASSISTING

AWU: CHAPTER 2

CLEANEVENT CASE STUDY

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A INTRODUCTION

1. Cleanevent Australia Pty Ltd (**Cleanevent**) is part of a corporate group which provides cleaning, waste management and associated services around Australia and internationally. Cleanevent itself provides cleaning services predominantly at events, such as sporting events, shows and concerts, and at particular entertainment venues.

2. The central issue raised in this case study is whether the Victorian Branch of the Australian Workers' Union (AWU Vic) entered into an arrangement with Cleanevent pursuant to which the operation of a Workchoices-era Enterprise Bargaining Agreement (**EBA**) was extended beyond its nominal expiry date, in exchange for an agreement by Cleanevent to make a payment of \$25,000 per annum to the AWU.
3. Associated with the above issue is the question of whether the AWU Vic inflated its membership numbers by issuing invoices for membership fees and adding names to its membership roll in circumstances in which there were no such members.
4. These submissions also examine the manner in which enterprise bargaining agreements have been negotiated by the AWU over the period between 2004 and the present.

B THE CLEANEVENT BUSINESS

5. It will be helpful at the outset to say something further about the Cleanevent business. As noted above, at the relevant time the Cleanevent business related to the provision of cleaning services for sporting and other events, including the Australian Formula One Grand Prix, the Melbourne Cup and the Sydney Royal Easter Show. Steven Webber summarised the Cleanevent business as follows:¹

Predominantly, prior the Spotless acquisition, it was a cleaning business that started in Australia that grew to, you know, the USA, and the United Kingdom in regards to major events. Wimbledon in the UK, for instance, and predominantly stadiums and racecourses, anywhere where there was, you know, a sporting, I guess, attachment to it.

6. At any one time the Cleanevent business had about 40 or 50 fulltime employees.² It also had a number of casual cleaners. It will be helpful to consider the latter in more detail.

The Casual Cleaners

7. Cleanevent's casual cleaners did the bulk of actual cleaning work. The number of casual employees varied from time to time depending on Cleanevent's requirements.

¹ Steven Webber, 28/5/15, T:13.2-8.

² Steven Webber, 28/5/15, T:13.29-30.

For example, the Melbourne Cup Carnival was Cleanevent's largest event and required the services of some 500 casual cleaners.³ Cleanevent kept a 'staff pool', being a database of people that it could call on to come in and carry out casual work as and when required.⁴

8. On the other hand, as appears from the evidence given by a number of Cleanevent's casual cleaners to the Royal Commission, many of these workers were long standing employees of Cleanevent. While classified as casual, in a practical sense they held permanent, or at least longstanding, positions.
9. Cleanevent maintained a division of labour as between venues and events. A venue was classified as a permanent site for regular sporting and entertainment such as the Opera House, ANZ Stadium or the Rosehill Racecourse. By contrast, events such as the Royal Easter Show, International Tennis, or the Mercedes Benz Fashion Week were seasonal one-off events that are not held in a venue in regular use. Employees at venues worked regularly at that venue, but were employed on a casual basis.⁵
10. For example, Robyn Cubban gave evidence that she was employed by Cleanevent as a casual cleaner and had worked as such at Cleanevent since 2004.⁶
11. Robyn Cubban described her work in more detail as follows:⁷

In my role as a casual cleaner, I work at major events in and around Sydney, New South Wales. These events include the Sydney Royal Easter Show, the APIA International Tennis Tournament, the Manly Surfing Competition and the Mercedes Benz Fashion Week Australia. I also clean boats owned by Spotless called MV Epicure I and MV Epicure II which are used for functions located at Jones Bay Wharf, Pyrmont, NSW. I am not based at a particular event and instead work wherever an event is being held.

12. The casual cleaners carried out hard, grinding work. In the nature of things the work tended to be carried out at night, when the crowds had left. The nature of the work is revealed in part by a letter Robyn Cubban wrote to her employer headed 'to whom it

³ Steven Webber, 28/5/15, T:13.39-45.

⁴ Steven Webber, 28/5/15, T:14.8-14.

⁵ Robyn Cubban, 28/15/15, T:83.9-28.

⁶ Robyn Cubban, witness statement, 28/5/15, para 2.

⁷ Robyn Cubban, witness statement, 28/5/15, para 3.

may concern' in 2011.⁸ This letter set out many of the practical difficulties which Robyn Cubban and persons in her position faced. Robyn Cubban said among other things:

Stephine and myself worked from 6.30am to midnight due to lack of staff was rang by night supervisor at 2.00am screaming he had no staff, crap everywhere. Stephine ended up going back in at 2.30am trying to get it up to standards before the client arrived. When client did arrive we were told that a formal complaint would be made regarding the situation. Lack of staff/mess.

13. Robyn Cubban's letter included other observations:⁹

I worked every day from April 2 to April 29 in the lead up to and during the Sydney Royal Easter show I had two days off and returned for a further 6 days for Fashion Week during this time.

14. Robyn Cubban confirmed in oral evidence that she had worked the public holidays during the Easter Break and ANZAC Day. She had also worked Sundays.¹⁰
15. Ken Holland's evidence was to the effect that he had started working for Cleanevent as a casual cleaner in 2003, before moving to Melbourne in 2004 and continuing to work for Cleanevent.¹¹ Ken Holland said that in 2006 he had become a cleaning supervisor in which role he managed a team of seven to eleven cleaners working at major events such as the Melbourne Cup, the Australian Grand Prix and the Moto GP.
16. Nayan Debnath gave evidence to the Commission that he had started working at Cleanevent as a casual cleaner in 2007 working night shifts.¹² Nayan Debnath said that in around 2009 or 2010 he became a supervisor of the cleaning nightshift at the Sydney Opera House and in September 2004 was promoted to venue manager (2nd in charge) of the Sydney Opera House.

⁸ Cubban MFI-1, 28/5/15, pp 16-21.

⁹ Cubban MFI-1, 28/5/15, p-17.

¹⁰ Robyn Cubban, 28/15/15, T:82.29-31.

¹¹ Ken Holland, witness statement, 23/5/15, paras 3-4.

¹² Nayan Debnath, witness statement 29/5/15, para 3.

17. The nightshifts which Nayan Debnath was working required him to start at 11 o'clock in the evening and work through to 7 o'clock in the morning.¹³
18. Colleen Ellington said that she had worked as a casual cleaner at Cleanevent since 2004.¹⁴ Colleen Ellington said that her role included: 'Cleaning toilets, removing garbage and cleaning offices, the VIP area and change rooms'. Colleen Ellington became a member of the AWU NSW in 2004 when she started working for Cleanevent and paid her union membership fees via payroll deduction.¹⁵
19. Shalee-Nicole Allameddine gave evidence that she had started working for Cleanevent in 2003 as a casual cleaner at ANZ Stadium at Sydney Olympic Park.¹⁶ Shalee-Nicole Allameddine also became a member of the AWU NSW at about the time she started working for Cleanevent, paying her membership dues by payroll deduction.
20. Marcin Pawlowski gave evidence to the effect that he had started work at Cleanevent in 2010 as a casual cleaner at major events, the first one being at Flemington Racecourse in Victoria.¹⁷
21. Brian Miles gave evidence that he was a casual cleaner at Dandenong Market in Victoria and has been since August 2011.¹⁸ Brian Miles said that his role at Cleanevent includes pressure washing, operating ride on scrubbers, cleaning toilets and waste management.¹⁹
22. The evidence of the Cleanevent casual employees was consistent in many respects. Each was a loyal, long term employee, having worked for Cleanevent in most cases for many years. Each did hard work, often at night, on public holidays or on weekends. The work included tidying up after crowds, including cleaning toilets.

¹³ Nayan Debnath, 29/5/15, T:165.40-46.

¹⁴ Colleen Ellington, witness statement, 29/5/15, para 2.

¹⁵ Colleen Ellington, witness statement, 29/5/15, paras 8-9.

¹⁶ Shalee-Nicole Allameddine, witness statement, 29/5/15, para 4.

¹⁷ Marcin Pawlowski, witness statement, 28/5/15, para 5.

¹⁸ Brian Miles, witness statement, 22/5/15, para 2.

¹⁹ Brian Miles, witness statement, 22/5/15, para 3.

23. Without meaning any disrespect, these witnesses did not appear to be sophisticated in the detail of industrial relations laws, nor in dealing with management. In short they were the very people who need and depend upon a strong and loyal union.

C THE 1999 AWARD

24. The reference award for many of the EBAs considered in this case study²⁰ was the *Cleaning Industry – AWU/LHMU – Cleanevent Pty Ltd Award 1999 (1999 Award)*.²¹

25. The 1999 Award was of national application²² and contained the following relevant provisions in relation to the employment of casual labour:

- (a) Employees were to be paid minimum weekly rates of pay appropriate to seniority-based classification levels, subject to arbitrated safety net adjustments each year (clause 9);
- (b) Casual employees were entitled to a base hourly rate of 1/38th of the appropriate weekly classification rate plus a 20% loading (clause 6.3);
- (c) All employees were entitled to overtime for work performed in excess of the hours mutually arranged (clause 6.4.7), payable as time and a half for the first two hours and double time hereafter (clause 13.1);
- (d) All employees were entitled to overtime for work performed on a Saturday at the rate of time and a half for the first two hours and double time thereafter (clause 13.2, 14.1.1);

²⁰ Being the Cleanevent Australia Pty Ltd Enterprise Agreement 2004 certified 20 December 2004 (**2004 EBA**) (Shorten MFI-5, VVol 2, p2 at 3 (clause 6.1)), and the Cleanevent Australia Pty Ltd AWU Agreement 2006 (**2006 EBA**) (Shorten MFI-5, VVol 2, p 127). Clause 39 of the 2006 EBA expressly excluded the operation of any award in relation to relevant matters, including penalty rates, consistently with the provisions of the *Workplace Relations Act* 1996 (Cth) then in force. By the time of negotiation of the 2010 MOU, the AWU proceeded on the basis that the 1999 Award remained applicable: Cleanevent MFI-1, p 307, clause 2.7(c).

²¹ Winter MFI-2 (containing all consolidations as at 23 June 2005). The relevant substantive terms of the 1999 Award were unchanged over the period considered in this case study: Craig Winter, 20/10/15, T:718.5-21, but the rates of pay were varied by review from time to time.

²² Winter MFI-2, Clause 4.1.

- (e) All employees were entitled to overtime for work performed on a Sunday at double time (clause 14.2);
 - (f) All employees were entitled to payment at a rate of double time and a half for work performed on a public holiday (clause 14.9).
26. The 1999 Award did not make any distinction between employees engaged to work at venues (such as sporting grounds and concert halls) and those engaged to work at events (such as major sporting tournaments, agricultural shows and music festivals).

D THE 2004 EBA

27. Cleanevent and the AWU entered into an enterprise bargaining agreement in 2004 (the 2004 EBA).
28. Bill Shorten was, from 1996, an organiser for Cleanevent. After he was appointed Victorian State Secretary in 1998, he continued to deal with Cleanevent, with organisers directly servicing worksites.²³

Negotiations for the 2004 EBA

29. In 2002 and 2003, Bill Shorten engaged in discussions with Cleanevent representatives in respect of the 2004 EBA.²⁴ Peter Smoljko was the organiser responsible for the negotiations on behalf of the AWU. In the course of the discussions Bill Shorten proposed to Cleanevent that there be a paid education levy paid by Cleanevent on a per capita basis to fund paid education leave for employees.²⁵ Craig Lovett, the Chairman and Executive Director of Cleanevent, communicated to Shorten his 'in principle

²³ Bill Shorten, 8/7/15, T:43.32-38.

²⁴ Shorten MFI-5, Vol 1, pp 350-352, 356.

²⁵ Bill Shorten, 8/7/15, T:87.7-12. The EBA that was certified on 31 March 1994 (Shorten MFI-5, VVol 1, p 1) (**1994 EBA**) contained provisions for paid training leave (not to be unreasonably withheld by the employer) and reimbursement of training expenses (clause 7(d), Shorten MFI-5, Vol 1, p 9). The EBA that was certified on 20 April 1999 (Shorten MFI-5, Vol 1, p 251) (**1999 EBA**) contained a similar provision in respect of training leave (clauses 9.4 and 9.5, Shorten MFI-5, Vol 1, p 256), as did the 2004 EBA (clauses 9.3 and 9.4, Shorten MFI-5, Vol 2, p 6), but the latter document did not make provision for a paid education levy.

agreement' with such an arrangement on 6 March 2002.²⁶ Mr Shorten does not know whether such a levy was ever paid.²⁷

30. During negotiations for the 2004 EBA, Bill Shorten participated in meetings with Craig Lovett and Peter Smoljko, the AWU organiser for Cleanevent.²⁸ Graeme Beard later participated in negotiations on the AWU side, and Ivan Dalla Costa and Bruce McNab on the Cleanevent side. Jo-Anne Schofield participated in the negotiations on behalf of the LHMU which also had coverage in the industry. The negotiations proceeded as follows.
31. The AWU, in concert with the LHMU, put the position that the rate for casuals employed at events was not appropriate as it did not take into account weekend and holiday loadings. Cleanevent's response was that the event rate was in line with industry standards. Mr Lovett contended in a letter dated 25 March 2003:²⁹

It is our firm belief that a Cleanevent rate of \$17.44 for new entrants is well above that of similar deployment within our industry.

32. Later, in a letter to Mr Shorten dated 29 March 2004, Mr McNab wrote:³⁰

...I again suggest that your proposals are not supported by what is actually occurring in the industry. Are you able to provide hard evidence of actual cases where the rates you are claiming are actually paid?

Jo-Anne Schofield has indicated that our proposed rates will not pass the 'no disadvantage' test. This does not seem to us to be the case, however if you or Jo-Anne are able to direct us to any authorities which would support the contention that the rates would not be sufficient then I would be grateful if you would do so.

33. The AWU pushed for an increase to the specialised 'event rate' to account for the fact that the existing rate was worse than that provided for in the relevant award. In a letter dated 3 May 2004, Mr Beard stated:³¹

²⁶ Shorten MFI-5, 8/7/15, Vol 1, p349.

²⁷ Bill Shorten, 8/7/15, T:87.15-16.

²⁸ Bill Shorten, 8/7/15, T:87.44-46, 88.9.

²⁹ Shorten MFI-5, 8/7/15, Vol 1, p 356.

³⁰ Shorten MFI-5, 8/7/15, VVol 1, pp 361-363.

³¹ Shorten MFI-5, Vol 1, pp 369-371.

I have discussed the issue with Jo-Anne Schofield and we believe that the rate does not properly represent an appropriate 'all-up' rate for casuals engaged at events. Events are usually active over weekends and can also include public holidays. Eg. Sydney Royal Easter Show.

Your rate does not provide adequate compensation for these matters. Currently, under the award with the Safety Net Review May 2003, a level I employee would receive \$31.30 per hour for work performed on a public holiday.

...

To ensure that casual employees would not be subject to any disadvantage, we believe that overtime, weekend work and public holidays for [sic] should be calculated in accordance with the award.

34. Cleanevent strenuously resisted any increase in their preferred rate of \$17.44 per hour for event casuals,³² and contemplated cancelling negotiations to secure its preferred rate. In an internal memorandum dated 29 September 2004, Bernadette Mynott of Cleanevent noted that the draft EBA put forward in 2003 did not pass the 'no disadvantage' test, and that casuals were at that time being paid below the 120% loading provided for in the Award.³³
35. On 21 May 2004 Ivan Dalla Costa, Group Finance Director of Cleanevent observed that another certified agreement reached in relation to specific venues would not pass the no-disadvantage test because the rate was substantially short of the award rate.³⁴ Bill Shorten stated that that EBA must have passed the no-disadvantage test in order to obtain approval. He did not know whether Graeme Beard showed him the correspondence,³⁵ or whether there were specific discussions as to whether the 2004 EBA passed the no-disadvantage test.³⁶ Mr Shorten said that whether an EBA satisfied the no-disadvantage test was not the primary focus of the AWU, the primary focus was achieving an agreement that members thought was fair and reasonable.³⁷

³² Shorten MFI-5, Vol 1, pp 356, 374, 378, (some compromise was made in Cleanevent's letter dated 20 May 2004, page 379), 385-386.

³³ Shorten MFI-5, 8/7/15, Vol 1, pp 393-394.

³⁴ Shorten MFI-5, 8/7/15, Vol 1, p 381.

³⁵ Bill Shorten 8/7/15, T:91.40-45.

³⁶ Bill Shorten 8/7/15, T:94.17.

³⁷ Bill Shorten 8/7/15, T:92.13-17.

36. LMHU withdrew from negotiations on 5 November 2004.³⁸ AWU and Cleanevent then engaged in discussions to finalise an AWU-only agreement.³⁹

Pay rates for casual employees under the 2004 EBA

37. The casual rates propounded by Cleanevent were included in the EBA that was put to members and signed by Bill Shorten in 2004.⁴⁰ Bill Shorten stated that the AWU had, during his time as AWU Vic Secretary, a practice of State Secretaries reviewing EBAs prior to execution. Organisers were expected to give monthly reports and submit summaries when putting forward EBAs for approval.⁴¹ He relied on those summaries to form a view of the appropriateness of the EBA.⁴²

38. The relevant provisions of the 2004 EBA were as follows:⁴³

8.3 Subject to clauses 8.4 and 8.5, the minimum hourly rates of pay for casual workers shall be as specified below:

	1 Aug 2003	1 Aug 2004	1 Aug 2005	1 Aug 2006
Level 1	15.62	16.28	17.45	17.80
Level 2	16.24	16.94	18.15	18.51
Level 3	17.73	18.49	19.81	20.21

8.4 Notwithstanding the provisions of clause 8.3, the minimum hourly rate for level 1 casual workers working at events shall be \$16.28 per hour, \$17.44 per hour for level 2 casual workers and \$18.44 per hour for level 3 casual workers.

8.5 Notwithstanding the provisions of clause 8.3, the minimum hourly rate for casual workers working on weekends and public holidays, but not at events, shall be \$19.17 until 1 August 2005, \$20.50 until 1 August 2006 and \$20.90 thereafter.

...

³⁸ Shorten MFI-5, 8/7/15, Vol 1, p 403.

³⁹ Shorten MFI-5, 8/7/15, Vol 1, p 404.

⁴⁰ Shorten MFI-5, Vol 2, pp 1-12, esp page 4[8.4].

⁴¹ Bill Shorten, 8/7/15, T:97.44-47, 98.1-7, 105.1-12

⁴² Bill Shorten, 8/7/15, T:98.20-31.

⁴³ Shorten MFI-5, 8/7/15, Vol 2, pp 4-5.

8.6.3 Cleanevent Australia Pty Ltd shall pay in addition to any awages or other entitlements due, a Public Holiday Event Allowance of \$55.00 to casual workers who work a minimum of 7.6 hours at an event on a gazetted public holiday.

39. Properly construed, the 2004 EBA had the following consequences for Cleanevent casual workers:

- (a) The casual rates provided for in clause 8.3 were slightly above 120% of the hourly rate of pay for permanent employees provided for in clause 8.1, and there was provision for pay rise for these casuals.
- (b) Casuals working at events were not entitled to a pay rise over the term of the agreement, which they would have been under the 1999 Award by operation of the arbitrated safety net adjustments.
- (c) The weekend and public holiday rates for venue casuals were less than time and a half, to which the workers would be entitled for the first two hours of work on a Saturday under the 1999 Award. The rates were far below the allowances for Sundays and public holidays under the 1999 Award.
- (d) Casuals working at events were not entitled to penalty rates for work on Saturdays or Sundays. Event casuals were entitled to an allowance for working in excess of 7.6 hours on a gazetted public holiday. The allowance breaks down to \$7.23 per hour worked over the 7.6 hours (and nothing for time exceeding 7.6 hours) which is less than time and a half for all of the event casual classification rates.

40. Annexure 1 to these submissions contains a comparison of the rates of pay to which Cleanevent casual workers would have been entitled under the 1999 Award and the rates they were entitled to under the 2004 EBA. Significantly, the base rates of pay for venue casuals and event casuals were above those payable under the 1999 Award, but:

- (a) The flat penalty rate to which venue casuals were entitled on Saturdays, Sundays and public holidays was below time and a half, being the rate applicable for Saturday work under the 1999 Award;

- (b) The public holiday allowance payable to event casuals that worked more than 7.6 hours is above time and a half, but well below double time and a half which is the public holiday rate under the 1999 Award;
- (c) Event casuals are otherwise not entitled to penalty rates, which they would be under the 1999 Award.

- 41. At the time of certification of the 2004 EBA 194 of the 244 employees of Cleanevent were casuals.⁴⁴
- 42. A number of matters emerge from the manner in which the 2004 EBA was negotiated and agreed:
- 43. *First*, it is apparent that the position taken by Cleanevent was that commercial and competitive constraints prevented it from paying in line with the 1999 Award. It was repeatedly stated by Cleanevent representatives that the award rates were not paid in the industry. Mr Shorten evidently accepted that this was the case in his negotiations with Cleanevent. He described the notion that event cleaners were being paid award penalty rates as ‘fanciful in the real world.’⁴⁵
- 44. *Secondly*, the AWU undertook the negotiations on the express basis that the rates contended for by Cleanevent would fall well below the employees’ entitlements under the 1999 Award. It appears from the correspondence, therefore, that Cleanevent and the AWU were in agreement that if Cleanevent’s rates were accepted, there would be issues achieving compliance with the no disadvantage test when the time came to have the 2004 EBA certified.
- 45. *Thirdly*, this position is not cured by Mr Shorten’s explanation that it was less important to pass the no disadvantage test than to obtain an agreement that was fair and reasonable for workers. The evident logic to that position is that, if the award were adhered to, the workers may not have jobs at all, because Cleanevent would be undercut for cleaning work by less scrupulous contractors. But that logic ignores the fact that (a) the 1999 Award was an enterprise award obtained specifically for Cleanevent’s employees; (b)

⁴⁴ Shorten MFI-5, 8/7/15, Vol 2, p 16.

⁴⁵ Bill Shorten, 8/7/15, T:82.1-8.

the 1999 Award provided safeguards (such as penalty rates) that were reasonably to be expected by casual workers employed not just in the cleaning industry, but across every industry in which casual labour is deployed; and (c) the 1999 Award provided an objective measure of whether an EBA is fair and reasonable for the workers.

46. Moreover, Mr Shorten's contention that it was 'fanciful' to assume that cleaners working at venues and events would be paid penalty rates,⁴⁶ and that double time and a half was a 'gold standard' rate⁴⁷ in the cleaning industry does not reflect the pay conditions applicable in the various State-based awards that would have applied in the absence of the 1999 Award. With two exceptions,⁴⁸ each of these awards provided for casual loadings of 20% or higher on the base rate,⁴⁹ and for casuals to be paid penalty rates on Saturdays, Sundays and Public Holidays, most at standard rates,⁵⁰ some at a slightly lower rate.⁵¹
47. Far from applying a 'gold standard', these awards were a fundamental safety net guaranteeing the minimum conditions workers could expect in the industry. If it was the case that there was systemic failure by employers in the event cleaning industry to pay

⁴⁶ Bill Shorten, 8/7/15, T:82.5-26.

⁴⁷ Bill Shorten, 8/7/15, T:88.21-26.

⁴⁸ The New South Wales *Cleaning and Building Services Contractors (State) Award* applied a casual loading of 8.3% (clause 7.2) and lower penalty rates than time and a half and double time on Saturdays and Sundays for casual cleaners, but double time and a half on public holidays. The Award included a special rate for events with a slightly higher loading and a flat penalty rate on Saturdays, Sundays and public holidays that is well below time and a half (clause 9(i), Part B). Unlike the public holiday loading in the 2004 EBA, the rate applies without having worked a full day. The *(Building and Property Services)(ACT) Award 1998* applied a casual loading of 6% (clause 15.4; Schedule A). However it applied a Saturday rate of time and a half (clause 30), a Sunday rate of time and three quarters (clause 31) and a public holiday rate of double time and a half (clause 37.6).

⁴⁹ *Building Services (Victoria) Award 2003* (clause 12.4.3), *Contract Cleaning Industry Award - State 2003* (Queensland) (clause 5.2.2(c)); *Cleaning Contractors (Hygiene and Pollution Control) Industry (Northern Territory) Award 2003* (clause 12.3.3); *Caretakers and Cleaners Award* (South Australia) (Part A, S1.4.2); *Cleaning and Property Services Award* (Tasmania) (clause 22(c)); *Contract Cleaners Award* (Western Australia) (clause 20).

⁵⁰ *Building Services (Victoria) Award 2003* (clauses 25, 27.1), *Contract Cleaning Industry Award - State 2003* (Queensland) (clauses 6.5, 6.2 and 7.6); *Cleaning (Building and Property Services)(ACT) Award 1998* (clause 37.6); *Cleaning Contractors (Hygiene and Pollution Control) Industry (Northern Territory) Award 2003* (clauses 29.13, 29.14, 38.18); *Caretakers and Cleaners Award* (South Australia) (clauses 6.2, 6.4); *Cleaning and Property Services Award* (Tasmania) (clauses 18(e)(i), 22(c), 29); *Contract Cleaners Award* (Western Australia) (clause 6.4).

⁵¹ Another consent award covering LHMU, the *Cleaning Services - Spotless Services Australia/ALHMWU - Outdoor Facilities - Consent Award 1998* provided for a 20% casual loading (clause 13.3.2(a)) and lower penalty loadings for casual and permanent employees on Saturdays, Sundays and Public Holidays (clauses 25.2, 25.3 and 13.3).

workers their award entitlements, the proper course for the AWU was not to assist one of those employers to do so. Other options were available, including making complaints to the Office of the Employment Advocate in relation to suspected non-compliance with award conditions.⁵²

48. There is some evidence of the communications with Cleanevent staff in relation to the 2004 EBA.⁵³ Those communications tend to reveal that employees were provided with a copy of the proposed agreement, and advised that they would be eligible for back pay in respect of the pay rises provided for in the agreement. There is no evidence that the employees were advised of the differences between the 2004 EBA and the 1999 Award, or that it was explained to them why the 2004 EBA was fair and reasonable, or that they indicated (other than by voting in favour of the 2004 EBA) that they believed that the 2004 EBA was fair and reasonable. This is of particular concern when it is considered that casuals employed at events, and most disadvantaged by the agreement, may not have been in a position to have the terms of the proposed 2004 EBA brought to their attention.

Certification of the 2004 EBA

49. Craig Winter prepared and ran the application for certification of the 2004 EBA with the Australian Industrial Relations Commission (AIRC).⁵⁴ Mr Winter has been an industrial officer at the AWU since 1988. His responsibilities include representing members in various tribunals, negotiating agreements and running applications for certification of those agreements.⁵⁵
50. Craig Winter gave evidence as to the process that was undertaken at that time when preparing for certification of EBAs. He said that at that time, he did not believe that organisers prepared a report. He said that the usual practice was that he was provided with a signed copy of the agreement and a copy of the statutory declaration of the employer. He spoke with the responsible organiser to obtain any additional information

⁵² s 86(1) *Workplace Relations Act* 1996 (Cth).

⁵³ Shorten MFI-5, Vol 1, pp 404-411.

⁵⁴ Shorten MFI-5, 8/7/15, Vol 2, p 1; Craig Winter, 20/10/15, T:699.1-5.

⁵⁵ Craig Winter, 20/10/15, T:698.6-24.

required, and completed a statutory declaration, on the basis of the information in the employer's statutory declaration and the information he received from the organiser.⁵⁶

51. The statutory declaration form completed by Craig Winter identified that the relevant award was the 1999 Award. The statutory declaration contained three questions addressed to the no-disadvantage test then applicable under s 170LT(1)-(3) and 170XA(2) of the *Workplace Relations Act* 1996 (Cth), as follows:⁵⁷

7.3 State whether certification would result, on balance, in a reduction in the overall terms and conditions of employment of employees covered by the agreement under relevant or designated awards or laws of the Commonwealth, a State or Territory (see s 170XA(2)).

7.4 To be answered only if there is **any** reduction in the terms and conditions of employees covered by the agreement or under any relevant or designated award or other law **but not resulting** in a reduction in the overall terms and conditions of employees.

By referring to specific clauses in the agreement, specify any such reductions.

By referring to specific clauses in the agreement, specify any terms or conditions which result, on balance, in there being no reduction in the overall terms and conditions of employment of the employees under the agreement.

7.5 To be answered only if certification **would result** in a reduction of the overall terms and conditions of employees covered by the agreement.

Indicate why the Commission should be satisfied that certifying the agreement is not contrary to the public interest.

52. The intention of these questions in the statutory declaration forms is plain: it enabled the Commissioner hearing the application: (a) in respect of question 7.3, to assess the deponent's opinion as to whether the no-disadvantage test was satisfied; (b) in respect of question 7.4, to test the deponent's opinion by requiring that he or she identify whether there were any reductions in the terms of the agreement when compared with competing instruments and explain with specificity why there was no disadvantage on balance; and (c) where there is an overall disadvantage, to assess whether there were any circumstances attracting the public interest exception.

53. Bruce McNab completed the employer's statutory declaration on behalf of Cleanevent. He did so by ticking a box beside question 7.3 stating: 'certification would not result in

⁵⁶ Craig Winter, 20/10/15, T:701.12-19, 702.1-14, 41-42.

⁵⁷ Shorten MFI-5, 8/7/15, VVol 2, p 22.

a reduction in the overall terms and conditions of employment.’⁵⁸ The responses to questions 7.4 and 7.5 were left blank.

54. Craig Winter’s statutory declaration contained the same box beside 7.3. It was not ticked and the responses to questions 7.4 and 7.5 were left blank.⁵⁹ Craig Winter said that he removed the contrary answer to question 7.3 that would have been in the electronic version of the form contained on the website of the AIRC.⁶⁰
55. The statutory declaration of Craig Winter put forward to the AIRC for certification of the 2004 EBA did not identify that the event casual rate was a reduction in the terms and conditions of the employees as against the relevant Award. Bill Shorten agreed that it should have.⁶¹
56. Craig Winter disagreed. His evidence was that, regardless of the difference in rates as between the 1999 Award and the terms of the 2004 EBA, clauses 6.1 and 6.3 of the 2004 EBA operated to incorporate the 1999 Award so that the event casuals were not disadvantaged.⁶² He described this as an ‘industrial fact’ that led to there being no reduction in the terms and conditions of the event casuals that would require an answer to questions 7.3 or 7.4.⁶³
57. There are a number of difficulties with this approach:
- (a) *First*, the approach apparently taken by Mr Winter involves acceptance that, where the EBA contains terms and conditions that disadvantage employees when compared with the applicable award, the award will operate to ‘fill the gap’ so that there is no relevant disadvantage. That is wrong on the terms of clause 6.1 of the 2004 EBA, which provides that the provisions of the agreement prevail over the award.⁶⁴ The statement in the same clause ‘no

⁵⁸ Shorten MFI-5, 8/7/15, VVol 2, p 17.

⁵⁹ Shorten MFI-5, 8/7/15, VVol 2, p 22.

⁶⁰ Craig Winter, 20/10/15, T:704.31-35.

⁶¹ Bill Shorten, 8/7/15, T:103.9-11, 41.

⁶² Craig Winter, 20/10/15, T:721.8-13.

⁶³ Craig Winter, 20/10/15, T:721.20-38.

⁶⁴ Shorten MFI-5, 8/7/15 Vol 2, p 3.

person shall be disadvantaged in any way by the operation of this agreement' is not of sufficient certainty to displace the clear terms of the balance of the clause.

- (b) *Secondly*, the approach is inconsistent with the *Workplace Relations Act 1996* (Cth), which provided at 170LY(1) that certified agreements prevail over awards or orders to the extent of any inconsistency.
- (c) *Thirdly*, the obligation imposed on Cleanevent in clause 6.3 of the 2004 EBA to conduct an audit on the request of any employee asserting on reasonable grounds that the EBA confers an overall disadvantage in comparison with the award⁶⁵ does not prevent the agreement operating to the disadvantage of workers on its terms.
- (d) *Fourthly*, if the approach adopted by Mr Winter were correct, there would be no reason for a no-disadvantage test as the terms of an award would always prevail to the extent that the agreement conferred any comparative disadvantage on an employee. The terms of the *Workplace Relations Act 1996* (Cth) in force at that time clearly comprehended the opposite.

58. The vice in Mr Winter's approach, assuming that he adopted that approach in completing the statutory declaration for the 2004 EBA, is that it has the tendency to cause a union officer to avoid scrutiny of the precise terms and conditions of the EBA when compared with the relevant award, in favour of some mistaken presumption that clause 6 of the EBA corrects all. The terms of ss 170LT(1)-(3) and 170XA(2) of the *Workplace Relations Act 1996* (Cth) clearly require a close consideration of a proposed EBA against other relevant instruments. The form of the statutory declaration is designed to identify the relevant considerations that the Commissioner must take into account when certifying the agreement pursuant to s 170LT(1) of the Act.

59. The course of the proceedings before Commissioner Mansfield on 20 December 2004 make this point. Mr Winter appeared on behalf of the AWU. The extent of the

⁶⁵ Shorten MFI-5, 8/7/15 Vol 2, p 3.

submissions on the question of the no-disadvantage test are contained in the following exchange:⁶⁶

THE COMMISSIONER: Good. Now, Mr Winter, my question: do you generally assert that this agreement meets the no disadvantage test?

MR WINTER: Yes, we believe it does, and---

THE COMMISSIONER: Good, that is sufficient.

60. It is evident that the Commissioner was reliant on Mr Winter's submissions in satisfying himself that the no-disadvantage test was satisfied. Having regard to the dearth of information in the statutory declaration, this is hardly surprising.
61. Bill Shorten accepted that, completed in the way it was, the statutory declaration of Craig Winter did not enable the Commissioner to properly identify any reduction in the terms and conditions of employment⁶⁷ and consider whether any disadvantages suffered by employees under the EBA could be justified in the public interest.⁶⁸ Mr Shorten accepted that, at the hearing before the AIRC for certification of the EBA on 20 December 2004, the Commissioner was under just such a disadvantage.⁶⁹

E THE 2006 EBA

62. In 2006 the AWU and Cleanevent entered into an enterprise bargaining agreement which came into force on 22 December 2006 (**2006 EBA**).⁷⁰
63. The 2006 EBA applied to all employees of Cleanevent in Australia who fell within the classification structures set out in the 2006 EBA, including permanent and casual employees. Because the 2006 EBA operated Australia wide it was signed off by the AWU at National Office. At that time the National Secretary was Bill Shorten. In fact the 2006 EBA was ultimately signed by Graham Roberts, then Assistant National Secretary to Bill Shorten. From August 2006, negotiations were primarily undertaken

⁶⁶ Shorten MFI-5, 8/7/15, Vol 2, p 31-32.

⁶⁷ Bill Shorten, 8/7/15, T:103.13-16.

⁶⁸ Bill Shorten, 8/7/15, T:103.36.

⁶⁹ Bill Shorten, 8/7/15, T:108.10, 16-20; Shorten MFI-5, 8/7/15, Vol 2, pp 27-32.

⁷⁰ Steven Webber, witness statement, 20/5/15, bundle of documents marked 'SW1' (**SW1**), tab 1.

by John-Paul Blandthorn, by then an organiser for Cleanevent.⁷¹ John-Paul Blandthorn reported to Bill Shorten, Cesar Melhem, Peter Smoljko and Mick Eagles.⁷²

64. From the point of view of Cleanevent, the 2006 EBA was negotiated by Craig Lovett, then Chairman, and Ivan Della Costa, then the Chief Financial Officer.⁷³

65. On 30 August 2006, Jean-Paul Blandthorn sent an email to Garry Ryan, Queensland President and Southern District Secretary of the AWU in relation to negotiations for the new EBA with Cleanevent.⁷⁴ Both Bill Shorten and Paul Howes were copied in to the email. The email stated:

Both Bill and Paul have asked me to take a national approach to Cleanevent.

66. Bill Shorten accepted that he had made such a direction in this instance, and confirmed that for businesses operating in multiple states, the AWU would ensure that a national approach to that business would be adopted by AWU to ensure consistency of terms and conditions across the business. That might include appointing a single organiser to oversee the approach of local organisers across the business.⁷⁵

67. At the time, AWU was engaged in a demarcation dispute with the LHMU in relation to the use of the 2006 EBA at some venues agreed to be covered by LHMU.⁷⁶

68. On 2 October 2006 Ivan Della Costa circulated a draft by email of the 2006 EBA that had been presented to John-Paul Blandthorn on 29 September 2006.⁷⁷ In his email Della Costa stated:

None of the issues we have re-drafted present a problem, except for the leave loading whereby our proposal to build the amount in the weekly rate will present a fundamental political issues [sic] to Bill Shorten – (not a real issue for us).

⁷¹ John-Paul Blandthorn, 20/10/15, T733.24-26.

⁷² John-Paul Blandthorn, 20/10/15, T733.32-41.

⁷³ Steven Webber, 28/5/15, T:15.32-38.

⁷⁴ Shorten MFI-5, 8/7/15, Vol 2, p 37.

⁷⁵ Bill Shorten, 8/7/15, T:45.7-38.

⁷⁶ Shorten MFI-5, 8/7/15, Vol 2, pp 35-36, 37.

⁷⁷ Shorten MFI-5, 8/7/15, Vol 2, p 40.

69. John-Paul Blandthorn said that he had no memory of a discussion at this time.⁷⁸ Bill Shorten was unable to shed any light on the nature of the political issue referred to in the email.⁷⁹

70. During the course of the negotiations with Cleanevent, on 20 October 2006, John-Paul Blandthorn provided a further proposed version of the agreement to Cleanevent, by email to Ivan Dalla Costa, copied to (amongst others) Bill Shorten and Cesar Melhem. In that email he stated:

I have spoken to the hierarchy of the AWU and they can't afford to trade core Award conditions at the moment, because we can't afford other unions attacking us.⁸⁰

71. Bill Shorten confirmed that he was in the hierarchy of the AWU at the time,⁸¹ but says that he would not have communicated this position to Blandthorn as that was not what he thought.⁸² John-Paul Blandthorn said that the reference to hierarchy was 'more likely' to refer to Mr Melhem or Mr Eagles, but that he had no memory of the conditions referred to.⁸³ Bill Shorten does not know whether he or Mr Melham responded to the other recipients of the email to correct Mr Blandthorn's statement.⁸⁴ Mr Shorten stated that the union referred to in the email was likely to be the LHMU, with which AWU had a history of demarcation in this industry.⁸⁵ This account was supported by Cesar Melhem, who otherwise said he had no knowledge of the context of this email as he did not have dealings with Cleanevent.⁸⁶ Mr Melhem said, in respect of the reference to trading core award conditions:⁸⁷

Well, we work in a very competitive environment and it's always arguing about coverage. From time to time, competitive unions will be going out there in order to smear the AWU and poach members that will use some of these slogans, but as far as I'm concerned, in my time and Mr Shorten's time, that wasn't the case.

⁷⁸ John-Paul Blandthorn, 20/10/15, T:735.21-34.

⁷⁹ Bill Shorten, 8/7/15, T:47.20-23.

⁸⁰ Shorten MFI-5, Vol 2, p 116A.

⁸¹ Bill Shorten, 8/7/15, T:48.1-3.

⁸² Bill Shorten, 8/7/15, T:48.35-36.

⁸³ John-Paul Blandthorn, 20/10/15, T:736.22-30.

⁸⁴ Bill Shorten, 8/7/2015, T:49.23,52.5.

⁸⁵ Bill Shorten, 8/7/15, T:50.43-47.

⁸⁶ Cesar Melhem, T:893.4-9.

⁸⁷ Cesar Melhem, T:893.19-26.

72. Bill Shorten gave evidence that he is friends with Craig Lovett.⁸⁸ Bill Shorten received an invitation on 25 October 2006 from Craig Lovett to attend the Cleanevent marquee at the Birdcage for Derby Day 2006.⁸⁹ Bill Shorten gave evidence that he attends the races socially, and that even if he had visited the Cleanevent marquee, that would not necessarily mean that negotiations were undertaken at that time.⁹⁰
73. On 2 November 2006, John-Paul Blandthorn sent an email to Ivan Dalla Costa requesting a further version of the draft EBA stating:
- I will need to run through it in detail before Bill can meet with Craig.⁹¹
74. Bill Shorten stated that John-Paul Blandthorn would have briefed him on any tough spots in the negotiation.⁹²
75. Bill Shorten and Jean-Paul Blandthorn met Craig Lovett on 9 November 2006.⁹³ Prior to the meeting, Jean-Paul Blandthorn sent an email to Craig Lovett and Ivan Dalla Costa setting out points for discussion at the meeting.⁹⁴ Those points included the query ‘what formula was used to calculate salary? Does this meet no-disadvantage?’ and statements as to applicable overtime rates, namely, that they should be time and a half for the first four hours of Saturday, double time thereafter and on Sunday and double time and a half on public holidays. Bill Shorten does not recall whether he discussed these points with John-Paul Blandthorn but accepts that this was a possibility.⁹⁵

⁸⁸ Bill Shorten, 8/7/2015, T44.1.

⁸⁹ Shorten MFI-5, Vol 2, page 117. In 2006 Derby Day fell on 4 November 2006.

⁹⁰ Bill Shorten, 8/7/2015, T52/39-47.

⁹¹ Shorten MFI-5, Vol 2, page 117A.

⁹² Bill Shorten, 8/7/2015, T53.26-28.

⁹³ Shorten MFI-5, Vol 2, pages 117B and 117C.

⁹⁴ Shorten MFI-5, 8/7/15, Vol 2, pp 117B.

⁹⁵ Bill Shorten, 8/7/15, T:55.7-12.

76. On 27 November 2006, John-Paul Blandthorn sent an email to Ivan Dalla Costa, copying Bill Shorten and Craig Lovett and attaching a further draft of the agreement and stating:⁹⁶

Bill is having a think about the issue outside Vic & NSW otherwise I am confident we have an EBA that will get a minimum 80% yes vote.'

77. The draft EBA provided for rates of pay for financial year 2006 as follows:

- (a) a minimum hourly rate of \$18.51 for level 2 casuals and \$20.21 for level 3 casuals;
- (b) an event hourly rate of \$17.44 for level 2 casuals and \$18.44 for level 3 casuals;
- (c) a penalty rate for weekends and public holidays (not applicable to events) of \$20.90 for level 2 casuals and \$22.81 for level 3 casuals;⁹⁷
- (d) a public holiday event allowance of \$55.00 available only to level 2 and 3 casual employees working a minimum of 7.6 hours at events on a public holiday.⁹⁸

78. On 27 November 2006 Ivan Dalla Costa of Cleanevent countered with the same base rates as provided for in the AWU draft, but with lower escalation over the term of the agreement for all rates except for weekend loadings.⁹⁹ The rates proposed for workers in States and Territories other than New South Wales and Victoria were significantly lower.¹⁰⁰

79. The 2006 EBA was signed by Graham Roberts, Assistant National Secretary of the AWU on 21 December 2006,¹⁰¹ with acceptance by a majority of Cleanevent employees

⁹⁶ Shorten MFI-5, 8/7/15, Vol 2, p 117F.

⁹⁷ Shorten MFI-5, 8/7/15, VVol 2, p 117R, clauses 16.6-16.8.

⁹⁸ Shorten MFI-5, 8/7/15, Vol 2, p 117W, clause 22.9.

⁹⁹ Shorten MFI-5, 8/7/15, Vol 2, p117AZ, clauses 16.6-16.8.

¹⁰⁰ Shorten MFI-5, 8/7/15, Vol 2, p 117BB, clauses 16.15-16.17.

¹⁰¹ Shorten MFI-5, 8/7/15, Vol 2, pp 123A, 159.

on a formal vote undertaken on 21 and 22 December 2006.¹⁰² It was lodged with the Office of the Employment Advocate on 22 December 2006.¹⁰³

80. Clause 8 of the 2006 EBA regulated the classification of Cleanevent employees, including in respect of casual employees.¹⁰⁴ Clause 8.3 provided:

A casual employee is an employee engaged on an hourly basis to work an irregular and varying number of hours each week. The casual wage rates in clause 16 incorporate a casual loading of 20 per cent.

81. Clause 16 of the 2006 EBA is headed 'Rates of Pay' and sets out rates of pay applicable to permanent and casual employees of Cleanevent.¹⁰⁵ Clause 16.6 sets out the minimum hourly rates of pay for casual workers in New South Wales and Victoria.

82. Clause 16.7 then provides as follows:

Notwithstanding the provisions of clause 16.6, the minimum hourly rate for casual workers **working at events** shall be (emphasis added):

	1/12/06	1/7/07	1/7/08	1/7/09
Level	\$	\$	\$	\$
1	16.28	16.28	16.28	16.28
2	17.44	17.44	17.79	18.14
3	18.44	18.90	19.37	19.86
4	20.00	20.60	21.22	21.85

83. Clause 16.8 then provides as follows:

Notwithstanding the provisions of clause 16.6, the minimum hourly rate for casual workers working on weekends or public holidays, **but not at events**, shall be (emphasis added):

	1/12/06	1/7/07	1/7/08	1/7/09
Level	\$	\$	\$	\$
1	20.09	20.39	20.86	21.69
2	20.90	21.21	21.86	22.56
3	22.81	23.15	23.68	24.63

¹⁰² Shorten MFI-5, 8/7/15, Vol 2, p 159A; Cleanevent MFI-1, pp 8-9. The voting results were 77 for and 15 against. No votes were recorded for workers at a number of Cleanevent sites, including Bluetongue Stadium, Brisbane Cricket Ground, Homebush Tennis Centre, Melbourne Convention Centre, and Rosehill Racecourse.

¹⁰³ Shorten MFI-5, 8/7/15, Vol 2, p 125.

¹⁰⁴ SW1, 28/5/15, tab 3, p 3.

¹⁰⁵ SW1, 28/5/15, tab 3, pp 12-13.

4	24.27	24.63	25.53	26.55
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84. Clause 16.15 and following set out the rates of pay for casuals employed in States other than Victoria and New South Wales.¹⁰⁶ Clause 16.15 set out minimum rates of hourly pay for casual workers that were lower than those payable to casual workers in Victoria and New South Wales. The position was the same in respect of event rates and penalty rates.

85. Clause 16.16 then provides as follows:

Notwithstanding the provisions of clause 16.15, the minimum hourly rate for casual workers **working at events** shall be (emphasis added):

	1/12/06	1/7/07	1/7/08	1/7/09
Level	\$	\$	\$	\$
1	16.16	16.16	16.16	16.16
2	17.04	17.04	17.38	17.73
3	18.06	18.51	18.96	19.43
4	19.00	19.57	20.16	20.76

86. Clause 16.7 then provides as follows:

Notwithstanding the provisions of clause 16.15, the minimum hourly rate for casual workers working on weekends or public holidays, **but not at events**, shall be (emphasis added):

	1/12/06	1/7/07	1/7/08	1/7/09
Level	\$	\$	\$	\$
1	19.08	19.37	19.82	20.61
2	19.85	20.15	20.61	21.43
3	21.67	21.99	22.50	23.40
4	23.05	23.40	24.26	25.23

87. Clause 22.9 provides that level 2 and 3 casual employees working a minimum of 7.6 hours on a public holiday will be paid a Public Holiday Allowance of \$55.00.¹⁰⁷

88. Properly construed, the 2006 EBA had the following consequences for Cleanevent casual workers:

¹⁰⁶ SW1, 28/5/15, tab 3, pp 13-14.

¹⁰⁷ SW1, 28/5/15, tab 3, p 17.

- (a) All of the rates of pay for casuals employed in New South Wales and Victoria were higher than those set for casuals employed in other States.
- (b) The venue casual rates provided for in clause 16.6 were slightly above 120% of the hourly rate of pay for permanent employees provided for in clause 16.2, and there was provision for pay rise for these casuals.
- (c) The venue casual rates provided for in clause 16.15 were slightly above 120% of the hourly rate of pay for permanent employees provided for in clause 16.2, but there was provision for pay rise for these casuals.
- (d) Casuals working at events in all states were being paid less than the 20% loading on the permanent rate comprehended by clause 8.3, and there was no provision for pay rises for level 1 event casuals over the term of the agreement.
- (e) The weekend and public holiday rates for venue casuals in all States were well below time and a half, to which the workers would be entitled for the first two hours of work on a Saturday under the 1999 Award. The rates were far below the allowances for Sundays and public holidays under the 1999 Award.
- (f) Casuals working at events were not entitled to penalty rates for work on Saturdays or Sundays. Event casuals were entitled to an allowance for working in excess of 7.6 hours on a gazetted public holiday, but only at level 2 and 3 classification levels. The allowance breaks down to \$7.23 per hour worked over the 7.6 hours (and nothing for time exceeding 7.6 hours) which is less than time and a half for all of the event casual classification rates.

89. Annexure 1 to these submissions contains a comparison of the rates of pay to which Cleanevent casual workers would have been entitled under the 1999 Award and the rates they were entitled to under the 2006 EBA. The comparison reveals that:

- (a) Level 1 event casuals in other States were being paid at the award minimum base rate and Level 2 event casuals in other States were being paid below the award minimum base rate;

- (b) All casuals at all levels in all states were being paid below time and a half for Saturdays, Sundays and public holidays, whereas they would have been entitled to standard penalty rates under the 1999 Award;
 - (c) Level 1 and 4 event casuals were not entitled to penalty rates, or a public holiday allowance. Level 2 and 3 event casuals were entitled to a public holiday allowance after working more than 7.6 hours on a public holiday, which was lower than time and a half and well below the double time and a half entitlement under the 1999 Award.
90. Bill Shorten stated that, on the basis that the document went to a vote of the members, he was satisfied that it was appropriate for his delegate to sign the 2006 EBA.¹⁰⁸
91. Bill Shorten acknowledged that it was difficult to secure votes from event casuals because of the nature of their employment and their socio-economic status. The practice of the AWU was to ensure that delegates ascertained the attitude of the workers.¹⁰⁹ On this occasion, John Paul Blandthorn visited Cleanevent's Melbourne sites on 21 December 2006¹¹⁰ and Cleanevent prepared 'talking points' for its management to discuss with employees.¹¹¹ Six of the ten talking points related to permanent employees rather than casuals.

Workchoices

92. Had Cleanevent and the AWU not entered into the 2006 EBA, the conditions of employment of Cleanevent employees would have been determined by application of the 1999 Award for employees who fell within the classification structure of the 1999 Award.

¹⁰⁸ Bill Shorten, 8/7/15, T:57.9-15.

¹⁰⁹ Bill Shorten, 8/7/15, T:106.1-22.

¹¹⁰ Cleanevent MFI-1, 19/10/15, p 5.

¹¹¹ Cleanevent MFI-1, 19/10/15, p 7.

93. The 2006 EBA was made under Part 8 of the *Workplace Relations Act* (Cth). In other words, the Work Choices regime was in force. Therefore, the 2006 EBA was not required to pass a “no disadvantage test” as between it and the 1999 Award.
94. Accordingly, clause 39 of the 2006 EBA provided that the agreement excluded any protected conditions in an Award, including in relation to shift loadings and penalty rates.¹¹²
95. The question arises as to how an agreement in these terms was acceptable to the AWU officials who were negotiating it. Evidently, it was negotiated in a legislative climate in which the employer enjoyed a significant advantage over the employees and the unions. Additionally, Cleanevent professed to be operating in a competitive environment in which the rates provided for in the 1999 Award were likely to confer a significant disadvantage as against other operators willing to deploy contract labour.
96. Questioned about the comparison between the 1999 Award and the 2006 EBA, Bill Shorten rejected the proposition that employees would have been better off, for the following reasons:
- (a) The award rates contained in the comparison may not have been those applicable to cleaners employed within the sectors in which Cleanevent workers were employed;¹¹³
 - (b) The practical reality at the time that the 2006 EBA was negotiated was that many cleaners were employed as ‘pyramid subcontractors’ off formal employment contracts and without access to penalty rates;¹¹⁴
 - (c) The AWU had negotiated benefits for Cleanevent workers that were not available for all cleaners, such as regular pay rises and superannuation;¹¹⁵

¹¹² SW1 28/5/15, p 32.

¹¹³ Bill Shorten 8/7/15, T:81.25-35,83.2-11, 31-42.

¹¹⁴ Bill Shorten 8/7/15, T:82.4-26, 83.22-26. There is some support for this contention from as far back as 2003, when Cleanevent General Manager Bruce McNab complained of ‘issues relating to contract hire at rates so far below what is proposed in our EBA that it is becoming impossible to compete. At a recent event in the Yarra Valley (at which we were unable to win any business) all cleaners I spoke to were being paid \$10.00 per hour.’ (Shorten MFI-5, 8/7/15, Vol 2, p 358)

(d) The object of the AWU in negotiating the 2006 EBA was to ensure that employees had a steady flow of work and regular income.¹¹⁶

97. The considerations put forward by Bill Shorten echo those that arose in relation to the 2004 EBA.¹¹⁷ Again, the AWU expressed concern that the terms of the agreement were not equivalent to the 1999 Award. Again, the AWU pressed for the payment of penalty rates. Again, the EBA ultimately agreed to was less advantageous to Cleanevent employees, and in particular to casual employees, than the 1999 Award.

Engagement after execution of the 2006 EBA

98. After execution of the 2006 EBA, the AWU and Cleanevent engaged in discussions in relation to ongoing demarcation disputes with the LHMU. On 29 January 2007 Nicko Mavro, Managing Director of the Cleanevent Group emailed personnel at the Sydney Opera House in relation to the dispute. He then sent an email to John-Paul Blandthorn stating:¹¹⁸

Mate, Please look below at the email I have just sent the client at the Opera House. I think that you could help us here. If the LHMU is talking to our clients at your sites, maybe your NSW guys can do the same. The client thinks that their operations will be effected [sic] by the LHMU and are quite concerned. Can you assist? Please pass this on to Bill.

99. John-Paul Blandthorn responded the same day, stating:¹¹⁹

I will chat to Bill and explain to him the situation (we will help). Bill mentioned some time ago that Cleanevent were going to make some donation to the AWU so as they could have one organiser, rather than a number around the country. Is this still happening. I think it would help to defuse the situation with the LHMU and make sure there are no mixed messages getting around.

100. John-Paul Blandthorn said that his understanding at the time was that Cleanevent wanted to have one organiser look after their sites across the country, and they had raised the issue with Bill Shorten. His evidence was that Cleanevent 'wanted to be able

¹¹⁵ Bill Shorten 8/7/15, T:82.30-35, 84.23-26.

¹¹⁶ Bill Shorten 8/7/15, T8:4.30-39.

¹¹⁷ Save that there is no evidence that any alternative award may have been applicable to the workers covered by the 2006 EBA, or that the terms of any such award would be less favourable to employees of Cleanevent than the 1999 Award.

¹¹⁸ Shorten MFI-5, 8/7/15, Vol 2, pp 161-162.

¹¹⁹ Shorten MFI-5, 8/7/15, Vol 2, p 160.

to pay for the organiser.’¹²⁰ He does not know the quantum of the donation.¹²¹ He was not, at that stage, aware of whether arrangements pursuant to which donations were made referable to the costs of an organiser had occurred in the past.¹²²

101. Bill Shorten stated that, during the negotiations in relation to the 2006 EBA, there was a single discussion with Cleanevent about making a donation to the AWU during the negotiation of the 2006 EBA.¹²³ He described the proposal as follows:¹²⁴

Cleanevent was a national business. We'd looked at having, to the best of my recollection, one organiser, so you'd have different individuals, as I think I said in evidence this morning; you know, someone from the Queensland Branch can visit the Queensland venue of work, someone from the Sydney branch, the Sydney venue and in Melbourne, Melbourne venues. Quite often it is useful to have a single point of contact for resolving issues. What we raised or what – Cleanevent might have said, "We want one organiser", we might have raised having one organiser. What we might have asked Cleanevent for is to assist with the airline costs and duties out of the ordinary to service a national agreement. There's plenty of precedent across the union movement that you might ask the company, whose workers you're organising, to help pay the transportation costs.

102. Bill Shorten said that he did not recall whether the donation was in fact made.¹²⁵

103. Nicko Mavro responded to Mr Blandthorn's email, again on the same day, stating:¹²⁶

Thanks JP. We will definitely entertain the one organiser principal [sic] and happy for you and Ivan to come up with the details. Thanks for your prompt response regarding the Opera house, but we do need your involvement.

104. John-Paul Blandthorn responded on 30 January 2007, indicating that he would 'talk to Bill about it' later that day.¹²⁷ He does not recall whether he in fact had a conversation with Bill Shorten.¹²⁸ He does not know whether any donation was ultimately made.¹²⁹

¹²⁰ John-Paul Blandthorn, 20/10/15, T:738.5-22.

¹²¹ John-Paul Blandthorn, 20/10/15, T:738.24-25.

¹²² John-Paul Blandthorn, 20/10/15, T:739.1-17.

¹²³ Bill Shorten, 8/7/15, T:84.47.

¹²⁴ Bill Shorten, 8/7/215, T:85.4-19.

¹²⁵ Bill Shorten, 8/7/15, T:86.7.

¹²⁶ Shorten MFI-5, 8/7/15, Vol 2, p 160.

¹²⁷ Shorten MFI-5, 8/7/15, Vol 2, p 163.

¹²⁸ John-Paul Blandthorn, 20/10/15, T:741.35-37.

¹²⁹ John-Paul Blandthorn, 20/10/15, T:742.14-16.

105. On 5 February 2007, John-Paul Blanthorn sent an email to Scott Rumph of the NSW AWU, copying Nicko Mavro and Bill Shorten and asking him to talk to members and management at the Opera House.¹³⁰
106. There is no evidence that would support a finding that a donation was in fact made for the purposes identified by Bill Shorten and John-Paul Blandthorn. The evidence does support a finding that a donation was discussed, during the period in which the parties were negotiating the 2006 EBA. The evidence also supports a finding that, despite not having occurred in the context of agreement to the EBA, the proposed donation was again suggested by John-Paul Blandthorn in exchange for services that one would expect the AWU to have provided in any event.¹³¹
107. The significance of these findings is the factual similarity between what was occurring at this stage of the dealings between Cleanevent and the AWU, its earlier dealings with Thiess John Holland,¹³² and its later dealings with Cleanevent, detailed below.

F DOUGLAS SITE SERVICES

108. Steven Hunter was an employee of Cleanevent between 1996 and 2001. He held the positions of Venue Manager of the Melbourne Exhibition Centre and later the Acer Arena in Homebush.¹³³ From 2001 to 2003 he was employed by Cleanevent International in the United Kingdom.¹³⁴
109. From 2003, Mr Hunter went out on his own. He operated a company known as Douglas Site Services (**DSS**) which provided consultancy services to Cleanevent and tendered for cleaning work, initially outside of events and entertainment venues.¹³⁵

¹³⁰ Shorten MFI-5, 8/7/15, Vol 2, p 166.

¹³¹ Both because the AWU had coverage at the Sydney Opera House, and because it was in the AWU's interest to secure that coverage, by its presence at the site, in the circumstances of the demarcation dispute with the LHMU.

¹³² As to which see Chapter [insert] of Counsel Assisting's submissions.

¹³³ Steven Hunter, witness statement, 19/10/15, paras 4-5.

¹³⁴ Steven Hunter, witness statement, 19/10/15, para 7.

¹³⁵ Steven Hunter, witness statement, 19/10/15, paras 9-10.

110. By early 2006, DSS had begun bidding for cleaning work at events.¹³⁶ By that time, DSS had full time staff of between 25 and 30, full time contract staff of 20 workers and fluctuating levels of casual workers numbering between 120 to 150.¹³⁷ In about 2006 DSS had also acquired a hospitality cleaning business¹³⁸ and had obtained a cleaning contract for the Commonwealth Games.¹³⁹
111. Steven Hunter approached the AWU to seek an EBA covering all of his workers. He contacted John-Paul Blandthorn in early 2006 and negotiations commenced. On 21 February 2006, John-Paul Blandthorn sent an email to Steven Hunter attaching a copy of the Cleanevent 2004 EBA and stating that it ‘will give you some indication of the pay rates we will discuss.’¹⁴⁰
112. At that time, much of DSS’s business concerned a contract at Mt Hotham ski resort. The staff of DSS were covered by the Victorian Alpine Resorts Award 1999 (**Alpine Award**). The Alpine Award was relatively generous to casuals: it provided for a casual loading of 25% which was the base for calculation of penalty rates, a site allowance of \$2.60 per hour, and standard penalties for weekends and public holidays.¹⁴¹
113. In about early February 2006, Mr Hunter attended a meeting at the offices of the AWU. His evidence is that the meeting was attended by John-Paul Blandthorn and, briefly, Cesar Melhem and Mick Eagles.¹⁴²
114. Mr Hunter said that during the negotiation, he expressed an initial preference for using the Alpine Award as the reference award for the proposed EBA because the base rates were lower than comparative awards. His evidence was that the AWU were keen for

¹³⁶ Steven Hunter, 19/10/15, T:596.9-11.

¹³⁷ Steven Hunter, 19/10/15, T:616.31-617.24.

¹³⁸ Steven Hunter, 19/10/15, T:618.19-21.

¹³⁹ Steven Hunter, 19/10/15, T:616.45-46.

¹⁴⁰ Hunter MFI-1, 19/10/15, p 1. It was put to Mr Hunter by counsel for Mr Blandthorn that the base rates for casual workers under the Alpine Award were lower than the rates provided for in the Cleanevent 2004 EBA: Steven Hunter, 19/10/15, T:611.7-613.27. The questions put to Mr Hunter proceeded on a flawed basis, in that they ignored the provisions of clause 12.2.1 of the Alpine Award, which provided that the base rate for casuals was 1/38 of the weekly wage and the prescribed industry allowance plus a 25% loading plus the Alpine Report Site Allowance. That brought the base rate of pay for Grade 1 cleaners under the Alpine Award to \$19.16 per hour, significantly above the Cleanevent 2004 EBA rate.

¹⁴¹ Steven Hunter, witness statement, 19/10/15, paras 11-12, Hunter MFI-1, 19/10/15, p 47.

¹⁴² Steven Hunter, witness statement, 19/10/15, para 17.

DSS to adopt the rates in the Cleanevent agreement. Mr Hunter accepted this on the basis that if he were to compete with Cleanevent in relation to event cleaning contracts, he would need to be paying lower penalty rates as Cleanevent were under the 2004 EBA.¹⁴³

115. On 2 March 2006 John-Paul Blandthorn sent Steven Hunter an email, copying Mr Eagles, and attaching a draft EBA. The email suggested a meeting with Mick Eagles early the following week and stated:¹⁴⁴

I have spoken to Bill Shorten and he is keen to do a deal but is hoping you may be able to move a little closer to Cleanevent rates.

116. The draft EBA attached applied the Alpine Award as the parent award.¹⁴⁵ John-Paul Blandthorn had inserted a suggested change nominating penalty rates of time and a half and double time on Sundays.¹⁴⁶

117. Negotiations in relation to the draft EBA continued between March 2006 and early 2007.¹⁴⁷ There appears to be some uncertainty during this period as to whether the DSS EBA had been executed, as John-Paul Blandthorn emailed on more than one occasion seeking confirmation as to whether DSS was operating under the EBA.¹⁴⁸ On 5 February 2007, John-Paul Blandthorn sent an email to Steven Hunter attaching a copy of the Cleanevent 2006 EBA and stating ‘thought you may want to look before we finish ours up.’¹⁴⁹

118. On 3 December 2007, John-Paul Blandthorn sent an email to Steve Hunter, copying Cesar Melhem and attaching a substantially different proposed agreement.¹⁵⁰ The draft agreement no longer nominated a parent award. Clauses 8.3 and 16 of the Agreement reflected the equivalent clauses in the Cleanevent 2006 EBA, and the rates for permanent employees, casuals, event casuals and venue casuals on weekends or public

¹⁴³ Steven Hunter, witness statement, 19/10/15, para 18.

¹⁴⁴ Hunter MFI-1, 19/10/15, p 29.

¹⁴⁵ Hunter MFI-1, 19/10/15, p 31, clause 7.

¹⁴⁶ Hunter MFI-1, 19/10/15, p 36, clause 14.

¹⁴⁷ Steven Hunter, witness statement, 19/10/15, para 21.

¹⁴⁸ Hunter MFI-1, 19/10/15, pp 115-116.

¹⁴⁹ Hunter MFI-1, 19/10/15, p 121.

¹⁵⁰ Hunter MFI-1, 19/10/15, p 156.

holidays were identical, or very close to, the rates in the Cleanevent 2006 EBA, save that there was no provision for a public holiday allowance for event casuals.¹⁵¹

119. The covering email contained the statement:

For the AWU to agree to be a party to the Agreement we would need a guarantee of membership as discussed.

120. Steven Hunter's evidence was that in late 2007 John-Paul Blandthorn had begun asking him to guarantee a minimum number of members in order to secure agreement to the EBA. This was described as making a 'financial commitment' to the Union. Steven Webber understood that Mr Blandthorn was asking DSS to make a commitment to the number of staff that would remain members of the Union.¹⁵² Steven Hunter said that a numerical figure was not proposed by John-Paul Blandthorn, rather he sought a commitment from DSS.¹⁵³

121. Steven Hunter said that his initial response was that he thought it was the job of the union to market their services to staff, but that he was more than happy to give Mr Blandthorn access to the staff for the purpose of recruiting members.¹⁵⁴ The staff base of DSS was quite transient, and most casual employees at Mt Hotham did not stay in employment for more than one season, with the consequence that there was a high turnover of staff.¹⁵⁵ Steven Hunter said that, in response to the email, he told John-Paul Blandthorn that he could not and would not guarantee union memberships.¹⁵⁶

122. John-Paul Blandthorn places a different characterisation on the reference to 'guarantee of membership.' He stated in his oral evidence that the email was 'clumsily written.'¹⁵⁷

¹⁵¹ Hunter MFI-1, 19/10/15, pp 159, 167-170, 173.

¹⁵² Steven Hunter, 19/10/15, T:598.9-12.

¹⁵³ Steven Hunter, 19/10/15, T:598.18-20.

¹⁵⁴ Steven Hunter, witness statement, 19/10/15, para 24.

¹⁵⁵ Steven Hunter, 19/10/15, T599.20-24.

¹⁵⁶ Steven Hunter, witness statement, 19/10/15, para 26.

¹⁵⁷ John-Paul Blandthorn, 20/10/15, T:761.12.

He said that Mr Hunter's account of the conversation between them is 'a lie.'¹⁵⁸ John-Paul Blandthorn's account of the 3 December 2007 email was as follows:¹⁵⁹

What the AWU had been seeking with Douglas Site Services for a large period of time, without much success, was access to recruitment. They were not necessarily forthcoming in doing that, and to enter into an enterprise agreement with this organisation at the time, we had to have members to be able to do so. That had been made very clear.

123. It was suggested to Mr Hunter that AWU representatives could not have demanded a guarantee of membership numbers if they did not know how many staff were employed by Mr Hunter. Mr Hunter responded that the AWU knew the size of the business that DSS conducted because he told them about the contracts DSS had won and the representatives he engaged with were well versed in the cleaning industry and aware of the fluctuating employment that characterised that industry.¹⁶⁰ That explanation should be accepted. It is evident from the history of the AWU's dealings with Cleanevent that the responsible officials were familiar with the industry. That is evident also from the evidence of Messrs Blandthorn, Melhem and Shorten in relation to their dealings with Cleanevent. Further, it is consistent with the logic of events that the AWU would seek some financial guarantee of membership precisely *because* employment in the industry is transient.¹⁶¹
124. It was suggested to Mr Hunter by senior counsel for Cesar Melhem that what Mr Melhem requested was that DSS give a commitment to allow access to workers so that the AWU could try to recruit them as workers.¹⁶² Steven Hunter disagreed with this proposition.¹⁶³ He said that Mr Melham asked for a commitment of staff to become members.¹⁶⁴
125. Mr Hunter's account of the request made of him should be accepted. The contrary proposition put by Messrs Melhem and Blandthorn is inconsistent with the words used

¹⁵⁸ John-Paul Blandthorn, 20/10/15, T:762.11.

¹⁵⁹ John-Paul Blandthorn, 20/10/15, T:761.12-18.

¹⁶⁰ Steven Hunter, 19/10/15, T:623.208, 33-41,635.27-44, 636.13-40.

¹⁶¹ See, for example, Cesar Melhem's evidence in relation to the services that were provided to Cleanevent employees, whether members or non-members: Cesar Melhem, T:886.23-25, 37-46, and to like effect, John-Paul Blandthorn, T:747.42-47.

¹⁶² Steven Hunter, 19/10/15, T:633.14-20.

¹⁶³ Steven Hunter, 19/10/15, T:633.14-20.

¹⁶⁴ Steven Hunter, 19/10/15, T:633.22-37.

in Mr Blandthorn's email of 3 December 2007 and subsequent correspondence. For the reasons explained in the introductory chapter to these submissions, great weight should be given to the contemporaneous documents.

126. Steven Hunter said that at a further meeting attended by John-Paul Blandthorn and Cesar Melhem, the issue of providing a guarantee of a certain number of AWU memberships was again raised.¹⁶⁵ Steven Webber said that he told the AWU representatives that he could not guarantee membership. He said that it was suggested that DSS include an opt-out clause in the application forms provided to applicants. Steven Hunter did not remember whether he proposed the opt out clause or the AWU.¹⁶⁶ Steven Hunter said that he agreed to this on the basis that the clause was prominent, clearly described that membership was optional and stated the financial commitment for which the employee would be liable if they did not opt out.¹⁶⁷ Shortly after the meeting, Steven Webber amended the DSS job application forms to include a box with the words:

It is an option for employees to become a union member. You have the option now to opt out of membership by putting a tick in this box.

127. John-Paul Blandthorn stated that he did not remember a conversation in which an opt-out clause was discussed. He stated that he was 'not sure where [Mr Hunter's] evidence came from.'¹⁶⁸ Later, faced with further correspondence referring to the opt-out clause, John-Paul Blandthorn conceded that it was 'possible' that there were discussions to that effect.¹⁶⁹ It is respectfully submitted that the evidence arising on the face of the contemporaneous correspondence should be accepted, namely, that Mr Blandthorn, Mr Melhem and Mr Hunter discussed the inclusion of an opt-out clause as a means of attracting membership from DSS workers, and that Mr Hunter introduced an opt-out clause accordingly.¹⁷⁰

¹⁶⁵ Steven Hunter, witness statement 1/10/15, para 27.

¹⁶⁶ Steven Hunter, 19/10/15, T:598.39-46, 624.2-16.

¹⁶⁷ Steven Hunter, witness statement, 19/10/15, para 28; Steven Hunter, 19/10/15, T:599.4-8.

¹⁶⁸ John-Paul Blandthorn, 20/10/15, T:763.29-37.

¹⁶⁹ John-Paul Blandthorn, 20/10/15, T:765.20-23.

¹⁷⁰ See, in particular Hunter MFI-1, 19/10/15, p 387.

128. The DSS EBA was finalised at about this time. On 23 July 2008, Steven Hunter sent an email to employees attaching the proposed EBA and informing them that a vote will be taken on the agreement.¹⁷¹ The email stated:

A representative from the (AWU) will be available to meet with staff at the locations:

- Mt Hotham - Time and Date to be confirmed
- Prince of Wales - Time and Date to be confirmed

Following the opportunity to meet with both the AWU and DSS representatives a vote will be taken. Every employee has the option to place a vote, although it is not compulsory.

...

Employees have the right to choose to be and or not to be a member of the AWU. Once the agreement is ratified formal documentation will be forwarded to all active employees confirming the details of the agreement. Staff who do not wish to become members will need to complete and return either by email or post a section noting their intent not to become members. All employees will be covered by the agreement, regardless of membership status with the AWU.

129. The email also included contact details for John-Paul Blandthorn. The attached EBA contained some changes to the rates set out in the previous draft, but the rates remained identical or very similar to those in the Cleanevent 2006 EBA.¹⁷²

130. On 24 July 2008, John-Paul Blandthorn responded to Steven Hunter proposing a date to meet with the workers.¹⁷³ Further email correspondence ensued, during which Mr Blandthorn indicated his unavailability to meet that week.¹⁷⁴

131. It was suggested to Steven Hunter by those representing Messrs Blandthorn and Melhem that Mr Hunter never told Blandthorn of the sites at which the events cleaning business operated, and never provided access to the workers.¹⁷⁵ Mr Hunter repeatedly

¹⁷¹ Hunter MFI-1, 19/10/15, pe 230.

¹⁷² Hunter MFI-1, 19/10/15, pp 242-245.

¹⁷³ Hunter MFI-1, 19/10/15, p 299.

¹⁷⁴ Hunter MFI-1, 19/10/15, p 302.

¹⁷⁵ Mr Blandthorn suggested that Mr Hunter had given evidence that he had told Mr Blandthorn about DSS's contracts for the Commonwealth Games, which had occurred before DSS had contacted the AWU: John-Paul Blandthorn, 20/10/15, T:766.22-25. That is wrong. The 2006 Melbourne Commonwealth Games were held between 15 and 26 March 2006. The first correspondence between Mr Blandthorn and Mr Hunter was dated 21 February 2006 and referred to a meeting to take place the following day: Hunter MFI-1, 19/10/15, p 1. The matter was not put to Mr Hunter, but an inference is readily available that the pendency of the Commonwealth Games at that time would make it a likely subject of discussion at the 22 February 2006 meeting.

denied that this was the case,¹⁷⁶ and said that Mr Blandthorn attended meetings at Mt Hotham and other venues (including a meeting at the Prince of Wales Hotel in St Kilda for hospitality staff), but not at event sites.¹⁷⁷ Mr Blandthorn's evidence goes no higher than that he does not recall whether Mr Hunter told him where he could meet with the workers, and whether he met with any of them.¹⁷⁸

132. The correspondence reveals that Mr Hunter made several attempts to have Mr Blandthorn meet with his workers. The meetings were expressly referred to in the email to DSS workers above. Whether such meetings ever took place is unclear on the documents following the distribution of the proposed EBA to employees. What is clear is that several attempts were made to arrange meetings with staff, and that the principal reason for them not occurring was Mr Blandthorn's unavailability. The evidentiary position tells against Mr Blandthorn's suggestion that the references to 'guaranteed membership' were to the provision of access to prospective AWU members in the employ of DSS.

133. On 5 August 2008, John-Paul Blandthorn sent an email to Steven Hunter stating:¹⁷⁹

Just wondering if you could send the names of the people who will be attending our function on Friday, otherwise Cesar was happy for just a donation if you can't attend.

134. Steven Webber does not remember what the function was that he was invited to.¹⁸⁰ His evidence was that he had been asked by John-Paul Blandthorn to donate an amount in the region of \$10,000, being equivalent to a table of 10 at \$1,000.00 per head.¹⁸¹ John-Paul Blandthorn also said that his recollection was that various businesses were asked by the AWU to buy a table for an event.¹⁸²

135. On 6 August 2008, Steven Hunter responded stating:¹⁸³

¹⁷⁶ Steven Hunter, 19/10/15, T:620.32-35, 43-45, 622.37-41.

¹⁷⁷ Steven Hunter, 19/10/15, T:621.1-8,638.1-18.

¹⁷⁸ John-Paul Blandthorn, 20/10/15, T:771.30-32,772.1-17.

¹⁷⁹ Hunter MFI-1, 19/10/15, p 307.

¹⁸⁰ Steven Hunter, 19/10/15, T:600.24-28.

¹⁸¹ Steven Hunter, 19/10/15, T:600.43-45, 601.1-3.

¹⁸² John-Paul Blandthorn, 20/10/15, T:765.1-2

¹⁸³ Hunter MFI-1, 19/10/15, p 307.

I have left a message on your phone last week. Unfortunately we will not be able to attend this coming Friday. Niamh and Scott are both [sic] out of the country and I am packing my bags to jump on a plane as well. I will speak with Niamh about the option of making a donation to the AWU. I might suggest to Niamh that as soon as we get the award up and running that we make a donation at that point. I am hoping that with your visit to the Hotham and a visit to St Kilda that we are very close to getting it signed off.

136. The reference in the email to ‘award’ was to the enterprise agreement.¹⁸⁴ Steven Webber gave the following account of his attitude at the time of sending the email.¹⁸⁵

At that point I was playing a little bit of a standoff. We needed to get an agreement in place. I wasn't going to have my hands tied behind my back and forced to make commitments that I didn't see as fair and reasonable, but I did see that there'd been, on both sides of the fence, an amount of work, quite a considerable amount of work had gone in to getting our award to what should have been finalisation and having it ratified, and, at that point, a donation in my mind would have been in recognition for works completed.

137. John-Paul Blandthorn responded on the same day, stating:

This is the only function we will ask for tickets as it goes to the reelection of the Secretary.

Will be up there tomorrow and happy to do St Kilda at your convenience [sic].

138. On 28 October 2008 Steven Hunter sent an email to employees stating:¹⁸⁶

Staff have now been given the opportunity to meet with myself and John-Paul from the AWU to discuss any concerns and or questions which they may have had regarding the proposed agreement.

139. The email invited votes on the proposed EBA by return email. Mr Blandthorn said that he does not recall ever meeting with DSS employees, but accepted that it was possible that he did so.¹⁸⁷ It is submitted that the above email supports Mr Hunter's evidence that Mr Blandthorn did meet with DSS employees prior to voting on the agreement and the Commissioner should so find.

140. On 6 November 2006, Steven Hunter sent an email to John-Paul Blandthorn stating:¹⁸⁸

Our voting closed last night at 5pm and I am pleased to say that we have had 3 votes, all in favour of the agreement. Can you please confirm if you need copies of the emails and forward a sample of the opt out clause to be included on our application forms for new employees.

¹⁸⁴ Steven Hunter, 19/10/15, T:600.36-38.

¹⁸⁵ Steven Hunter, 19/10/15, T:601.3-12.

¹⁸⁶ Hunter MFI-1, 19/10/15, p 315.

¹⁸⁷ John-Paul Blandthorn, 20/10/15, T:764.26-28.

¹⁸⁸ Hunter MFI-1, 19/10/15, p 351.

141. Steven Hunter said that at that stage DSS was already using an opt-out clause in its application forms but he wanted to see John-Paul Blandthorn's proposed wording to ensure that it was agreeable to both parties.¹⁸⁹

142. John-Paul Blandthorn responded on the same day stating:

I have been reading the agreement and there are a couple of tidy ups that I will forward shortly that are marked up.

Cesar will also need some sort of commitment regarding membership.

143. Steven Hunter said that after receipt of this email, John-Paul Blandthorn then sent a further email to Steven Hunter, copying Cesar Melhem and stating:¹⁹⁰

I have marked-up changes to the document for you to look over.

Clause 19.4 can only be changed by increasing the overall rate or else it will fail the no-disadvantage test.

As discussed Cesar will only sign if we are guaranteed membership through some arrangement.

144. The changes to the EBA (that had, by this stage, been voted on by members) included changes to the rates of pay.¹⁹¹ Steven Hunter's understanding of the 'arrangement' referred to in this email, based on his conversation with John-Paul Blandthorn, was as follows:¹⁹²

What he was asking me to do was enter into - whether he's asking - he never directly asked me for a list of names that would marry up against a set number of memberships or agreed memberships. He was asking - from what I take from the conversation, or took from the conversation was that if - at that point he still hadn't confirmed what the rate per membership was going to be, but let's just say it was \$12 a fortnight per member, he was asking for 20 members, and do your calculation on that for an annual amount.

145. Steven Hunter said that once the employment form was distributed to employees, all of the staff had ticked to opt out of AWU membership.¹⁹³ Steven Webber said that he had

¹⁸⁹ Steven Hunter, witness statement, 19/10/15,, para 32.

¹⁹⁰ Hunter MFI-1, 19/10/15, p 353.

¹⁹¹ Hunter MFI-1, 19/10/15, pp 364-367.

¹⁹² Steven Hunter, 19/10/15, T:603.23-32.

¹⁹³ Steven Hunter, 19/10/15, T:601.42-47.

raised with the representatives of the AWU that he could not as a matter of practicality commit his workers to membership.¹⁹⁴

146. Steven Hunter responded to John-Paul Blandthorn the same day, stating:¹⁹⁵

With regard to membership, we are already using the opt out clause on our application forms. We have not nominated the rate for employee contributions. From the conversations we had with yourself and Cesar when we last met, I took it that we were to agree on a 1% of gross wage with a cap of \$12 per fortnight for all employees who do not opt out.

147. Steven Hunter said that he does not recall receiving wording for an opt-out clause, or confirmation of what the membership fee would be for DSS employees who became members of the AWU.¹⁹⁶ Steven Hunter said that, for reasons he cannot recall, the EBA was never finalised.¹⁹⁷

148. In about August 2009, DSS engaged solicitors to prepare a single-enterprise EBA.¹⁹⁸ The EBA was drafted on the basis that it would not, on its terms, pass the no-disadvantage test when compared with two State awards.¹⁹⁹ DSS submitted to Fair Work Australia that the exceptional circumstances warranting approval of the agreement in the public interest were that DSS's main competitor was Cleanevent which had an award and EBA providing for low casual rates, and without equivalent rates, DSS would not be able to compete for events.²⁰⁰

149. On 10 February 2010, Commissioner Lewin declined to approve the EBA on the basis that it did not pass the no-disadvantage test.²⁰¹ The Commissioner rejected the argument identified above, observing:

[20] The Applicant submits that because a competitor was fortunate to avail itself of the window of opportunity to apply and have approved a collective agreement against the lesser or less demanding test of approval operating between 26 March 2006 and 6 May 2007, it would

¹⁹⁴ Steven Hunter, 19/10/15, T:602.23-32.

¹⁹⁵ Hunter MFI-1, p 387.

¹⁹⁶ Steven Hunter, 19/10/15, T:605.32-42.

¹⁹⁷ Steven Hunter, witness statement, 19/10/15, para 39.

¹⁹⁸ Steven Hunter, witness statement, 19/10/15, para40, Hunter MFI-1, 19/10/15, pp 389-464.

¹⁹⁹ Steven Hunter, witness statement, 19/10/15, para41, Hunter MFI-1, 19/10/15, pp 478-479.

²⁰⁰ Hunter MFI-1, 19/10/15, pp 483, 510-511.

²⁰¹ *Douglas Labour Services Pty Ltd; re Douglas Labour Services Pty Ltd Agreement 2009* [2010] FWA 555 (Hunter MFI-1, 19/10/15, p 514).

not be contrary to the public interest to approve an agreement which fails the no-disadvantage test prescribed by the Fair Work Act 2009. The potential implication of accepting this Submission should be starkly apparent. It is difficult to see how, if adopted, such an approach should not also apply to any employer which operates in an industry in which competitor companies operate with existing agreements approved under the test which applied under the Workplace Relations Act 1996 in the period between 26 March 2006 and 6 May 2007. This would give rise to what would seem to be a new and exotic basis for the approval of enterprise agreements made during the bridging period. One which would have particular rather than general application and arise serendipitously for some employers and not for others operating in the same marketplace, depending upon what agreements were approved in the period between 26 March 2006 and 7 May 2007 and remain in operation.

[21] To introduce such a novel test of approval against what appears to be the clear and determined policy of the Parliament in the circumstances would seem to me to be contrary to a well established and considered view of the legislature of what the public interest requires in respect of the level of terms and conditions of employment to be provided by collective agreements between employers and employees, in order to be given statutory force by Federal legislation.

150. DSS was not a successful business. On 19 December 2012, it was placed into administration and was ultimately wound up.²⁰² The Administrators' report to creditors identified the reasons for the insolvency of the company as including high operating costs, including substantial employment costs.²⁰³ Steven Hunter said that DSS had paid its workers under the applicable award in the absence of an EBA and bore substantial employment costs as a result.²⁰⁴ He said that clients would approach DSS with a budget based on what they had paid in the past, and DSS would build a staff plan around the budgets presented which 'blew us out of the water' because of the award rates that were paid.²⁰⁵
151. Steven Hunter was subjected to extensive cross-examination in relation to the failure of Douglas Site Services and associated companies.²⁰⁶ The cross-examination appeared to be directed to a suggestion that the real reason for the failure of the company was that it had been unable to pay employee entitlements. This was denied by Mr Hunter who maintained that the cause of DSS's failure was due to its inability to compete while paying penalty rates.²⁰⁷ Logic supports this account: if high wage costs are causing financial pressure, it may well follow that the payment of employee entitlements might pose a challenge. That does not eliminate a root cause of the problem being challenges

²⁰² Steven Hunter, witness statement, 19/10/15, para 44.

²⁰³ Hunter MFI-1, 19/10/15, p 524.

²⁰⁴ Steven Hunter, witness statement, 19/10/15, para 45.

²⁰⁵ Steven Hunter, 19/10/15, T:610.32-43.

²⁰⁶ Steven Hunter, 19/10/15, T:596.9-11, 626-631.

²⁰⁷ Steven Hunter, 19/10/15, T:628.11-20.

in obtaining competitive and profitable work due to high wage costs when compared with another participant in the market.

152. The significance of the experience of DSS is to highlight the issues arising from the AWU's engagement with Cleanevent in the same industry. The following observations may be made:
153. *First*, it is clear that the AWU adopted a negotiating stance that proceeded on the basis that the Cleanevent 2006 EBA was an appropriate comparator. The consequence of this, in circumstances in which Steven Hunter intended to avoid paying penalty rates to his casual employees, was that the employees of DSS had no-one bargaining on their behalf that had an interest in securing the penalty rates provided for in the applicable award.
154. *Secondly*, it appears that the price for adopting an agreement in similar terms as the Cleanevent 2006 EBA was for DSS to provide a 'guarantee' of membership. The first appearance of a draft EBA in similar terms as the Cleanevent 2006 EBA was on 3 December 2007, and the issue of guaranteed membership was raised in the same email. The mechanisms by which this was proposed to be done, by way of a financial commitment on account of nominal members or by way of an opt-out clause, are the same mechanisms proposed by Messrs Melhem and Blandthorn to Cleanevent in 2010. Indeed, Cesar Melhem's evidence is that Cleanevent was using an opt-out clause in its employee application forms at that time.²⁰⁸
155. *Thirdly*, as was the case in relation to the negotiations for the Cleanevent 2006 EBA, Mr Melhem and Mr Blandthorn also sought a donation from DSS at the time that negotiations for the proposed EBA were in progress. Mr Hunter's reaction to the request is similar to the explanations of other employers dealing with Mr Melhem,²⁰⁹ namely that a donation was appropriate in view of the significant work that was being done by AWU in negotiating the EBA. There are a number of issues that arise from this approach, not the least of which is that the AWU was undertaking such work for the benefit of the members of the AWU (as well as other non-member employees bound by the EBA). For an employer to pay for such work gives rise to a real possibility that the

²⁰⁸ Cesar Melhem, 22/10/15, T:887.24-45.

²⁰⁹ See, for example, the evidence of Mr Gilhome in respect of ACI Glass, Counsel Assisting Submissions Chapter 5.

interests of the employer might gain a significance to the AWU at the expense of the interests of the workers.

156. *Fourthly*, the financial advantages that Cleanevent gained by obtaining, and maintaining in operation, the 2006 EBA is starkly apparent when one considers the consequences for DSS at being required to pay its workers in accordance with their award entitlements. That is not an excuse for the AWU supporting Cleanevent in this regard. There were other options available to the AWU, particularly after the commencement of the *Fair Work Act 2009* (Cth). For example, the AWU could have undertaken an advocacy role against venues and event promoters that contracted with cleaning companies paying employees below the award. The AWU could have assisted workers with complaints to the Fair Work Ombudsman.²¹⁰ Any of these options would have been more transparent, and would have more persuasively shown a commitment to protecting the rights of workers to fair pay without endangering their employment prospects.

G RENEWING THE 2006 EBA

157. The nominal expiry date of the 2006 EBA was 1 December 2009. As at 1 January 2010, the new industrial relations regime in the *Fair Work Act 2009* (Cth) was due to commence. This included the introduction of the National Employment Standards, the ‘better off overall test’ for approval of enterprise agreements and the Modern Awards (subject to applicable transitional provisions). There was a drastic change in the environment in which the AWU could conduct its negotiations for a new EBA after this date. In particular, it was open to the AWU to apply to the Fair Work Commission for the termination of:
- (a) The 1999 Award, pursuant to Item 5 of Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth); and
 - (b) The 2006 EBA, pursuant to item 16 of Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) applying ss 225-227 of the *Fair Work Act 2009* (Cth).

²¹⁰ Thus enlivening the Ombudsman’s powers under s 706 of the *Fair Work Act 2009* (Cth).

158. It is important to emphasise the importance to Cleanevent of keeping the 2006 EBA in place, rather than negotiating a replacement EBA. Any replacement EBA would (in the absence of the 1999 Award) have had to pass the ‘better off overall test’ under the *Fair Work Act 2009* (Cth) as against the Modern Award.²¹¹
159. This would have required amongst other things Cleanevent to pay casual workers penalty rates of up to double time and half for public holidays. As appears further below the savings to the Cleanevent business in not being required to comply with the modern award were estimated as being as in the order of \$1.6 million per year in 2010.
160. Michael Robinson agreed that it was ‘very commercially important’ to Cleanevent to keep the 2006 EBA in place and that doing so would save Cleanevent a lot.²¹²
161. In his witness statement Michael Robinson deposed as follows:
- It was very commercially important to Clean Event to maintain the rates of pay contained in the 2006 EBA, as far as possible in any renewed or renegotiated arrangement. In December 2009, the 2006 EBA reached its nominal expiry date and prior to its expiry, negotiations for a renewed EBA began. I recall that the beneficial casual pay rates and overall agreement terms were very attractive to Spotless and one of the reasons it acquired the Clean Event business in 2010.
162. In oral evidence, Michael Robinson agreed that the reason the casual rates were very attractive to Spotless was that there was a large number of casual workers working for Cleanevent; the bulk of their work was on weekends and public holidays or at night; and that this ‘army’ of casual workers was not receiving anything in the nature of penalty rates for their weekend or public holiday work, or at least penalty rates comparable to those which would have been paid pursuant to the modern award.²¹³
163. In advance of the nominal expiry date of the 2006 EBA John-Paul Blandthorn initiated discussions with Cleanevent concerning a replacement EBA. John-Paul Blandthorn was the organiser employed by AWU Vic in connection with Cleanevent. John-Paul Blandthorn reported to the then State Secretary of the AWU Vic, Cesar Melhem.²¹⁴

²¹¹ Item 18(2)(b) of Schedule 7 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

²¹² Michael Robinson, 29/5/15, T:102.7-14.

²¹³ Michael Robinson, 29/5/15, T:102.35-103.10.

²¹⁴ John-Paul Blandthorn, 3/6/15, T:426.14.

AWU Vic prepared a commencement of bargaining letter to Cleanevent on about 9 November 2009.²¹⁵

164. Various negotiations on this subject proceeded as between John-Paul Blandthorn and Steven Webber and Michael Robinson in the latter part of 2009 and early 2010. At least initially, the negotiations were directed at replacement of the existing EBA by a standalone agreement on similar terms. A draft provided by Michael Robinson to John-Paul Blandthorn on 10 October 2009 proposed no changes to the rates provided for under the 2006 EBA, but proposed deleting the Public Holiday Event Allowance payable to event casuals in clause 22.9, as well as a similar loading for permanent employees in clause 22.10.²¹⁶
165. For the reasons identified above, Cleanevent decided that it wished in its own interest to continue or 'roll over' the 2006 EBA, rather than enter into a replacement EBA.²¹⁷

Conduct of the negotiations on behalf of the AWU

166. There is no controversy surrounding the fact that the negotiations in relation to renewing or replacing the 2006 EBA were led on behalf of Cleanevent by Michael Robinson and Steven Webber.
167. On the other hand there is a good deal of controversy as to who led the negotiations on behalf of the AWU Vic. In particular, while John-Paul Blandthorn said that he had carried out many of the day to day negotiations himself he also said that at all times he kept Cesar Melhem informed and 'in the loop' as to the progress of those negotiations, including by regularly seeking instructions from Cesar Melhem as to what to do next.
168. On the other hand Cesar Melhem was at pains to emphasise that he was not personally involved in the negotiation of the replacement to the 2006 EBA, indeed he said that he

²¹⁵ Cleanevent MFI-1, 19/10/15, pp 48-49.

²¹⁶ Cleanevent MFI-1, 19/10/15, pp 14-15 at 26-28, 31.

²¹⁷ Michael Robinson, witness statement, 21/5/15, para 23.

did not even familiarise himself with the terms of the 2006 EBA. By way of example, Cesar Melhem's oral evidence included the following:²¹⁸

Q. You were personally involved, were you not in the negotiation of the MOU, certainly in 2010?

A. I wasn't directly; no, I was not.

Q. You familiarised yourself, I take it, with the content of the 2006 EBA for the purposes of the negotiations you conducted in 2010?

A. No.

Q. Not at all?

A. No.

Q. Wouldn't that have been an important thing for you to do, in the interests of your members?

A. No, the EBA is a national EBA; it is not a state based EBA, and I don't necessarily get involved in every single EBA. I've got 2000 employers, 2000 EBAs and don't expect me to get involved in every single EBA discussion.

169. It is submitted that the Commission should prefer the evidence of John-Paul Blandthorn and find that Cesar Melhem did have direct involvement in the conduct of the negotiations, in the sense that he received regular reports from, and gave regular instructions to, John-Paul Blandthorn throughout the process. He also intended the First and the Second Meetings, as set out below.

170. The reasons why it is submitted this finding would be appropriate include the following.

171. *First*, it is consistent with the contemporaneous documents. A number of relevant emails are set in full below. In essence the emails from John-Paul Blandthorn suggest that he was regularly conveying developments in the negotiations to Cesar Melhem and seeking instructions from Cesar Melhem as to what to do next. Michael Robinson also sent emails to the effect that he was seeking Cesar Melhem's position on various issues. Moreover, there is evidence that Cesar Melhem issued instructions to John-Paul Blandthorn by email, by reference to the terms of the MOU.

172. *Secondly*, this construction is also consistent with the objective logic of events. The fact is that, at this time, John-Paul Blandthorn was an organiser and not an especially

²¹⁸ Cesar Melhem, 1/6/15, T:189.1-18.

experienced one. On the other hand Cesar Melhem was highly experienced and the State Secretary. It is entirely plausible that John-Paul Blandthorn would have gone to Cesar Melhem regularly to obtain instructions and provide updates. John Paul Blandthorn's evidence is that that was his custom and practice.²¹⁹ It is unlikely that Cesar Melhem would in substance have relinquished any role in the negotiations and left matters in the hands of John-Paul Blandthorn.

173. *Thirdly*, Cesar Melhem's evidence was consistently marred by his inability to recollect with any precision the detail of what had occurred. The fact that he apparently has such a poor recollection of events mean that it is difficult for the Commission to give any weight to his evidence to the effect that he was not involved in the negotiations.

The First Meeting at Cesar Melhem's office

174. The electronic calendars of both Mr Blandthorn and Mr Melhem suggest that there were two meetings at the AWU offices between AWU officials and Cleanevent representatives.²²⁰ The first meeting in those calendars is recorded as being scheduled for 13 May 2010, with Mr Melhem, Mr Robinson and Mr Blandthorn as attendees. The second is recorded as being scheduled for 17 September 2010, with no attendees specified.
175. There was some confusion in the evidence regarding what was said at which meeting, engendered in part because the above calendars were produced by the AWU after the examination of Mr Webber, Mr Robinson and Mr Melhem.²²¹
176. On 17 May 2010 Mr Robinson sent an email to Ms Page referring to the proposed extension of the 2006 EBA by an MOU and raising the possibility of making a 'donation of \$20k to the union in some way, shape or form (tables at the AWU ball, paying our level 3 casuals membership etc)'.²²² The email is examined in further detail

²¹⁹ John-Paul Blandthorn, 20/10/15, T:745.39-47, 750.22-40.

²²⁰ Blandthorn MFI-3, 4/6/15; Blandthorn MFI-4, 4/6/15.

²²¹ Blandthorn MFI-3 and Blandthorn MFI-4, tendered 4 June 2015.

²²² Page MFI-1, 19/10/15, p 2.

below, but its terms suggest that, if a proposal to pay the AWU money was raised at the meeting of 13 May 2010, it was not in very specific terms.

177. It is, however, plain from Mr Robinson's email of 27 May 2010 to Ms Page that by that date there had been a specific proposal to pay a sum to the AWU purportedly by way of membership fees.²²³ It also plain from the same email that, at this time, the amount of the payment had not been settled but the suggested figure was \$20,000 per year, on the basis that it represented 1.2% of payroll (although, according to Mr Robinson, Mr Blandthorn had suggested that Mr Melhem 'would be happy with 1%'). The first draft of the MOU, prepared by 31 May 2010, contained a figure of \$10,000 per year.²²⁴
178. A number of witnesses gave evidence that 'at the first meeting', Mr Melhem said that he required an amount of \$25,000 to be paid. This could not be correct, at least if, as the electronic calendars suggest, that meeting occurred on 13 May 2010.
179. John-Paul Blandthorn described the seating arrangements at the 'first meeting' as follows²²⁵:

My recollection of the meeting is that there were a couple of seats at our three end of the couch, and then there was a coffee table and then his desk was there, and I was in one of the single seats and Mr Melhem was in of the single seats, and the two gentlemen were in the other two – on the couch part.

180. No one took any notes.²²⁶ In his witness statement John-Paul Blandthorn deposed that he arranged the First Meeting following a request by Mr Melhem.²²⁷ John-Paul Blandthorn said further in his witness statement that:²²⁸

To the best of my recollection, Mr Robinson explained to Mr Melhem and I why Cleanevent was seeking to enter into a Memorandum of Understanding rather than to proceed with a new EBA. Mr Melhem said to Mr Robinson and Mr Webber words to the effect that his biggest issue with Cleanevent that the AWU did not have enough members with them, that there were no industrial issues by reason of the relationship they had with the AWU and the amount of

²²³ Page MFI-1, 19/10/15, p 121.

²²⁴ SW1, 28/5/15, p 35.

²²⁵ John-Paul Blandthorn, 3/6/15, T:432.40-45.

²²⁶ Steven Webber, 28/5/15, T:17.30-40; Michael Robinson 29/5/15, T:108.30; John-Paul Blandthorn, 3/6/15, T:433.4.

²²⁷ John-Paul Blandthorn, witness statement, 1/6/15, para 12.

²²⁸ John-Paul Blandthorn, witness statement, 1/6/15, para 12.

work that I and the AWU delegates at Cleanevent put in with Cleanevent and that all this work needed to be paid for by Cleanevent.

181. John-Paul Blandthorn's evidence in connection with what was said at this meeting was slightly different in his oral evidence.²²⁹

And then Mr Melhem sort of stated to the company that it was his opinion that they got a good service out of the AWU and its delegates in helping to make sure that things run smoothly from day to day and they should look to pay some sort of service fee to the AWU for that type of work, but I can't recall what number was set.

182. John-Paul Blandthorn was asked in particular whether the words 'service fee' were used given that he had not included those words in paragraph 12 of his witness statement. His response was that.²³⁰

To the best of my recollection, I think that would have been the phrase Cesar would have used.

183. John-Paul Blandthorn said that he could not recall whether any explanation was given as to what precisely was meant by 'service fee'²³¹. He said that a figure was stated by Mr Melhem in respect of the amount that should be paid by Cleanevent but he could not recall exactly how much.²³²

184. John-Paul Blandthorn deposed that this was the first time that anyone to his knowledge had raised with Cleanevent the proposition that some sort of fee whether a service fee or otherwise would have to be paid.²³³ That evidence is not consistent with his later evidence in respect of the similar suggestion made to Cleanevent in 2006-7, and in respect of Douglas Site Services.²³⁴

185. When John-Paul Blandthorn's account of the meeting was put to Mr Melhem his evidence was in effect that he could not recollect whether these words were said or

²²⁹ John-Paul Blandthorn, 3/6/15, T:433.27-32.

²³⁰ John-Paul Blandthorn, 3/6/15, T:433.35.

²³¹ John-Paul Blandthorn, 3/6/15, T:434.7.

²³² John-Paul Blandthorn, witness statement, 1/6/15, para 12.

²³³ John-Paul Blandthorn, 3/6/15, T:435.5.

²³⁴ See sections D and E above.

not.²³⁵ Mr Melhem does, however, maintain that the characterisation of the payment was as a fee for servicing non-members.²³⁶

The service was to provide service for all Cleanevent employees who are covered by the MOU and the enterprise agreements and there was no discrimination against members, non-members, casuals, permanents, and the AWU has, particularly the Victorian Branch, put enormous resources into servicing that workplace, along with delegates.

186. Steven Webber deposed in paragraph 6 of his witness statement the following:²³⁷

At the meeting, Michael and I were told by Cesar that to get the AWU's agreement to the EBA Extension MOU, it would be necessary for Cleanevent to pay \$25,000 per annum for membership fees. The way this was put by Mr Melhem was that the AWU wanted there to be a certain number of union members amongst Cleanevent employees, and that up to \$25,000 would be paid by Cleanevent on behalf of employees that were or would become union members. I cannot now recall the precise words that were said, or the number of union members the AWU required, but this was my general understanding of the effect of what the AWU wanted.

187. It seems likely that Mr Webber is recalling the meeting that appears to have taken place on 17 September 2010. The electronic calendars of Mr Melhem and Mr Blandthorn do not record Mr Webber as an attendee at the May 2010 meeting, and, as indicated above, the contemporaneous documents make it clear that the proposal to pay \$25,000 came at a later date. John-Paul Blandthorn said that Mr Webber responded to Mr Melhem's proposal by saying 'I'm not sure I can agree to that. I need to go back and seek some advice and speak to the general manager'.²³⁸ Again, it is likely that Mr Blandthorn is recalling a later meeting, or alternatively is recalling words that were said by Mr Robinson, as Mr Robinson's email dated 17 May 2010 is consistent with the response he recalls.

188. In oral evidence Steven Webber confirmed that he had set out the gist of what he could recollect concerning what was said at the First Meeting in paragraph 6 of his witness statement.²³⁹

189. Steven Webber said that his recollection no one had raised the topic of 'service fees' at the first meeting and that he had not heard that expression before.²⁴⁰ Steven Webber

²³⁵ Cesar Melhem, 1/6/15, T:200.28-201.28.

²³⁶ Cesar Melhem, 22/10/15, T:886.38-44.

²³⁷ Steven Webber, witness statement, 28/5/15, para 6.

²³⁸ John-Paul Blandthorn, 3/6/15, T:435.19-21.

²³⁹ Steven Webber, 28/5/15, T:18.3.

said further in the oral evidence that the First Meeting was the first time that he was made aware of the possibility of making some payment by Cleanevent to the AWU.²⁴¹

190. Michael Robinson's evidence concerning this meeting was that at this meeting an 'in principle agreement' was discussed. Mr Blandthorn's evidence in his witness statement concerning 'in principle agreement' was as follows:²⁴²

As part of the EBA negotiations I reached in principle with Mr Blandthorn that in consideration for the AWU agreeing to effectively roll over the wages rates for the casual staff, Clean Event would assist the AWU in recruitment of new members from the casual staff work base by providing lists of casual employees who could become members. I also agreed with Mr Blandthorn that Cleanevent was paid for the membership dues of new casual-employee members up to a maximum cap.

191. Michael Robinson's oral evidence included the following exchange concerning what was said at the First Meeting:²⁴³

Q. And doing the best you can, what was said, as you sit here today, can you remember?

A. It was mainly around the quantum of the payment that Cleanevent would make regarding the membership dues that we were to pay to the Australian Workers' Union.

Q. What was said about that quantum?

A. I think the sticking point was the AWU wanted us to pay more money in membership dues then we wanted to pay. And as per any negotiation we discussed the points for that.

Q. How much did they want you to pay?

A. I think they wanted us to pay \$25,000 plus GST.

192. It was put to Michael Robinson that according to Steven Webber, Mr Melhem had said at the First Meeting that the AWU wanted there to be a certain number of union members amongst Cleanevent employees and that up to \$25,000 would be paid by Cleanevent on behalf of employees that were or would become union members.

193. Michael Robinson's response was as follows:²⁴⁴

²⁴⁰ Steven Webber, 28/5/15, T:18.13-18.

²⁴¹ Steven Webber, 28/5/15, T:21.45.

²⁴² Michael Robinson, witness statement, 29/5/15, para 26.

²⁴³ Michael Robinson, 29/5/15, T:108.45-109.7.

I left the meeting with that understanding. I don't recall who said what in that meeting. I certainly don't recall whether Mr Melhem said those words.

194. John- Paul Blandthorn said that the meeting concluded on fairly good terms. Everyone shook hands. Michael Robinson and Steven Webber then left Cesar Melhem's office.²⁴⁵

Internal discussion at AWU Vic following the First Meeting

195. John-Paul Blandthorn further deposed that shortly after the meeting ended he had a further discussion with Mr Melhem in which he told Cesar Melhem in effect that Cleanevent would be uncomfortable with the proposal Cesar Melhem had just put.

196. John-Paul Blandthorn deposed that the discussion between himself and Cesar Melhem proceeded as follows:²⁴⁶

Mr Melhem responded by saying that that was their bad luck and that Cleanevent needed to pay the AWU. I then said to Mr Melhem that in my experience this had never been done before and I was not confident that Cleanevent would agree. Mr Melhem then said to me that he was given (sic) me a direction and I had to ensure that Cleanevent agreed to his proposal.

197. Cesar Melhem did not recall whether he said words to the effect 'Cleanevent has to pay for this work'²⁴⁷. He suggested that Steven Webber and Michael Robinson did not leave the First Meeting saying that they needed to get authority to enter into a proposal of the kind he had floated, saying that his recollection was that an agreement in principle was reached before that meeting took place.²⁴⁸

198. Otherwise Cesar Melhem was unable to recollect whether he had had a discussion with John-Paul Blandthorn following the First Meeting in the terms described by John-Paul Blandthorn.²⁴⁹

²⁴⁴ Michael Robinson, 29/5/15, T:110.27-29.

²⁴⁵ John-Paul Blandthorn , 3/6/15, T:435.24-29.

²⁴⁶ John-Paul Blandthorn, witness statement, 1/6/15, para 13.

²⁴⁷ Cesar Melhem, 1/6/15, T:201.36.

²⁴⁸ Cesar Melhem, 1/6/15, T:201.42.

²⁴⁹ Cesar Melhem, 1/6/15, T:203.40-204.34.

Internal discussions at Cleanevent following the First Meeting

199. On 17 May 2010, Michael Robinson sent an email to Julianne Page, attaching a comparison of the 1999 Award to the proposed MOU with AWU.²⁵⁰ Julianne Page was at that time the Group General Manager for the Spotless Cleaning Division.²⁵¹ She was not herself involved in meetings with the AWU concerning the negotiations in relation to the MOU, and the email was sent to her by way of update.²⁵²
200. Ms Page was the person responsible for giving approval to the agreement that was being negotiated. She did so on the recommendation of the HR Department and after taking advice from the legal department.²⁵³
201. In his email Michael Robinson noted that the difference between the 1999 Award and the 2006 EBA was approximately \$420,000 for event casuals and about \$1.2 million for venue casuals. Robinson then said:

The union are looking for an “opt out” clause in our casual application forms. Whilst this is not illegal there is some grey area surrounding the freedom of association and whether our part would constitute a violation of this. There is also the ethical argument that we are taking advantage of poor literacy in our workforce to push our own agenda.

On the flip side of this we are using the same form and trusting the same level of literacy to provide details of workcover injuries and criminal records and while it could be argued that these are usual parts of the application process these cleaners are used to, we are not hiding the process and could certainly highlight this again during inductions and assist in the “opt out” process to balance any disadvantage the cleaner may have.

... The union are looking at \$2 per shift for casuals which if they were lucky they would get, lets say, 100 at Victoria tracks and stadiums. Multiply that \$200 by about 50 footy games and race meets and the union would be lucky to pull \$10K per annum. For a saving of \$1.5M we could make a donation of \$20K to the union in some way, shape or form (tables at the AWU ball, paying our level 3 casuals membership, etc) and this would get over the line. This deal would only be locked to the Consent Award/MOU while it stands, and after that all bets are off.

I am sure that making this “donation” in what ever [sic] form we choose would be legal but but then this becomes a question of scruples. I have run this past Amanda (cc'd) she is certainly in favour of the high road on both the above scenarios, it saves any issues with integrity. While I share Amanda's concerns for any exposure we may be opening ourselves to

²⁵⁰ Cleanevent MFI-1, 19/10/15, pp 55-56.

²⁵¹ Steven Webber, 28/5/15, T:21.4; Julianne Page, 19/10/15, T:545.30-33.

²⁵² Julianne Page, 19/10/15, T:547.10-20.

²⁵³ Julianne Page, 19/10/15, T:550.35-47.

I feel there is definitely merit in fleshing this out simply for the massive competitive advantage that we will be creating for ourselves in the market.

202. Julianne Page accepted that the email referred to the significant savings that Cleanevent would achieve by lower payment of penalty rates in accordance with the 2006 EBA when compared with the 1999 Award.²⁵⁴ That was something she was keen to achieve.²⁵⁵

203. Her evidence was that she understood the reference to a ‘donation’ to mean a proposal to pay membership for the casual employees.²⁵⁶ Julianne Page’s evidence was that she was untroubled at the time about the proposal to pay memberships for casuals. Her evidence was that Cleanevent would be helping casual employees by paying for their union membership, so that if they had any issues with membership they could go to the Union.²⁵⁷ She stated in her private hearing:²⁵⁸

...the casual workforce was changing all the time and it was hard for us to take union dues out of their pay. Because they were casuals they'd work one week, then they might not work for another six months, so that was my understanding of what the 25,000 was for.

204. She left the issue of whether the members in fact wanted to become a member of the union to the operations people.²⁵⁹

205. Additionally, Julianne Page was keen to achieve the saving outlined in the email, because part of her role involved ensuring the profitability of the Cleanevent business. She thought that a means of achieving the saving was to make the donation suggested by Mr Robinson in the email.²⁶⁰

206. John-Paul Blandthorn said that he had no recollection of there being a discussion about the possibility of an opt-out clause in casual application forms at the 13 May 2010

²⁵⁴ Julianne Page, 19/10/15, T:547.35-47, 548.1.

²⁵⁵ Julianne Page, 19/10/15, T:553.31-40.

²⁵⁶ Julianne Page, 19/10/15, T:550.19-23.

²⁵⁷ Julianne Page, 19/10/15, T:551.2-16.

²⁵⁸ Julianne Page, Private Hearing, 29/09/15, T:10.4-8.

²⁵⁹ Julianne Page, Private Hearing, 29/09/15, T:10.20-22.

²⁶⁰ Julianne Page, 19/10/15, T:553.2-13.

meeting, although he conceded that it was possible.²⁶¹ Cesar Melhem, on the other hand, accepted that there had been a discussion in relation to this subject.²⁶²

207. Cesar Melhem said that there was a discussion concerning a special membership fee of \$2 per shift for casuals, to ensure that membership was not cost prohibitive for casuals who worked only one or two shifts per week.²⁶³ John-Paul Blandthorn agreed that this issue was discussed,²⁶⁴ however, he says that this discussion did not occur until much later when AWU member contributions were being revised.²⁶⁵
208. On 27 May 2010, Michael Robinson sent an email to Steven Webber and Julianne Page.²⁶⁶ In the email he referred to a meeting with David Jenkinson, Julianne Page and Amanda Ratnam at which a further meeting with the AWU was discussed. Mr Robinson referred to Ms Ratnam's suggestion that an MOU should be drafted in advance of the meeting, and continued as follows:

Amanda felt that the terms of our payment of membership should sit within this document. The union will never agree to having any trade off for lower wages with a payment of membership in the one document. They indicated in our initial discussion on the MOU by saying "a separate agreement." It would be crazy for the union to put that down on a page and to be honest I wouldn't feel happy with it being on the same document either.

First, let's agree with the union on a price. JP phoned me this morning to discuss changing the meeting time to Tuesday and we bantered around amounts, he suggested \$20K may be too high and that he feels Cesar would go for a little less (what a great relationship). His flawed rationale though was that \$20K was about 1.2% of payroll and Cesar would be happy with 1%. Now we know that our payroll is much larger than that so I don't think we mess around with trying to save a thousand or two when we have a much bigger prize at the end. I don't want to alert them to the true payroll percentage of what we are going to offer because it may put an unnecessary sour on a negotiation we want to keep positive. So lets assume that \$20K is our resting agreement with the union.

...

Thirdly we need to work out the documentation. The reality is no matter what we sign at any time the AWU can pull this deal out from under us (Which we are pretty sure they wont [sic] if we can get the deal finalised) We need to document in the MOU that we agree to a set of pay scales and that the union agree to not terminate the consent agreement or the MOU until the MOU has expired.

²⁶¹ John-Paul Blandthorn, 20/10/15, T:743.29-43, 745.25-31.

²⁶² Cesar Melhem, 22/10/15, T:887.24-45.

²⁶³ Cesar Melhem, 22/10/15, T:888.4-13.

²⁶⁴ John-Paul Blandthorn, 20/10/15, T:746.30-42.

²⁶⁵ John-Paul Blandthorn, 20/10/15, T:747.1-5.

²⁶⁶ Cleanevent MFI-1, 19/10/15, p 175.

...

As far as documentation of the membership agreement I think we could go either way depending on our legal advice from Amanda. If we have a handshake deal, the union will be happy, there is no risk to the union that we won't pay it as they will simply terminate all privileges and send us straight to the Modern Award rates. Why would we need a document of that, I suggest that we simply stage our payments of membership so that if the MOU for some reason fell through mid year then we wouldn't have paid all the memberships for nothing. Even if we agree to pay all memberships after 6 months then we would have saved that \$20K thirty fold in wages by then. I don't care if we document that part or not.

I also suggest that we commit to a tick box for the union on our application forms and invite them to our inductions.

209. Ms Page accepted that the reference to the Union being potentially reluctant to record the payment of membership in the same document as the MOU meant that it would look bad for the Union and for Cleanevent, in the sense of there being an appearance of some form of payoff.²⁶⁷ Her understanding of the basis for the payment was that it would be made as a blanket payment to cover all casual employees, so that any employee with issues would have access to the Union.²⁶⁸ At that time, Cleanevent had approximately 1300 to 1500 casual employees.²⁶⁹ Ms Page was not aware of the manner in which the figure of 20,000 was calculated.²⁷⁰
210. As Julianne Page understood it, Cleanevent would receive in exchange the Union's agreement to the MOU.²⁷¹
211. John-Paul Blandthorn stated that he could not recall a conversation with Mr Robinson on about 27 May 2010 in which he discussed Cesar Melhem's willingness to go below a figure of \$20,000. He accepted that it was possible that such a conversation occurred and that the initial figure that was discussed was \$25,000 rather than \$20,000.²⁷²

²⁶⁷ Julianne Page, 19/10/15, T:558.11-34.

²⁶⁸ Julianne Page, 19/10/15, T:559.6-11.

²⁶⁹ Julianne Page, 19/10/15, T:559.23-24.

²⁷⁰ Julianne Page, 19/10/15, T:559.26-31.

²⁷¹ Julianne Page, 19/10/15, T:559.19-21.

²⁷² John-Paul Blandthorn, 20/10/15, T:749.3-28.

First draft of the side deal

212. On Monday 31 May 2015 Michael Robinson sent an email to Steven Webber and Julianne Page attaching a draft MOU.²⁷³ Mr Robinson's email of 31 May 2010 was in the following terms:

See the attached MOU adjusted by the legal team. Note clause 2.2 and 2.3 that tied the membership to the EBA. This cannot be our approach. These clauses need to be omitted. Please comment.

213. Michael Robinson's evidence was that he did not recall drafting the memorandum of understanding attached to his email of 31 May 2010, although he thought it was 'likely' that he did draft it.²⁷⁴ Having regard to the email of 27 May 2010 and Mr Robinson's attitude to the drafting as expressed above, it is likely that the draft attached to the email was amended by Ms Ratnam.

214. Clauses 2.2 and 2.3 of the draft MOU attached to Mr Robinson's email of 31 May 2010 provide in substance that Cleanevent would pay on behalf of the employees of Cleanevent 'who are or would become members of the AWU,' amounts described as 'union fees' up to \$10,000 for the next three financial years.

215. It would seem from the content of the 31 May 2010 email (taken with the earlier email dated 27 May 2010) that Michael Robinson had serious reservations about recording the payments suggested in the draft MOU attached to his email. Steven Webber's evidence was that he could not recall that he made any comments to Mr Robinson as requested in the email of 31 May 2010.²⁷⁵ He said that he was unable as he gave evidence to shed any light on the concerns that may have been ventilated that time about the arrangement pursuant to which Cleanevent would pay (as was suggested at 31 May 2010) \$10,000 for the next three financial years.²⁷⁶

216. John-Paul Blandthorn accepted that he indicated that the AWU did not wish the arrangement in respect of membership and the MOU to be recorded in the one

²⁷³ SW1, 28/5/15, tab 3, p 34.

²⁷⁴ Michael Robinson, 29/5/15, T:113.36.

²⁷⁵ Steven Webber, 28/5/15, T:22.30.

²⁷⁶ Steven Webber, 28/5/15, T:23.13.

document.²⁷⁷ His reasoning was that the MOU was to govern the employment terms of the employees.²⁷⁸ He did not accept, but would not demur, from the proposition that a reason for this suggestion was that it could be seen as a trade-off for the low wages provided for in the MOU.²⁷⁹

217. Cesar Melhem said that he did not recall whether there was any discussion about recording the side deal separately to the MOU. He said that he did not really care how the agreement was recorded, and ‘a handshake would do the job.’²⁸⁰

August correspondence

218. The next email produced to the Royal Commission by either Cleanevent or the AWU Vic relating to these negotiations was dated 19 August 2010.²⁸¹ Steven Webber’s evidence was that he would ‘assume’ the negotiations were continuing between May and August that some questions may have been raised by email but he did not know whether there were further emails travelling between the AWU and Cleanevent, or within Cleanevent, relevant to this issue during the period May to August 2010.²⁸²

219. When the gap in the documentation produced to the Commission for the period March – August 2010 was pointed out to Michael Robinson in his oral examination he stated:²⁸³

I understand that the negotiations didn’t cease for any large period of time, so if there were emails – it’s likely there would have been emails generated throughout the whole negotiation process, so I’m not sure as to why there is a gap then.

220. Whether the production is incomplete or not, it is at least clear that on 19 August 2010 Michael Robinson sent an email to John-Paul Blandthorn with a copy to Steven Webber under the subject heading ‘EBA Changes’.²⁸⁴ Michael Robinson’s email of 19 August

²⁷⁷ John-Paul Blandthorn, 20/10/15, T:748.9-12.

²⁷⁸ John-Paul Blandthorn, 20/10/15, T:748.14-20.

²⁷⁹ John-Paul Blandthorn, 20/10/15, T:748.14-749.

²⁸⁰ Cesar Melhem, T:887.1-22.

²⁸¹ SW1, 28/5/15, tab 3, p 39.

²⁸² Steven Webber, 28/5/15, T:23.30-24.4.

²⁸³ Michael Robinson, 29/5/15, T:118.14-18.

²⁸⁴ SW1, 28/5/15, tab 3, p 39.

2010 notes that Cleanevent accepts certain changes to what was presumably a draft memorandum of understanding under discussion at that time. Michael Robinson's email of 19 August 2010 concludes:

I trust these adjustments find you favourably. I think we are getting close to finalising this document.

221. On 31 August 2010 John-Paul Blandthorn sent an email in response to Michael Robinson, with a copy to Steven Webber.²⁸⁵ Jean- Paul Blandthorn's response was as follows:

This seems fine.

Cesar would like a letter or email from Cleanevent stating that it is happy to pay a contribution to the AWU if you're ok with that?

Do we need to meet to wrap this up?

Probably best if I bring Cesar as well.

222. Cesar Melhem's evidence was that it was possible – although he also said 'I don't quite remember' – that he told John-Paul Blandthorn that he wanted a letter or email from Cleanevent stating it was happy to pay a contribution.²⁸⁶

223. The following day, 1 September 2010, Michael Robinson responded by email as follows:

I will get the letter to you, and then if you are happy with that we will come over and sign it off.

224. A short time later John-Paul Blandthorn sent an email back to Michael Robinson stating:²⁸⁷

Sounds good.

225. Later, on 1 September 2010 Michael Robinson sent a further email to John-Paul Blandthorn with a copy to Steven Webber, this time with the subject heading reading

²⁸⁵ SW1, 28/5/15, tab 3, p 38.

²⁸⁶ Cesar Melhem, 1/6/15, T:26.

²⁸⁷ SW1, 28/5/15, tab 3, p 38.

'Membership Contributions'.²⁸⁸ Michael Robinson's email of 1 September 2010 read as follows:

I thought Cesar might like this membership contribution drafted as an MOU also. Let me know if this is acceptable or if you think changes are required (This is what I understood was agreed to by both parties). It will be good to set this part of the relationship out formally so that each party understands the process.

226. Michael Robinson's email of 1 September 2010 at 1.56pm had attached a draft memorandum of understanding.²⁸⁹ This memorandum of understanding was in similar terms to that which was that sent under cover of Michael Robinson's email of 31 May 2010 (see above), except that clause 2.2 now refers to an amount of \$20,000 rather than \$10,000. It is somewhat unclear why Michael Robinson's position has changed from that which articulated in his email of 31 May 2010, namely that the side deal could not be recorded in the MOU.

227. Steven Webber said that he was not involved in any discussions concerning the increase in the amount payable from \$10,000 to \$20,000.²⁹⁰

228. On 2 September 2010 John-Paul Blandthorn sent an email in response in the following terms:²⁹¹

I think this is too formal and we should steer clear of an MOU or deed as such.

Cesar is just looking for an undertaking that Cleanevent will contribute the money each year as discussed from year to year by us.

229. Cesar Melhem said it was possible but he did not recall whether John-Paul Blandthorn had showed him the draft letter. However he denied that he had said words 'I'm just looking for an undertaking', giving evidence as follows: 'no, I don't recall I've said that, and I wouldn't say that'.²⁹²

230. A minute later at 2.13pm on 2 September 2010, Michael Robinson responded by email to John-Paul Blandthorn with a copy to Steven Webber stating: 'understood, will

²⁸⁸ SW1, 28/5/15, tab 4, p 41.

²⁸⁹ SW1, 28/5/15, tab 4, page 43.

²⁹⁰ Steven Webber, 28/5/15, T:27.3.

²⁹¹ SW1, 28/5/15, tab 4, p 41.

²⁹² Cesar Melhem, 1/6/15, T:207.4.

redraft'.²⁹³ At 3.30pm on 2 September 2010 John-Paul Blandthorn sent an email back stating simply 'cheers'.²⁹⁴ Steven Webber had no recollection of whether he had any discussions with Mr Robinson in relation to these issues at the time.²⁹⁵

First draft of the letter

231. As noted above John-Paul Blandthorn had communicated to Michael Robinson that the AWU wished to 'steer clear' of an MOU or deed and that Cesar was just looking for an undertaking for annual contributions from Cleanevent.

232. Michael Robinson's attempt to produce a less formal version of the agreement is contained in an email he sent on Monday, 6 September 2010 at 3.32pm to John-Paul Blandthorn with a copy to Steven Webber under the subject heading 'email to Cesar'.²⁹⁶

233. Michael Robinson email of 6 September 2010 began with the following introductory words:

Just looking for your thoughts on this letter. Does this reflect your understanding of our agreement? If you think it is fine I'll wack [sic] it on letterhead or send it straight to Cesar and then we can meet to finalise.

234. The email went on to set out the text of what would become on due course the letter dated 13 October 2010 which produced in writing the side deal as between the AWU and Cleanevent. Again, Steven Webber's evidence was that he could not recollect having any discussions with either Mr Robinson or Mr Blandthorn concerning the draft letter or the changes which were in due course suggested by John-Paul Blandthorn.²⁹⁷

²⁹³ SW1, 28/5/15, tab 4, p 41.

²⁹⁴ SW1, 28/5/15, tab 4, p 41.

²⁹⁵ Steven Webber, 28/5/15, T:27.22.

²⁹⁶ SW1, 28/5/15, tab 5, p 46.

²⁹⁷ Steven Webber, 28/5/15, T:28.45.

235. John-Paul Blandthorn was asked in evidence if he got instructions from Cesar Melhem on the form of letter contained within Michael Robinson's email and he replied that that would have been his practice.²⁹⁸
236. The introductory words of Michael Robinson's email are significant. Michael Robinson is asking for John-Paul Blandthorn's thoughts and asked him in particular whether the version of the letter reflected his understanding of the agreement. It is plain that both sides had turned their mind to the question and endeavoured to record in writing the substance of what had been agreed between them at the First Meeting in early May 2010.
237. In circumstances in which some five years have passed since the First Meeting, contemporaneous written records of this kind, in which both sides to the negotiations endeavoured carefully to capture the substance of what had been agreed, should carry more weight than attempts by witnesses to recollect oral statements made at the meeting.
238. The draft prepared on 6 September 2010 was in the following terms:

Cesar,

I'm writing to you regarding the implementation of new pay scales and the continuation of the terms and conditions as prescribed in the Cleanevent Pty Ltd AWU Agreement 2006 (Cleanevent EBA) and the agreement by Cleanevent to pay membership fees on behalf of some employees who wish to join the AWU.

While the MOU is in operation Cleanevent will pay, on behalf of employees of Cleanevent who are or become members of the AWU, the employees' union fees up to \$20,000 for each financial year up to 20 June 2013 (This approximately represents 1% of pay roll). Payments will be made by Cleanevent biannually (December and June) to the AWU, and Cleanevent will provide a list of names that the union fees would be paid for. ~~on receipt of a list of Cleanevent employees and the associated membership fees that Cleanevent are being requested to pay.~~

During the period of operation of the MOU it is understood that the AWU will not commence or take any step which may result in the commencement of enterprise bargaining under the *Fair Work Act 2009*; or seek to terminate (or support or encourage the termination of) the Cleanevent EBA or the aforementioned MOU.

Cleanevent look forward to continuing the many years of positive association with the AWU.

239. At least two observations should be made concerning the draft agreement contained in Michael Robinson's email of 6 September 2010. First, the effect of the deletion of the

²⁹⁸ John-Paul Blandthorn, 3/6/15, T:447.2.

words in 'strikethrough' above are that Cleanevent would provide the list of names of employees in respect of whom union fees would be paid.

240. Secondly, the amount of annual fees suggested in this version of the letter was \$20,000.

241. On Tuesday, 7 September 2010 at 11.56am John-Paul Blandthorn sent an email to Michael Robinson stating:

I would make the following change that I have highlighted.

242. The change which John-Paul Blandthorn seems to have made was the deletion of the words in 'strikethrough' in the above quote.

Steven Webber seeks approval to sign off

243. On 12 September 2010, Michael Robinson sent an email to John-Paul Blandthorn, stating:²⁹⁹

I have the letter and MOU ready, just need a time and place to meet with Cesar and yourself to sign this off and then work out the back pay to the permanent staff members.

244. That email was forwarded to Cesar Melhem on 14 September 2010.³⁰⁰

245. On Wednesday 15 September 2010 Michael Robinson sent an email to John-Paul Blandthorn with the following words:³⁰¹

Please find attached the MOU and pay scales as agreed below and the email to Cesar regarding the contribution of membership fees.

246. The text of Michael Robinson's email of 15 September 2010 included the email in respect of membership contribution, the first version of which had been sent in his email of 6 September 2010. The second paragraph of the text of that draft email was as follows:³⁰²

²⁹⁹ Cleanevent MFI-1, 19/10/15, p 191.

³⁰⁰ Cleanevent MFI-1, 19/10/15, p 193.

³⁰¹ SW1, 28/5/15, tab 6, p 48.

³⁰² SW1, 28/5/15, tab 6, p 48.

While the MOU is in operation, Cleanevent will pay, on behalf of employees of Cleanevent who are or become members of the AWU, the employees' union fees up to \$20,000 for financial year up to June 2013. Payments will be made by Cleanevent biannually (December and June) to the AWU, and Cleanevent will provide a list of names that the union fees will be paid for.

247. As appears from the introductory words set out above, Michael Robinson's email of Wednesday 15 September 2010 also included a draft of the memorandum of understanding which was ultimately agreed in November 2010. Relevant provisions of the memorandum of understanding are set out further below.

248. On 15 September 2015, John Paul Blandthorn forwarded the email from Michael Robinson containing the draft of the side letter to Cesar Melhem, with the message 'HERE IT IS.'³⁰³ Despite the email having been forwarded to him, Cesar Melhem maintained that he did not recall seeking the letter.³⁰⁴

249. After sending his email to John-Paul Blandthorn at 1.37pm on 15 September 2010 as set out above, Michael Robinson at 1.41pm on Wednesday 15 September 2010 forwarded his email to Steven Webber with the words:³⁰⁵

I sent this to JP. I have a copy on my desk for you to sign when you get back in.

250. On Wednesday 15 September 2010 at 2.30pm Steven Webber sent an email to Julianne Page stating:³⁰⁶

Michael and myself are meeting with the union on Friday to close our negotiation on the EBA.

Are you OK with me signing this off?

251. Steven Webber's email to Julianne Page included a draft of the memorandum of understanding ultimately signed in October 2010.

252. Steven Webber in due course signed off on the memorandum of understanding, as appears further below. However his evidence was that he needed approval from Julianne Page before he could execute the memorandum of understanding:³⁰⁷

³⁰³ Cleanevent MFI-1, 19/10/15, p 194.

³⁰⁴ Cesar Melhem, 22/10/15, T:891.44-46.

³⁰⁵ SW1, 28/5/15, tab 6, p 48.

³⁰⁶ SW1, 28/5/15, tab 7, p 55

- Q. Did you get signoff for paying the \$20,000 each year from Ms Page?
- A. I can't recall in that exact letter there, but obviously, eventually, there was sign off, yes.
- Q. When you say 'sign off', did you get something in writing or did she just do it orally?
- A. From my – yes it must have been orally.
- Q. When you say it 'must have been', do you have no memory one way or the other?
- A. Well, no, and I can't find any record of it in a written sense.
- Q. You have looked for that record have you?
- A. Yes.
- Q. Did she, likewise, give you authority to sign off on the draft MOU at that time?
- A. I would say yes or I wouldn't have done it, otherwise.

253. Ms Page, although she could not recall actually having done so, accepted that she would have given Mr Webber authority to sign off on the MOU.³⁰⁸ Her evidence was that she understood that the final arrangement involved an agreement by Cleanevent to pay \$25,000 to the Union and that this had been recorded in a separate document to the MOU.³⁰⁹ She does not separately recall approving the side letter.³¹⁰

The Second Meeting in Cesar Melhem's office and finalising the MOU

254. On 19 September 2010 a second meeting took place in Cesar Melhem's office attended by Cesar Melhem, John-Paul Blandthorn, Steven Webber and Michael Robinson.

255. As noted above, the arrangements contemplated by the MOU were intended to have national operation. It was therefore necessary for the MOU to be approved by the AWU's National Office. On 21 September 2010 John-Paul Blandthorn emailed Zoe Angus, a Legal Officer for the AWU, copying Cesar Melhem, as follows:³¹¹

³⁰⁷ Steven Webber, 28/5/15, T:31.10-29.

³⁰⁸ Julianne Page, Private Hearing 29/09/15, T:19.6-8.

³⁰⁹ Julianne Page, 19/10/15, T:562.20-35.

³¹⁰ Julianne Page, Private Hearing, 29/09/215, T:21.1.

³¹¹ Zoe Angus, witness statement, 20/10/15, Annexure 1; Cleanevent MFI-1, 19/10/15, pp 202-210.

Cesar and I have been negotiating with Cleanevent on their new agreement and the following difficulties have presented:

1. Cleanevent has their own award called: Cleaning Industry AWU/LHMU Cleanevent Pty Ltd Award 1999.
2. If Cleanevent was forced to do a new agreement then they would use their old award for measurement purposes.
3. There is little negotiating power due to the high nature of casuals in the industry.
4. If industrial action was taken by the permanent staff then there is a high likelihood of casuals replacing them.
5. Industrial action would present severe economic difficulties for members based on their low wages.

We have come up with a MOU and new pay scales that members are very happy with in Victoria and around Australia (according to our contacts).

However, Cesar has told the company he is not willing to recommend the deal to National Office unless there is a preamble that includes the following things:

1. The MOU is an extension of the current enterprise agreement and that it will continue to operate.
2. That all current conditions remain unless what is in the MOU is more beneficial.
3. The parties to the agreement are the AWU and Cleanevent.
4. That re-negotiation of the current agreement must begin no later than 1 January 2013.
5. That the future agreement will be tested against the new modern cleaning award.

What I am hoping is that you can have a look at the MOU we have been working on and perhaps do a preamble making sure the above matters are included? If that is ok?

256. Ms Angus gave evidence that she could not recall any other instances in which she encountered an MOU intended to extend the operation of the MOU.³¹² However, she later accepted the suggestion of Counsel for Mr Melhem that an extension of an EBA was 'not uncommon.'³¹³ She presumes that she turned her mind to any issues that might be associated with that procedure at the time of receipt of the email.³¹⁴

257. Cesar Melhem responded later on 21 September 2010 as follows:³¹⁵

³¹² Zoe Angus, 20/10/15, T:675.35-47.

³¹³ Zoe Angus, 20/10/15, T:689.17-23.

³¹⁴ Zoe Angus, 20/10/15, T:676.2-5

³¹⁵ Zoe Angus, witness statement, 20/10/15, Annexure 2, Cleanevent MFI-1, 19/10/15, p 211.

The overtime rate for permanent should be time and a half and not the casual rate, that's what we agreed on in my office.

258. An exchange followed between Cesar Melhem and John-Paul Blandthorn over the proper definition of overtime for permanent workers.³¹⁶
259. Zoe Angus responded on 27 September 2010 attaching a redrafted MOU.³¹⁷ Her evidence is that, at the time that she received the email from John-Paul Blandthorn, she did not know of any particular circumstance at Cleanevent. She noted that the operation of the 2006 EBA was to be extended, but with wage increases and some conditions during the extended period of operation.³¹⁸ However, Zoe Angus said in her email dated 27 September 2010: 'haven't even looked at the attached rates you sent.'³¹⁹ She confirmed in oral evidence that she did not, at that time, undertake any comparison between the rates in the proposed agreement and the applicable award.³²⁰ The draft MOU prepared by Zoe Angus included, consistently with John-Paul Blandthorn's request, a new clause 2.6 and 3 as follows:

- 2.6. It is agreed that the effect of this MOU is to continue the operation of the Cleanevent Agreement subject to the operation of any provision more beneficial to the relevant employees arising by virtue of this MOU.

DURATION OF MEMORANDUM OF UNDERSTANDING

- 3.1 This MOU shall operate and have full effect from 1 July 2010 until 1 July 2013.
- 3.2 The parties agree to commence negotiations for a replacement Cleanevent Agreement no later than 1 January 2013.
- 3.3 The parties agree that in the event that approval is sought from FWA for a replacement Cleanevent Agreement, the appropriate reference instrument for the purpose of the FWA better off overall test is the Cleaning Services Award 2010.
260. John-Paul Blandthorn then forwarded the email to Cesar Melhem stating:³²¹

Zoe has done a clean up of the agreement to reflect what was spoken about with Cleanevent.

I have had a look and it looks to include everything from my notes.

³¹⁶ Cleanevent MFI-1, 19/10/15, pp 213-219.

³¹⁷ Zoe Angus, witness statement, 20/10/15, Annexure 3; Cleanevent MFI-1, 19/10/15, pp 224-228.

³¹⁸ Zoe Angus, witness statement, 20/10/15, para 25.

³¹⁹ Zoe Angus, witness statement, 20/10/15, Annexure 3; Cleanevent MFI-1, 19/10/15, p 224.

³²⁰ Zoe Angus, 20/10/15, T:677.2-5.

³²¹ Cleanevent MFI-1, 19/10/15, p 229.

If you are happy would you like me to prepare documents for National Office to sign?

261. On Tuesday 5 October 2010 John-Paul Blandthorn sent an email to Michael Robinson and Steven Webber attaching the draft memorandum of understanding and the proposed letter to Cesar Melhem (now on letterhead).³²²

262. John-Paul Blandthorn's email of 5 October 2010 read as follows:

Attach the two documents.

If you are happy Cesar will send to National Office for signing.

263. It is clear that the draft letter to Cesar Melhem did not need to be sent to the National Office 'for signing'; the only proposed signatory of the draft letter was Michael Robinson.³²³ Nonetheless, the terms of Mr Blandthorn's email suggest that, at that time, he comprehended that the side letter would be provided to the National Office.

264. On Friday, 8 October 2010 at 11.51am Michael Robinson sent an email to John-Paul Blandthorn with a copy to Steven Webber, responding to Jean- Paul Blandthorn's email of 5 October 2010.³²⁴

265. Michael Robinson's email raised three questions or issues concerning the draft documentation, in relation to clauses 2.6 and 3.3, and the proposed fee of \$25,000. In relation to the last point Michael Robinson's email of 8 October 2010 stated as follows:

For the purposes of signing off this document we need to keep the fee at \$20k because this is what we have gained signoff for. It is outside our authority limits to approve anything higher at this particular point though you have SW's word that upon winning an additional contract of some significance we will meet with you and discuss the amount again. We will certainly be on the front foot with this discussion or we can delay this process further with the Spotless bureaucracy and request an increase. Thoughts?

266. On Friday 8 October 2010 at 3.37pm John-Paul Blandthorn sent an email in response to Michael Robinson.³²⁵ In his email John-Paul Blandthorn provides some information concerning the operation of clause 2.6 and states that he has changed the wording of clause 3.3. He also states:

³²² SW1, 28/5/15, p 62.

³²³ SW1, 28/5/15, p 69.

³²⁴ SW1, 28/5/15, p 71.

³²⁵ SW1, 28/5/15, p 71.

Cesar is keen on the \$25K I would have to get his approval to go back to \$20K.

267. Sixteen minutes later, at 3.53pm on Friday 8 October 2010 Michael Robinson sent an email to John-Paul Blandthorn on the following terms:³²⁶

Thanks for that.

I'll work on getting the fee to \$25K if we can look at 3.3 again. I am just concerned that, as happened with the consent agreement, by signing this I may preclude Cleanevent from a competitive advantage that I am not aware of. I understand that the consent will probably not be in existence by the time we renegotiate and the modern award will probably be the referenced document at that time but in absence of sending this back past our legal team I would not like to box us into that without allowing the business to explore other options. Can you move on this so I don't have to involve legal?

268. Eight minutes later, at 4.01pm on Friday 8 October 2011 John-Paul Blandthorn responded to this email in the following terms:³²⁷

The beauty of a MOU is that it is not enforceable.

Cesar is pretty keen in putting something in their [sic] but I understand if you need to run it past your legal department.

269. Steven Webber's evidence was that he could not recollect any discussions whether or not the MOU was enforceable and that he himself had given no thought as to whether it was, as he put it 'legal or illegal or enforceable or unenforceable.'³²⁸

270. At 4.32pm on Friday 8 October 2010 Michael Robinson responded to John-Paul Blandthorn's email as follows:³²⁹

The issue that I have here is twofold.

1. It is my understanding that Cleanevent was bought under certain warranties that included governing industrial instruments. When I take this to legal I'm sure that a response to that effect will prevent a clause like this being agreed to.
2. The appropriate reference agreement cannot be 'agreed to' it must be one that applies by law. The commission will make that determination based on both our submissions depending on the business and industrial environment at the time.

Can you please run this past Cesar, I am happy to come down and discuss the position and the reasoning behind it with him if he so wishes.

³²⁶ SWI, 28/5/15, p 71.

³²⁷ SWI, 28/5/15, p 70.

³²⁸ Steven Webber, 28/5/15, T:35.24.

³²⁹ SW1, 28/5/15, p 70.

271. At 5.43pm on Friday 8 October 2010 John-Paul Blandthorn responded to Michael Robinson's email stating:³³⁰

I will run it past Cesar and get back to you.

272. On Monday, 11 October 2010 at 12.27pm John-Paul Blandthorn sent an email to Michael Robinson stating in respect of clause 3.3:³³¹

What if we shifted that clause or something similar into the letter.

273. At 3.10pm on Monday 11 October 2010 Michael Robinson responded to John-Paul Blandthorn's email as follows:³³²

I think I would be in the same boat JP. I can't make a representation that would break the terms of the sale or contract that would have to come from the Group MD. Since it is something that cannot be agreed to anyway in an MOU we can simply leave this clause out or state the reference document be determined by the commission at that time if there is any dispute? I am sure there won't be an issue at the time but it is what I can put to paper now that it (sic) the only issues.

Execution of the MOU and side letter by Cleanevent

274. On Wednesday 13 October 2010 at 9.05am John-Paul Blandthorn sent an email to Michael Robinson attaching the draft memorandum of understanding and the letter to Cesar Melhem from senior Cleanevent and stating as follows:³³³

Attached are final documents.

1. We have removed the reference to any Modern Award.
2. The \$25,000 needs to remain.
3. This is as far as the AWU are prepared to move from the attached documents.

I am very keen to meet with members on Thursday or Friday to do a vote for approval because I'll be away for the next two weeks.

If you could let me know if Cleanevent are happy to proceed that would be appreciated.

³³⁰ SW1, 28/5/15, p 70.

³³¹ SW1, 28/5/15, p 73.

³³² SWI, 28/5/15, p 73.

³³³ SWI, 28/5/15, p 73.

275. Consistently with paragraph numbered '1' in the above email, the version of the MOU attached to Jean- Paul Blandthorn's email of 13 October 2010 has deleted paragraph 3.3.
276. The draft letter to Cesar Melhem contained in the email makes reference to payment of a fee of \$25,000. The draft letter also reverts to the original language (i.e, the second paragraph of the draft letter does not contain the words in strikethrough which were apparently inserted by John-Paul Blandthorn in or at the time of his sending his email of 7 September 2010 as set out above). In other words paragraph 2 of the draft letter sent under cover of the email of Wednesday 13 October 2010 read as follows:³³⁴
- While the MOU is in operation, Cleanevent will pay, on behalf of the employees of Cleanevent who are or becoming members of the AWU, the employees' union fees up to \$25,000 for each financial year up to 30 June 2013. Payments will be made by Cleanevent biannually (December and June) to the AWU on receipt of a list of Cleanevent employees and the associated membership fees that Cleanevent are being requested to pay.
277. Cleanevent, through Steven Webber executed the memorandum of understanding sent under cover of John-Paul Blandthorn's email of 13 October 2010 on the same day.³³⁵
278. Michael Robinson sent an email to John-Paul Blandthorn at 11.45 am on 13 October 2010 attaching the signed MOU and the side letter signed by Michael Robinson.³³⁶
279. John-Paul Blandthorn's email of 13 October 2010 at 9.05am suggested that he would be meeting with members on either 14 or 15 October 2010. Michael Robinson's email dated 13 October 2010 likewise referred to a meeting with employees. Cesar Melhem deposed that he did not know 'specifically' whether a meeting with members took place but he assumed that a meeting took place.³³⁷
280. Steven Webber was unsure as to whether the MOU was authorised or approved by employees by Cleanevent, although he said also 'I would say it would have been put through the delegates.'³³⁸ Steven Webber himself did not take any steps himself to notify members of the AWU, or for that matter Cleanevent's employees generally, about the

³³⁴ SW1, 28/5/15, p 83.

³³⁵ SW1, 28/5/15, p 88.

³³⁶ Cleanevent MFI-1, 19/10/15, p 234.

³³⁷ Cesar Melhem, 1/6/15, T:216.7.

³³⁸ Steven Webber, 28/5/15, T:41.46.

arrangements contained in the letter of 13 October 2010.³³⁹ Julianne Page does not recall whether the Cleanevent workers were advised of the existence of the side deal. She said that advising the cleaners would be an operational or HR issue.³⁴⁰

281. It was the evidence of the Cleanevent workers that appeared before the Commission that they were not aware of any arrangement pursuant to which Cleanevent paid money on their behalf for union membership fees,³⁴¹ or that the MOU extended the operation of the 2006 EBA.³⁴² Julianne Page accepted that, looking back, Cleanevent should have informed the workers about the side deal, because its effect in her mind was that ‘we had signed them up’.³⁴³ It follows, from that acceptance, that she took no steps to ensure that the casual workers were made aware that they were entitled to access the services of the Union following the execution of the side letter.
282. The evidence is equivocal as to whether employees of Cleanevent were advised of the existence of the MOU or its terms. Having regard to the evidence of several Cleanevent employees to the effect that they knew nothing about it, it is submitted that the Commissioner should find that not all employees were made aware of the MOU.

Execution of the MOU by AWU National Office

283. The MOU regulated all Cleanevent employees regardless of which state they were in. Accordingly as discussed above it required signoff by the National Office. Zoe Angus gave evidence that where an EBA negotiated by a State branch of the AWU had national or interstate coverage, the usual practice was for the National Office to be notified at the

³³⁹ Steven Webber, 28/5/15, T:42.10-22.

³⁴⁰ Julianne Page, 19/10/15, T:563.26-32.

³⁴¹ Ken Holland, witness statement, 23/05/15, para 12; Robyn Cubban, witness statement, 26/5/15, para 8; Brian Miles, witness statement, 22/5/15, para 9; Marcin Pawlowski, witness statement, 26/5/15, para 11, Graeme Heatley, witness statement, 20/5/15, para12; Nayan Debnath, witness statement, 20/5/15, para 7; Colleen Ellington, witness statement, 29/5/15, para12; Shalee-Nicole Allamedine, witness statement, 29/5/15, para 12.

³⁴² Ken Holland, witness statement, 23/05/15, para 9; Robyn Cubban, witness statement, 26/5/215, para 17; Nayan Debnath, witness statement, 20/5/15, para 6; Colleen Ellington, witness statement, 29/5/15, para 11; Shalee-Nicole Allamedine, witness statement, 29/5/15, paras 10-11.

³⁴³ Julianne Page, 19/10/15, T:564.1-29.

time of commencement of negotiations.³⁴⁴ John-Paul Blandthorn described the process pursuant to which this sign off occurred in the following terms:³⁴⁵

My understanding of the process, the normal process, was that the organiser would negotiate an agreement; they would then have to provide a checklist, which included a tick-off from the industrial office in Victoria. That would then be sent to the Secretary. If the Secretary was happy it would be forwarded to the National Office. The National Office would then send that around to – the agreement around to the States. The States would be asked to provide comment and then my understanding was that the National Office, whether it was through an organiser or the industrial officers, would then prepare a document for the National Secretary to sign based on all that feedback.

284. John-Paul Blandthorn gave evidence that he produced various analyses and that there were communications between AWU Vic and the AWU National Office.
285. Cesar Melhem said that it was possible that some communication travelled from the Victorian Branch to the National Office in writing concerning the MOU but he did not remember one way or the other.³⁴⁶ Cesar Melhem could also not recall whether any information about the ‘side deal’ pursuant to which Cleanevent was proposing to pay \$25,000 a year to the AWU was communicated to the National Office of the AWU.³⁴⁷
286. The correspondence broadly confirms the arrangements deposed to by John-Paul Blandthorn, albeit that the process does not appear to have been faithfully adhered to.
287. On 13 October 2015 John-Paul Blandthorn sent an email to Cesar Melhem stating:³⁴⁸

Cesar,

Attached are the final documents.

Do you want me to send to National Office?

288. As occasionally happens, there was no attachment to the email. Cesar Melhem responded seeking the attachment and John-Paul Blandthorn responded attaching both

³⁴⁴ Zoe Angus, 20/10/15, T:674.3-22.

³⁴⁵ John-Paul Blandthorn, 3/6/15, T:453.11-22, 36-46.

³⁴⁶ Cesar Melhem, 1/6/15, T:219.21-26.

³⁴⁷ Cesar Melhem, 1/6/15, T:219.31.

³⁴⁸ Cleanevent MFI-1, 19/10/15, p 242.

of the documents sent to him by Michael Robinson earlier that day, the MOU and the side letter.³⁴⁹

289. On 15 October 2010 John-Paul Blandthorn sent an email to Zoe Angus attaching only the MOU and not the side letter. The email stated:³⁵⁰

Attached is the MOU Cesar has agreed to with Cleanevent.

We have polled the member [sic] and they are 100% in favour of the deal.

We are hoping you could get Paul or Scott to sign on behalf of the National Office.

290. John-Paul Blandthorn stated that, as per his email, he had sought to discuss with Cesar Melhem whether the documents attached to his email should be sent to the National Office.³⁵¹ He said that he did not have a specific recollection,³⁵² but to the best of his memory the effect of the conversation he had with Mr Melhem was that the letter was between the Victorian Branch and Cleanevent, and he should send the document to National Office that pertained to the National Office.³⁵³ He agreed that a decision was made not to send the side letter to the National Office.³⁵⁴ He accepted that, in hindsight, the existence of a side deal was an important matter that should have been referred to the National Office.³⁵⁵ The decision not to do so was taken by Cesar Melhem as Secretary, with whom he was in contact.³⁵⁶

291. Cesar Melhem, on the other hand, denied that he told John-Paul Blandthorn not to send the side letter to the National Office.³⁵⁷ He said that he had no recollection of giving such an instruction and there was no reason for him to tell Mr Blandthorn not to send the side letter.³⁵⁸ Moreover, he rejected the proposition that was clear on the face of the

³⁴⁹ Cleanevent MFI-1, 19/10/15, p 243. The attachments bore the same file names as the attachments to Mr Robinson's email.

³⁵⁰ Zoe Angus, witness statement, 24/7/15, Annexure 4; Cleanevent MFI-1, 19/10/15, pp 251-257.

³⁵¹ John-Paul Blandthorn, 20/10/15, T:752.32-37.

³⁵² John-Paul Blandthorn, 20/10/15, T:754.7-10.

³⁵³ John-Paul Blandthorn, 20/10/15, T:752.39-43.

³⁵⁴ John-Paul Blandthorn, 20/10/15, T:753.4-6.

³⁵⁵ John-Paul Blandthorn, 20/10/15, T:753.15.18, 755.30-34, 756.20-24.

³⁵⁶ John-Paul Blandthorn, 20/10/15, 753.26-43.

³⁵⁷ Cesar Melhem, 22/10/15, T:878.30-31.

³⁵⁸ Cesar Melhem, 22/10/15, T:878.21-24.

documents, namely, that he could not be certain that the side letter was not sent to the National Office despite the presence of two attachments to Mr Blandthorn's email of 13 October 2010 and only one to his email of 15 October 2015, bearing the same file name as the MOU attached to the earlier email.³⁵⁹ Mr Melhem maintained that the arrangement reflected in the side letter was a matter for the Victorian Branch, and had nothing to do with the National Office.³⁶⁰ Asked whether he considered that the other Branches might be interested in knowing that the Victorian branch was receiving an additional benefit, he responded:³⁶¹

It's the matter for the other branches to negotiate their own things.

292. It is submitted that the Commissioner should find that Mr Melhem did give an instruction not to send the side deal to the National Office.
293. *First*, the file names of the attachments to Mr Blandthorn's email are the same as those attached to Mr Robinson's email of the same day, forwarding the executed MOU and side letter. The MOU attached to the email to Zoe Angus bears the same file name. That is consistent with a deliberate decision by Mr Blandthorn not to attach the side letter.
294. *Secondly*, Mr Blandthorn sought an instruction from Mr Melhem as to whether the documents should be forwarded to the National Office and it was practice to follow Mr Melhem's instructions.
295. *Thirdly*, it was Mr Melhem's view that the side deal was nothing to do with the other branches, or the National Office. That is consistent with him having instructed Mr Blandthorn not to send the side letter.
296. *Finally*, both Zoe Angus and Paul Howes disclaimed any knowledge of the side deal.³⁶² Ms Angus said that she had no other experience of such an arrangement.³⁶³ She was not

³⁵⁹ Cesar Melhem, 22/10/15, T:882.30-31.

³⁶⁰ Cesar Melhem, 22/10/15, T:992.37-46.

³⁶¹ Cesar Melhem, 22/10/15, T:885.3-4.

³⁶² Zoe Angus, 20/10/15, T:674.28-38.

³⁶³ Zoe Angus, 20/10/15, T:675.5-14.

aware of any other person in the National Office receiving a copy of the side letter.³⁶⁴ The Commission should find therefore that the National Office was not made aware of the side deal, and deliberately so.

297. On 19 October 2010 at 10:30am Zoe Angus responded to John-Paul Blandthorn, copying Scott McDine and seeking that he complete an organiser's report for 'Paul/Scooter' to sign off.³⁶⁵ The form attached was entitled 'Agreement Summary' and was in the form of a checklist detailing whether various provisions, described as 'FWA Model Clauses' and 'Union Friendly Clauses' as well as allowances for work conditions, leave, hours and breaks, and wage increases were contained in the agreement. Space was provided for these features of the agreement to be explained by the organiser.

298. Also on 19 October 2010 at 10:50 am, Zoe Angus forwarded John-Paul Blandthorn's email of 15 October 2010 to a large number of AWU staff, setting out the key effects of the MOU and requesting that branches contact Scott McDine with any concerns about committing to the MOA on a National basis by 22 October 2010.³⁶⁶

299. Zoe Angus then sent a further email to John-Paul Blandthorn on 19 October 2010 at 10:52 am, stating:³⁶⁷

I've only just twigged this is a national agreement ... gotta go through the internal process of consultation ... will take about a week, will advise if any probs emerge.

300. Zoe Angus stated that the process of consultation with other branches was a requirement before any EBA with National Coverage could occur. She said that she did not enquire of Mr Blandthorn as to records of polling of members or a breakdown of voting on the agreement, and that she relied on the organiser's comments in this regard.³⁶⁸

³⁶⁴ Zoe Angus, 20/10/15, T:690.1-3, 22-24.

³⁶⁵ Zoe Angus, witness statement, 24/7/15, Annexure 7; Cleanevent MFI-1, 19/10/15, pp 258-260.

³⁶⁶ Zoe Angus, witness statement, 24/7/15, Annexure 6; Cleanevent MFI-1, 19/10/15, pp 261-268.

³⁶⁷ Zoe Angus, witness statement, 24/7/15, Annexure 5; Cleanevent MFI-1, 19/10/15, p 269.

³⁶⁸ Zoe Angus, 20/10/15, T:677.29-47.

301. John-Paul Blandthorn responded on 20 October 2010:³⁶⁹

It is a national agreement but there is [sic] very few people it has an impact on outside Victoria.

302. On 22 October 2010, Zoe Angus sent an email to John-Paul Blandthorn, copying Scott McDine and stating the following:³⁷⁰

Looks like we've hit a snag with the Cleanevent MOA.

After circulating the MOA to other Branches, Qld Branch sent back some concerns, most particularly in relation to the "other states" wage rates. See the email from Tom Jeffers below. Scooter then asked me to review the MOA against the relevant award. I include below my comments to Scooter about the MOA. As you will see, there is a problem with the wage rates falling below the award rates. What do you want to do?

Clearly Paul is unlikely to sign the MOA in its current form. Do you want to raise these issues with Cesar and/or Cleanevent? Let me know.

303. The email forwarded an earlier email from Tom Jeffers, the Vice President and Southern District Secretary of the Queensland Branch of the AWU to Ben Swan, the Assistant Secretary dated 20 October 2010, which was then forwarded to Scott McDine. The Tom Jeffers email stated:

With regard to the Cleanevent agreement and the Wages can you get some advise [sic] as to why the Rates are different for other States excluding NSW and VIC.

For a Perm Level 1 the other States rate is \$ 15.81 but in Victoria and NSW it is listed at \$16.64, a difference of 83 cents per hour.

This difference continues down through the Wages matrix.

The Junior rate also applies up to 20 years of age.

My view is that the Adult rate should start at 18 Years of age.

I have not gone any further at this time as I believe that the Wages must be addressed prior to any signing of the MOU.

304. Tom Jeffers said that as Southern District Secretary he represented the interests of AWU members in the area between the Sunshine Coast and the Gold Coast,³⁷¹ including Brisbane.³⁷² He had no dealings with Cleanevent in the course of his role.³⁷³ He said

³⁶⁹ Cleanevent MFI-1, 19/10/15, p 269.

³⁷⁰ Zoe Angus, witness statement, 24/7/15, Annexure 9; Cleanevent MFI-1, 19/10/15, pp 273-277.

³⁷¹ Killian Thomas Jeffers, witness statement, 15/10/15, para 6.

³⁷² Tom Jeffers, 20/10/15, T:691.35-37.

³⁷³ Tom Jeffers, 20/10/15, T:691.39-47.

that he would have been ultimately responsible if any AWU members in the Southern District had raised any issues, but that a local organiser would be the first point of contact.³⁷⁴

305. Tom Jeffers said that he sent the email to Ben Swan, he believes on Mr Swan's instructions.³⁷⁵ He did not have any discussions with any Queensland Branch organisers to gain information about the Cleanevent business.³⁷⁶ Tom Jeffers said that his only concern was to undertake the analysis of the rates of pay and that was it.³⁷⁷ He only looked at the rates in the MOU to make a comparison between the rates payable in NSW and Victoria and those payable in other States, and did not undertake a comparison between those rates and the rates of pay contained in any relevant award.³⁷⁸

306. The analysis undertaken by Zoe Angus at the direction of Scott McDine³⁷⁹ was also forwarded to John-Paul Blandthorn on 22 October 2010. It contained a comparison between the MOU wage rates, the *Cleaning Services Award* and the *Amusement, Events and Recreation Award*. The analysis identified three 'problems' with the MOA:

(a) The ordinary wage rates for level 1 and level 3 cleaners in other states were below those provided for in the *Cleaning Services Award*. Zoe Angus observed:

I recall being involved in a discussion between JP and Cleanevent where they sought our agreement that the *Amusement Award* applied. I pointed out that it was not as appropriate a coverage 'fit' as the *Cleaning award* and that the rates in the *Amusement Award* were lower and we couldn't agree to lower wages. They said something to the effect of "don't worry, this isn't about wages, the rates will be above anyway..."

(b) The casual loading is approximately 15% for all casuals, regardless of location, rather than 25% as provided for in the Awards;

³⁷⁴ Tom Jeffers, 20/10/15, T:692.5-13.

³⁷⁵ Killian Thomas Jeffers, witness statement, 15/10/15, para 11; Tom Jeffers, 20/10/15, T:693.40-46.

³⁷⁶ Tom Jeffers, 20/10/15, T:692.37-43.

³⁷⁷ Tom Jeffers, 20/10/15, T:693.7-9.

³⁷⁸ Tom Jeffers, 20/10/15, T:21-26.

³⁷⁹ Zoe Angus, witness statement, 24/7/15, para 30.

- (c) The casual event cleaning rates are below the federal minimum wage for level 1 casuals and below both Award rates for all levels.

307. Ms Angus said that she had no direct memory of the conversation referred to in her email of 21 October 2010,³⁸⁰ but that she accepted that she had been involved in some discussions with John-Paul Blandthorn and representatives of Cleanevent at which the applicable award was discussed.³⁸¹ Ms Angus's evidence is that, at the time that she undertook this analysis, she did not turn her mind to the fact that Cleanevent employed a high proportion of casuals. She said that she was made aware by the organiser that there was a high level of permanent employment in Cleanevent.³⁸² This evidence stands contrary to the email from Mr Blandthorn to Ms Angus on 21 September 2010,³⁸³ in which he refers to the 'high nature of casuals in the industry' and the likelihood that casuals would replace any permanents that took industrial action.

308. John-Paul Blandthorn responded to Zoe Angus on 1 November 2010.³⁸⁴ He stated that the applicable award was not a new Modern Award, but the 1999 Award. He then explained the rationale for continuing the 2006 EBA by means of the MOU in the following terms:

- Most cleaning companies (Cleanevent included) have a 28-day termination clause with the venue operator.
- If Cleanevent were forced to pay the new Modern Award they would have to seek to renegotiate all their agreements to remain viable.
- The result would be that every contract would be terminated and we would lose all the members but more importantly they would either lose their job or be re-employed on lower wages (as most big cleaning companies have a NAPSA).

309. Zoe Angus, asked whether she responded to Mr Blandthorn asking why the AWU was not pressing for the Modern Award, responded that it was her view that whatever was the best outcome for employees was what should be advanced.³⁸⁵ She did not put this proposition to Mr Blandthorn, but rather put the issues she had identified to him and

³⁸⁰ Cleanevent MFI-1, 19/10/15, p 274.

³⁸¹ Zoe Angus, 20/10/15, T:679.15-26.

³⁸² Zoe Angus, 20/10/15, T:680.21-46.

³⁸³ Cleanevent MFI-1, 19/10/15, p 202.

³⁸⁴ Zoe Angus, witness statement, 24/7/15, Annexure 10; Cleanevent MFI-1, 19/10/15, pp 278-279.

³⁸⁵ Zoe Angus, 20/10/15, T:682.34-39.

asked how he wished to proceed.³⁸⁶ She did not see it as her role to question Mr Blandthorn's 'industrial judgment.'³⁸⁷ She accepted John-Paul Blandthorn's explanation in his email of 1 November 2010, notwithstanding that it did not address the point she had raised about the level 1 event casuals being paid below the Federal Minimum Wage.³⁸⁸

310. Zoe Angus responded on 2 November 2010 asking how many Cleanevent employees worked in Queensland and observing that no other state branch had raised an issue.³⁸⁹ John-Paul Blandthorn responded that, as far as he knew, there were two permanent employees as the Gabba in Queensland.³⁹⁰
311. This assertion by John-Paul Blandthorn was inaccurate or at least incomplete. It conflicts with his evidence that, in 2006, he visited the Gabba in Brisbane to visit members and that, if there was an event, there would be a number of casuals on site.³⁹¹ Julianne Page's evidence was that Cleanevent had contracts at sporting venues on the Gold Coast and in Townsville.³⁹²
312. Zoe Angus said that she assumes that she did not enquire about whether there were any casual employees of Cleanevent in Queensland.³⁹³
313. John-Paul Blandthorn affirmed that the contract that Cleanevent had with the Gabba involved work by casual cleaners at events, who were members of the AWU. He cannot explain why he referred only to the two permanents in the email.³⁹⁴
314. Zoe Angus's evidence is that she does not believe that she circulated her analysis to the other Branches, there being no record of her having done so. She said that it was likely that she considered that this was a matter for the organiser to address.³⁹⁵

³⁸⁶ Zoe Angus, 20/10/15, T:682.41-44.

³⁸⁷ Zoe Angus, 20/10/15, T:683.4-17.

³⁸⁸ Zoe Angus, 20/10/15, T:683.19-30.

³⁸⁹ Zoe Angus, witness statement, 24/7/2015, Annexure 11; Cleanevent MFI-1, 19/10/15, p 285.

³⁹⁰ Zoe Angus, witness statement, 24/7/2015, Annexure 12; Cleanevent MFI-1, 19/10/15, p 292.

³⁹¹ John-Paul Blandthorn, 20/10/15, T:733.28-31.

³⁹² Julianne Page, Private Hearing, T:7.10-13.

³⁹³ Zoe Angus, 20/10/15, T:685.1-16.

³⁹⁴ John-Paul Blandthorn, 20/10/15, T:757.1-23.

315. The next communication was on 11 November 2010, when John-Paul Blandthorn sent an email to Zoe Angus and Scott McDine, copying Cesar Melhem and stating:³⁹⁶

Wondering how you are progressing with the Cleanevent deal?

Not to put too much pressure on but I am getting calls on the hour every hour from delegates and the bosses wanting information.

316. Cesar Melham then responded to Blandthorn a few minutes later on 11 November 2010, without copying Zoe Angus or Scott McDine to the email, and stating 'I spoke to Tom Jeffrey [sic] from Qld branch his [sic] OK with it.'³⁹⁷

317. Tom Jeffers said that he did not see Zoe Angus' analysis of the Modern Awards against the MOU rates, nor was he told that Mr Howes would be unlikely to sign the MOU in that form.³⁹⁸ He was not informed of any other issues in relation to the MOU.³⁹⁹ Tom Jeffers has no memory of a conversation with Mr Melhem.⁴⁰⁰ He said that his job was completed when he sent his email of 20 October 2010.⁴⁰¹ He said that the usual practice would be for Mr Melhem to contact the Branch Office and speak with Ben Swan or the Branch Secretary, and neither of those officers contacted him in relation to the issue.⁴⁰² This was also John-Paul Blandthorn's evidence. He said that it was not Mr Melhem's custom and practice to ring people who were not Branch Secretaries.⁴⁰³ He does not recall having any conversation with Cesar Melhem about Tom Jeffers.⁴⁰⁴

318. Despite being invited to provide evidence clarifying the evidence given on the last occasion, by reference to material now placed in evidence⁴⁰⁵ (including the statements of Ms Angus and Mr Jeffers), Mr Melhem has given no evidence as to whether he in fact spoke with Mr Jeffers and what was discussed. Taking the available evidence at its

³⁹⁵ Zoe Angus, 20/10/15, T:684.16-34.

³⁹⁶ Zoe Angus, witness statement, 24/7/15, Annexure 13; Cleanevent MFI-1, 19/10/15, p 299.

³⁹⁷ Cleanevent MFI-1, 19/10/15, p 300.

³⁹⁸ Tom Jeffers, 20/10/15, T:694.7-32.

³⁹⁹ Tom Jeffers, 20/10/15, T:694.41-45.

⁴⁰⁰ Killian Thomas Jeffers, witness statement, 15/10/15, para 13; Tom Jeffers, 20/10/15, T:695.5-7.

⁴⁰¹ Tom Jeffers, 20/10/15, T:695.1-3.

⁴⁰² Tom Jeffers, 20/10/15, T:695.9-30.

⁴⁰³ John-Paul Blandthorn, 20/10/15, T:757.40-45.

⁴⁰⁴ John-Paul Blandthorn, 20/10/15, T:758.18-21.

⁴⁰⁵ AWU MFI-2, 23/10/15, p 131.

highest, it seems likely that if a conversation with Mr Jeffers took place, it was of insufficient consequence to trigger a memory in Mr Jeffers. It is doubtful, in those circumstances, that the content of the discussion was sufficient meaningfully to assuage in an informed way any concerns Mr Jeffers may have had, and on any view it did not canvass the issues which Zoe Angus had identified, still less the side deal.

319. Zoe Angus said that she went to Alice Springs between 9 November and 14 November 2009, and that she was unlikely to have been progressing the matter during that period.⁴⁰⁶
320. Paul Howes, the National Secretary of the AWU, signed the MOU.⁴⁰⁷ The signature of Mr Howes was witnessed by Zoe Angus signing the letter dated 13 October 2010 and dating her signature 15 November 2010. Zoe Angus states that she has no recollection of Paul Howes signing the MOU, or of any discussion with Paul Howes about the MOU.⁴⁰⁸ She said that, according to her diary, she returned to work on 16 November 2010.⁴⁰⁹ Paul Howes also said that he does not recall the circumstances in which he signed the MOU.⁴¹⁰
321. Zoe Angus's evidence is that she was advised that Tom Jeffers had agreed to the MOU following discussions with Cesar Melhem on 12 November 2010 and had agreed to it.⁴¹¹ She does not state who told her this. Her evidence is not consistent with Cesar Melhem's email of 11 November 2010 in which he stated that the conversation had already taken place. In oral evidence Ms Angus said that she had no direct recollection of what she was told and relied on the note in the Organiser's report referred to below.⁴¹² She says that she has a recollection of an impression that the MOU was now cleared for processing.⁴¹³ She says that she does not recall taking any steps to confirm

⁴⁰⁶ Zoe Angus, witness statement, 24/7/215, para 34.

⁴⁰⁷ SW1, 28/5/15, p 88.

⁴⁰⁸ Zoe Angus, witness statement, 24/7/15, para 36.

⁴⁰⁹ Zoe Angus, witness statement, 24/7/15, para 35.

⁴¹⁰ Paul Howes, witness statement, 23/7/15, para 15.

⁴¹¹ Zoe Angus, witness statement, 24/7/15, para 35.

⁴¹² Zoe Angus, 20/10/15, T:685.26-34.

⁴¹³ Zoe Angus, 20/10/15, T:686.13-21

whether the Federal Minimum Wage issue had been addressed,⁴¹⁴ or the penalty rates issue.⁴¹⁵ Ms Angus said that her approach was as follows:⁴¹⁶

Well, I suppose I didn't see my role as to interfere in any judgment calls about the terms of the agreement, save for providing advice about the concerns in relation to the base rates and the Award. So, having provided that advice, I left it for others to have a discussion about how best to deal with them.

322. Zoe Angus then states that she completed the Organiser's report for the MOU on 16 November 2010 and forwarded it to Paul Howes on 16 November 2010, together with the MOU for signing. Zoe Angus says that she does not recall why she completed the Organiser's report, but says that she thinks it likely that John-Paul Blandthorn had not done it and it was a simple administrative task for her to complete.⁴¹⁷ She accepted that the usual practice was for the Organiser to undertake this task.⁴¹⁸ The Organiser's report contains two notes in Zoe Angus's handwriting⁴¹⁹ additional to the information required in the form.⁴²⁰

323. A note at the bottom of the page stated:

Circulated nationally only branch to respond – QLD gave OK (after Tom Jefferies talked Cesar on 12/11/10)

324. Another note on a post-it stuck to the form stated:

There has been a delay on this (due internal consultation) ALL CLEARED WITH BRANCHES. Vic now keen for \$.

325. The first note supports Zoe Angus's account of her information that the MOU was now approved nationally (although not the source of this information). Zoe Angus says the following in respect of the latter note:⁴²¹

In this note I was referring to the fact that the Victorian Branch was anxious to get the pay rise provided by the MOU which had been agreed to commence almost five months earlier, from 1

⁴¹⁴ Zoe Angus, 20/10/15, T:686.23-26.

⁴¹⁵ Zoe Angus, 20/10/15, T:686.42-44.

⁴¹⁶ Zoe Angus, 20/10/15, T:687.12-17.

⁴¹⁷ Zoe Angus, witness statement, 24/7/15, para 35.

⁴¹⁸ Zoe Angus, 20/10/15, T:687.26-32.

⁴¹⁹ Zoe Angus, witness statement, 24/7/15, para 41.

⁴²⁰ Zoe Angus, witness statement, 24/7/15, Annexure 14; Cleanevent MFI-1, 19/10/15, pp 301-303.

⁴²¹ Zoe Angus, witness statement, 24/7/15, para 41.

July 2010. I certainly recall the impression at the time that Blandthorn was checking in with me regularly to ensure that the agreement was signed so that the wage increase would flow to employees as quickly as possible. This persistence from Organisers was not unusual where the commencement date of an agreement had already passed. I also note that Blandthorn had told me in the email of 11 November 2010 that delegates had been contacting him asking about when they would get their pay increases.

326. Zoe Angus denies that the reference to “\$” was a reference to the side deal.⁴²² Zoe Angus disclaims any knowledge of the side deal to the MOU.⁴²³ Paul Howes also denies any knowledge of the side deal.⁴²⁴ Both state that they first became aware of allegations of payments of \$25,000 from Cleanevent after the issue emerged before the Commission.
327. Zoe Angus’s recollection that John-Paul Blandthorn had suggested that the source of the pressure to complete the agreement was the members’ desire for a pay increase is unsupported by any document. That is unsupported by the email of 11 November 2010 to which she refers in her statement, which makes no reference to the members or pay rises.⁴²⁵ However, her evidence on this point should be accepted in circumstances in which the evidence makes plain that the officers of the Victorian Branch did not bring the existence of the side deal to their attention.
328. Zoe Angus states that she then forwarded the signed MOU, dated 15 November 2010, to John-Paul Blandthorn on 17 November 2010.⁴²⁶ She says that she cannot explain the error as she believes the signatures occurred on 17 November 2010 upon Paul Howes’ return to Sydney.⁴²⁷
329. The process by which the MOU came to be signed on behalf of the National Office of the AWU reveals serious failures in the processes that were in place to ensure that Enterprise Agreements with National coverage were properly scrutinised.
330. *First*, the National Secretary at the time was Paul Howes. His evidence was to the effect that he had signed the MOU but had no recollection of doing so. No documents have

⁴²² Zoe Angus, witness statement, 24/7/15, para 43; Zoe Angus, 20/10/15, T:688.22-24.

⁴²³ Zoe Angus, witness statement, 24/7/15, para 42.

⁴²⁴ Paul Howes, witness statement, 23/7/15, para 16.

⁴²⁵ Zoe Angus, witness statement, 24/7/15, Annexure 13; Cleanevent MFI-1, 19/10/15, p 299.

⁴²⁶ Zoe Angus, witness statement, 24/7/15, para 37, Annexure 16; Cleanevent MFI-1, pp 305-311.

⁴²⁷ Zoe Angus, witness statement, 24/7/15, para 38.

been produced to show what precisely was before Mr Howes when he signed the MOU. However his evidence in respect of industrial agreements negotiated by branches but signed off at national level was that: 'I required a report to accompany industrial agreements brought to me for signing. As National Secretary, it was not my role to personally analyse the terms of industrial agreements to check their adequacy. I was dependent on the report to highlight any relevant issues.'⁴²⁸ That begs the question of whether that is an appropriate approach in circumstances in which the National Secretary assumes the role of binding the Union and its members to an EBA with National coverage. It appears to be an abrogation of the responsibility that a National Secretary should assume when enterprise agreements are put forward for his or her approval. By failing to properly scrutinise the enterprise agreement before signing, Paul Howes missed what was apparent to Scott McDine in 2015,⁴²⁹ and what he caused to be submitted to the Fair Work Commission at that time, namely:⁴³⁰

This old agreement, the only purpose that it is currently serving is to deny employees, particularly casual employees, access to penalty rates.

331. It follows from this evidence, and for that matter from the fact that he held the role of National Secretary and personally signed off on the MOU, that Paul Howes should take responsibility for the failures in proper process discussed below.
332. In other words, while the discussion below concentrates on the role of Zoe Angus, who was the person who had day to day carriage of the negotiations, it would not be fair to Ms Angus focus on her in isolation. Ms Angus reported to, and was under the supervision of, persons senior to her in the organisation, including Scott Dine and Paul Howes.
333. As just noted, the person with day to day responsibility for acting as a conduit between the relevant branch and the National Secretary and Assistant National Secretary was Zoe Angus. Ms Angus accepted that she was the point of contact for the purposes of communications with the National Office.⁴³¹ She was legally qualified and capable of turning an independent mind to whether the MOU was properly in the interests of

⁴²⁸ Paul Howes, witness statement, 23/7/15, para 14.

⁴²⁹ And should, with respect, have also been apparent to Mr McDine in 2010.

⁴³⁰ Shorten MFI-5, 8/7/15, p208 [PN82].

⁴³¹ Zoe Angus, 20/10/15, T:689.34-43.

members and compliant with the then prevailing legislative requirements. On the one hand, it was apparent that Ms Angus was relying without question on what the relevant organiser, Mr Blandthorn, was telling her about the industrial environment in which the agreement was reached. On the other, she took it upon herself to prepare the organiser's report, being the document required for the National Secretary to make an informed decision about whether to sign off on the MOU. Moreover, she did so in circumstances in which she was aware of the concerns of one of the State Branches and had herself identified serious issues with the rates provided for in the MOU, including that they fell below the Federal Minimum Wage in some instances. The evidence shows that Ms Angus did not turn an independent mind to the issues surrounding the MOU and take action to ensure that her concerns (and those of the other branches) were appropriately addressed.

334. *Secondly*, the evidence shows that Mr Blandthorn was less than forthcoming with the information that he provided to the National Office. On two occasions he downplayed the significance of the MOU to employees of Cleanevent outside Victoria. On Cesar Melhem's instructions, he did not provide the side letter to the National Office, and he did not on any other occasion inform the National Office or the other branches that the AWU Vic Branch was receiving payments on account of membership. He did not complete the organiser's report, which he was best placed to do. Again, in fairness to Mr Blandthorn these comments should be understood in context, namely that Mr Blandthorn was a relatively junior organiser, who reported to the State Secretary, Mr Melhem.

335. *Thirdly*, the process by which concerns were notified and dealt with was lacking. An issue with the MOU was raised in writing by an officer of the Queensland branch. The Assistant National Secretary and the State Branch Secretary were aware of the issue. However, it seems to have been dealt with by the briefest of telephone calls. The outcome of the call, and the reasons why the concerns of the Queensland Branch were addressed, was not documented. The nature of the objection and how it was resolved was not notified to Paul Howes prior to his execution of the MOU. Nor was Ms Angus's analysis of the MOU against the Modern Award notified to the other State Branches.

336. These failings of process occur in every large organisation from time to time. However, in the present case, they resulted in approval of an agreement that significantly disadvantaged workers when measured against their award entitlements. This is addressed in the following sections of these submissions. Moreover, the fact that the AWU Vic did not draw the side deal to the attention of the National Office had the consequence that a side agreement reached with an employer in exchange for the MOU was not made subject to the scrutiny of the National Office.

337. On 17 November 2010 Michael Robinson forwarded the executed MOU to Julianne Page, copy to Stephen Webber and David Jenkinson.⁴³² He stated by way of explanation:

This agreement represents a significant competitive advantage for Cleanevent Australia in the leisure market.

The final pay scales agreed to was a 3.85% increase each year to our small permanent base and an average of 1.33% increase each year for venue and event casuals off our already low casual rates. Our casual event rate will now be \$18.05 and will not be subject to weekend, shift or public holiday penalties. From memory, according to the calculations carried out in April based on previous years, this will represent a saving of greater than \$1million in wages each year when compared to the modern award rates.

It is expected that this MOU will run it's [sic] full course of 3 years though it is still at risk to legislative change or FWA claims against it as we have discussed in the past. We will need to start assessing our plan for the future of Cleanevent in the new year to ensure we have a viable and sustainable model to continue our success in the market post the expiration of this MOU.

338. This correspondence reveals that Cleanevent got precisely what it was looking for from the AWU when the MOU was executed: an agreement that avoided the employer's responsibility to pay its employees, at minimum, at the relevant award.

H PAYMENTS PURSUANT TO THE AWU

The first payment

339. On 6 December 2010 an employee of the AWU Vic, Rebecca Eagles, sent an email to Cesar Melhem with the subject heading: 'Final documents from Cleanevent'.⁴³³ The

⁴³² Cleanevent MFI-1, 19/10/15, p 312.

⁴³³ Melhem MFI-2, 1/6/15.

email from Rebecca Eagles of 6 December 2015 attached the copy of the letter of Wednesday 13 October 2010 signed by Michael Robinson.

340. Two days after receipt of this email, John-Paul Blandthorn telephoned Steven Webber and Michael Robinson with regard to Cleanevent making a payment to the AWU Vic. Until that time AWU does not appear to have taken any steps with respect to seeking payment by Cleanevent of the first biannual instalment of what were described as 'union fees' payable in December 2010.

341. At 2.25pm on Wednesday 8 December 2010 Jean- Paul Blandthorn sent an email to Michael Robinson and Steven Webber, with a copy to Cesar Melhem stating:⁴³⁴

Just following up from our phone call today that you guys will action the payment?

342. On Thursday 9 December 2010 at 1.43pm Steven Webber sent an email to John-Paul Blandthorn in response stating:⁴³⁵

Sweet mate, can you send me the details of who and where to send cheque to.

343. Steven Webber agreed in evidence that at the time he sent the above email he could not have been in receipt of an invoice from AWU, because if he had been he would not have needed to ask the questions raised by him in his emails.⁴³⁶

344. On 9 December 2010 Michael Robinson sent an email to Rohan Harris and Steven Webber stating:⁴³⁷

Steven needs to authorise a \$12,500 payment to the AWU during December. Can you please get this ready for his sign off. I am away after tomorrow so I won't be chasing this up.

345. Steven Webber responded the same day stating:⁴³⁸

Awaiting JP to come back with how he wants the cheque to look.

⁴³⁴ SWI, 28/5/15, , p 92.

⁴³⁵ SW1, 28/5/15, p 92.

⁴³⁶ Steven Webber, 28/5/15, T:39.41-46.

⁴³⁷ Cleanevent MFI-1, 19/10/15, p321.

⁴³⁸ Cleanevent MFI-1, 19/10/15, p321.

346. On Monday 13 December 2010 at 2.47pm John-Paul Blandthorn sent an email to Steven Webber with a copy to Cesar Melhem and Mei Lin giving two ways of making the payments sought, namely by cheque or by electronic funds transfer.⁴³⁹
347. The fact that John-Paul Blandthorn sent the above email providing account details and other information concerning how to pay the money suggests that no invoice was ever sent by the AWU concerning the making of this first instalment. Had an invoice been sent then there would have been no necessity for Steven Webber to have inquired for details as to how make the payment, since these would have been included in the invoice. No invoice has been produced by the AWU or Cleanevent concerning this first instalment.
348. Steven Webber included in his witness statement the following observation concerning this issue:⁴⁴⁰

As I understand it no copy of an invoice in relation to this payment has been located. I do not recall receiving an invoice in relation to this payment, but I would be surprised if I did not receive one as it is very difficult to action payment within Cleanevent without an invoice.

349. Whether or not Steven Webber may have been surprised for the reasons set out above it is submitted that a finding should be made that no invoice was sent.
350. Following receipt of John-Paul Blandthorn's email of Monday 13 December 2010 there followed an exchange of emails between Steven Webber and the finance manager for Spotless, Rohan Harris, which culminated in Rohan Harris advising Steven Webber that it would be easiest for Spotless to make the payment by EFT.⁴⁴¹
351. At 3.09pm on Monday 13 December 2010 Steven Webber sent an email to Rohan Harris stating:⁴⁴²

Cool, can we make this happen, is there anything you need from me?

\$12,500 Big Ones!!! Then our next instalment will be in June.

⁴³⁹ SW1, 25/8/15,p 91.

⁴⁴⁰ Steven Webber, witness statement, 20/5/15, para 10.

⁴⁴¹ SW1, 28/5/15, p 90.

⁴⁴² SW1, 28/5/15, p 90.

352. At 4.10pm on 13 December 2010 Steven Webber sent an email to John-Paul Blandthorn, with a copy to Cesar Melhem, Mei Lin and Rohan Harris advising that: 'An EFT will take place before the end of the week'.⁴⁴³

353. This amount was in due course paid by EFT.

354. John-Paul Blandthorn responded to this email at 8.35am the following morning, Tuesday 14 December 2010, stating: 'Thanks mate'.⁴⁴⁴

The first list of names

355. On 17 December 2010 Mei Lin sent an email to Cesar Melhem, copied to John-Paul Blandthorn, stating:⁴⁴⁵

We receive \$12,500.00 from Cleanevent today. Record it as membership??

356. Cesar Melhem responded the same day, stating:⁴⁴⁶

Yes, Ask JP to get them to send us a list.

357. Mei Lin sent an email to John-Paul Blandthorn stating:⁴⁴⁷

Could you please ask Cleanevent to send us a list for \$12,500 we receive today?

358. On Thursday, 26 May 2011 Steven Webber sent an email to Michelle Ference, a pay roll officer at Cleanevent, stating:⁴⁴⁸

I need 100 names of our regular cleaners, these names will go to the Union as new members as I pay for there [sic] memberships. We need this fairly quickly [sic].

359. It would appear that Steven Webber did not receive a response to his email to Michelle Ference immediately. On Monday, 30 May 2011 at 1.35pm Steven Webber sent a

⁴⁴³ SW1, 28/5/15, p 94.

⁴⁴⁴ SW1, p 94.

⁴⁴⁵ Cleanevent MFI-1, 19/10/15, p 322.

⁴⁴⁶ Cleanevent MFI-1, 19/10/15, p 322.

⁴⁴⁷ Cleanevent MFI-1, 19/10/15, p 322.

⁴⁴⁸ SW1, 28/5/15, p 100.

further email to Michelle Ference and, this time Kim Dodd with a copy to Michael Robinson stating:⁴⁴⁹

Michelle, the request below has now become urgent, I need these names to me by 10.00am tomorrow morning.

360. At 2.01pm on Monday 30 May 2011 Michelle Ference sent an email to Steven Webber in response providing a list of the 'regular cleaners' that Steven Webber had sought.⁴⁵⁰

361. As Steven Webber conceded in evidence it was clear from this list that it was simply a set of names collected at random with no regard for whether those persons had actually made, or communicated any conscientious wish to join the AWU. Among other things it had been prepared some 26 minutes after Steven Webber's email, and the list of names was simply set out in alphabetical order culminating at the letter 'G'.

362. Steven Webber's oral evidence included the following exchange concerning the list of names put together on 30 May 2011:⁴⁵¹

Q. She [*i.e.*, *Ms Ference*] has simply inserted in the body of the email a list of names. Do you see that?

A. Yes.

Q. And the list goes from pages 97 through to 98 through to 99?

A. Yes.

Q. And it looks as though that is simply an alphabetical list of names?

A. It appears that way, yes.

Q. It gets to 'G' and stops?

A. It does.

Q. At page 99 – presumably because she had got to 100.

A. I imagine so, yes.

Q. You didn't give her any instructions about how to pick the names?

A. No.

⁴⁴⁹ SW1, 28/5/15, p 99.

⁴⁵⁰ SW1, 28/5/15, p 97.

⁴⁵¹ Steven Webber, 28/5/15, T:4-44.

Q. As far as you were concerned, your evidence earlier was that they would be picked at random.

A. Yes.

Q. No thought was given, was there, as to where these employees worked? They could work anywhere in Australia; is that right?

A. Well, if it's alphabetical, then yes.

Q. I am sorry?

A. Yes. Yes.

Q. You gave no thought did you, to whether they levels one, two, or three employees.

A. Correct, yes.

Q. As far as you were concerned, she just had to grab 100 names, whomever they might be, and you would pass that on?

A. That was my note to her.

363. One minute after he had received Michelle Ference's email, Steven Webber forwarded it to John-Paul Blandthorn, with a copy to Michael Robinson, stating:⁴⁵²

100 names below as requested.

364. The short period of time that elapsed between his receiving Michelle Ference's email and his forwarding it on (namely, one minute) confirms that this was simply a list of names picked at random, with no thought as to whether the casual cleaners named wished to become members of the AWU, had authorised the provision of their name to the AWU, or knew anything about the arrangements contained in the letter of 13 October 2010.

365. At 2.06pm on Monday 30 May 2011 John-Paul Blandthorn sent an email to Angela Leo, with a copy to Cesar Melhem and Ben Davis stating:⁴⁵³

100 names for Cleanevent for May intensive they are forwarding addresses on.

366. According to Cesar Melhem the 'May Intensive' was an 'intensive campaign to recruit members throughout industries' which was carried out on a national basis.⁴⁵⁴

⁴⁵² SW1, 28/5/15, page 97.

⁴⁵³ SW1, 28/5/15, p 97.

⁴⁵⁴ Cesar Melhem, 1/6/15, T:225.46-226.1.

367. At 2.46pm on Monday 30 May 2011 Cesar Melhem sent an email to Angela Leo, with a copy to Claire Raimondo, John-Paul Blandthorn and Ben Davis stating:⁴⁵⁵

As you know we have received a cheque for \$15,000 in DEC2010, can you allocate that amount to members listed below.

368. There are several errors in Cesar Melhem's email. The amount seems to have been paid by EFT not cheque. Further, the amount was \$12,500, not \$15,000. Nevertheless the intention was clear enough. Cesar Melhem wished to have the first instalment paid by Cleanevent allocated to the 100 names of casual cleaners which had been forwarded by Cleanevent earlier that day.

369. Claire Raimondo then sent an email to Angela Leo at 2:58pm on 30 May 2011 stating:⁴⁵⁶

Full year's membership December to December.

100 Members \$150 membership payment for each member.

370. At 3:02pm on the same day, Claire Raimondo sent a further email to Angela Leo stating:

Checked with Accounts it was only 12,500 so its \$125 per member not \$150.

371. Angela Leo confirmed that, consistently with Claire Raimondo's advice and Cesar Melhem's instructions, she entered the names of the 100 persons on the membership roll and allocated a membership fee of \$125 to each name, regardless of what the formal fee structure was under the AWU rules.⁴⁵⁷ She did not know whether the employees on the list were aware of their inclusion on the membership roll. She said that her role was to take the information supplied and process it accordingly.⁴⁵⁸

372. The names forwarded by Cleanevent on 30 May 2011 included those of Shalee-Nicole Allameddine, Robyn Cubban, Nayan Debnath and Colleen Ellington.⁴⁵⁹ Each of these persons gave evidence to the Commission. Each was at all relevant times including May 2011, a resident of NSW. None knew of, let alone authorised or permitted, the

⁴⁵⁵ SW1, 28/5/15, p 97.

⁴⁵⁶ Angela Leo, witness statement, 15/10/15, Annexure 1, p 7.

⁴⁵⁷ Angela Leo, witness statement, 15/10/15, para 26; Angela Leo, 21/10/2015, T:797.39-43.

⁴⁵⁸ Angela Leo, 21/10/15, T:797.39-43.

⁴⁵⁹ SW1, 28/5/15, pp 98-99.

release of his or her name by Cleanevent to the AWU. Each, except for Mr Debnath was a member of AWU NSW and making membership payments by payroll deduction.⁴⁶⁰

Industry 2020 lunch

373. On 16 June 2011 Cesar Melhem sent Michael Robinson an invitation to an Industry 2020 lunch with Bill Shorten.⁴⁶¹ Michael Robinson forwarded this invitation to Julieanne Page and Tom Gibbons. Later the same day Julieanne Page responded by email to Michael Robinson and Tom Gibbons in the following terms:⁴⁶²

I suggested Rowan Wilke attend but he has indicated that the cost is \$5,500 and could be seen as a donation to the AWU which given the current climate is not wise.

374. Julianne Page explained that the reference to the 'current climate' was to a dispute Spotless was engaged in with United Voice in relation to a separate EBA.⁴⁶³ A few minutes later Michael Robinson responded to Julieanne Page's email as follows:⁴⁶⁴

Ok, no worries,

How does our paying of membership fees sit re: the MOU we negotiated with the AWU. I think SW would have paid the latest instalment by now as we are approaching the end of the financial year.

375. The ordinary natural reading of Michael Robinson's email in the context of Julieanne Page's email sent four minutes before is that he was concerned that the paying of so called 'membership fees' by Cleanevent could be seen as a donation to the AWU. Indeed given that no true members were being supplied construing the membership fee as a donation would appear entirely reasonable. Michael Robinson however denied that this was his intended meaning.⁴⁶⁵ Although generally a reliable witness it is submitted that on this point his evidence should not be accepted.

⁴⁶⁰ Robyn Cubban, witness statement, 26 May 2015, [5]-[7]; Colleen Ellington, witness statement, 29 May 2015, [8]-[9], Shalee-Nicole Allemedine, witness statement, 29 May 2015, [6]-[7].

⁴⁶¹ SW1, tab 14, p 101.

⁴⁶² SW1, tab 14, p 101.

⁴⁶³ Julianne Page, Private Hearing, 29/09/2015, T22.40-46.

⁴⁶⁴ SW1, tab 14, p 101.

⁴⁶⁵ Michael Robinson, 29/5/15, T:140.32-41.

The second payment

376. On 18 April 2012 Cesar Melhem appears to have left a telephone message for Michael Robinson to ring him.

377. At 2.48pm on 18 April 2012 Mei Lin sent an email to Michael Robinson, with a copy to Cesar Melhem, and the subject 're membership invoice.'⁴⁶⁶

378. It should be noted that the word 're' after the subject line in the said email suggests that Mei Lin's email was sent in response to an earlier email with the same subject line from Michael Robinson. However that original email has never come to light, in response to the Notices to Produce issued by the Royal Commission.

379. Mei Lin's email of 18 April 2012 was in the following terms:⁴⁶⁷

Please find attached for membership for financial year 2011-2012. It would be much appreciated if you could arrange the payment as soon as possible.

Please feel free to contact me should you have any queries.

380. Mei Lin's email of 18 April 2012 appears to have attached tax invoice 023590 from AWU Vic to Cleanevent, marked to the attention of Steven Webber.⁴⁶⁸ The description of services for which payment was sought in tax invoice 023590 was 'membership fees for Financial Year 2011-2012. The tax invoice was in a total amount of \$27,500, inclusive of GST. The item code was 'membership'.

381. At 5.27 on 16 April 2012, Michael Robinson responded to Cesar Melhem by email in the following terms:⁴⁶⁹

Good afternoon Cesar, you are on my call back list that I see subject below. I have sent that through to Steven Webber the Accounts Payable department and spoken to them both and this should be sorted soon for you. Please let me know if there is any delays [sic] and I will chase it up for you (sometimes the cogs can turn a little slow here) talk to you soon.

⁴⁶⁶ SW1, tab 15, p 103.

⁴⁶⁷ SW1, tab 15, p 103-4.

⁴⁶⁸ SW1, tab 16, p 111.

⁴⁶⁹ SW1, tab15, p 103.

382. Cesar Melhem responded three minutes later by email sent at 5.30 pm to Michael Robinson stating:⁴⁷⁰

We need an up to date list of employees for the financial year so that we can put them on our system.

383. On Friday 20 April 2012 Steven Webber sent an email to Cesar Melhem, with a copy to Michael Robinson, and the subject 'names of Cleanevent employees' in the following terms:⁴⁷¹

Hope all is well in your world and they're not making you work to [sic] hard!!

Following on from your request to Michael, I have attached the names of cleaning staff.

384. Steven Webber's email of 20 April 2012 attached a list of 100 employees. In at least some instances the list included names that had been provided in the earlier list of causal cleaners sent on 30 May 2011.⁴⁷²

385. The list of names forwarded by Steven Webber on 20 April 2012 is not so obviously at random as the alphabetical list sent 30 May 2011. Nevertheless it is clear that it was simply a list of names pulled together at random, and did not represent persons who had indicated to desire to become members of the AWU. This emerges from the following passage of transcript:⁴⁷³

Q. How did you cause that list to be drawn up?

A. I got someone from administration to pull together a list.

Q. So it was simply a list of names of certain cleaning staff of Cleanevent.

A. Yes.

Q. That someone had pulled together—

A. Yes.

Q. — more or less at random?

A. Yes.

⁴⁷⁰ SW1, tab 15, p 103.

⁴⁷¹ SW1, tab 15, p 106.

⁴⁷² SW1, tab 13A, p 97.

⁴⁷³ Steven Webber, 28/5/15 T:29.36–30.2.

386. On Wednesday 13 June 2012 Duc Vu sent an email to Steven Webber with the subject 'URGENT: Overdue Tax Invoice'⁴⁷⁴:

Could you please advise the payment date for these two invoices.

387. Duc Vu's email contained a copy of tax invoice 023590 dated 18 April 2012, to which reference was made above. It also included a copy of tax invoice 023639 in relation to what was said to be OH&S Training.⁴⁷⁵

388. Subsequent to receiving that email Steven Webber sent an email to Simon Jaensch forwarding the email from Duc Vu, and stating:⁴⁷⁶

Simon can you please put in a prompt payment for these please, we have to keep the union happy!!!

389. Despite Steven Webber's request the invoices were not paid. Mei Lin sent emails to Steven Webber requesting payment on 15 June 2012 and again on 20 June 2012.⁴⁷⁷ On 27 June 2012 at 1.42pm Mei Lin sent an email to Steven Webber stating:⁴⁷⁸ the attached invoice for union dues 2011-2012 has been outstanding for more than 2 months. Could you please arrange the payment by this Friday?

390. On Monday 25 June 2012 at 11.36 Wendy Field (the group general manger- cleaning services at Spotless) sent an email to Steven Webber, with a copy to Tom Gibbons, Andrew McBride and Elena Young with the subject heading 'Payment Request'.⁴⁷⁹ Wendy Fields' email stated as follows:

Steve,

I have been presented the following to request for payment which I require justification for.

1. Membership Fees for the Australian Workers' Union. What does this membership do and why do we need it? Why is it in Cleanevent's name anyway. This type of expense must be submitted for approval in advance before even being considered as you do not have LOA for memberships and subscriptions. \$27.5k.

⁴⁷⁴ SW1, tab 16, p 109.

⁴⁷⁵ SWI, tab 16, p 112.

⁴⁷⁶ SWI, tab 16, p 109.

⁴⁷⁷ Cleanevent MFI-1, page 327.

⁴⁷⁸ SW1, tab 17, p 114.

⁴⁷⁹ SW1, tab 19, p 120.

391. The second numbered paragraph in the above email has not been reproduced by us. It does not appear relevant to the case study presently under consideration. The letters 'LOA' in the above email stand for level of approval.⁴⁸⁰

392. At 12.47 on Monday 25 June 2012 Steven Webber responded by email to Wendy Field, with a copy to Tom Gibbons, Andrew McBride and Elena Young, in the following terms:⁴⁸¹

The below is all associated with our EBA.

In May 2010 the EBA was reworked, this was a very difficult negotiation and at times looked as though it would not get done. We managed to lock a new agreement away through an MOU for a further three years.

The \$25k was part of that negotiation and was approved by Julianne the \$25k is an annual cost.

The implication to the business by not having the EBA and employing labour through the Modern Award is circa \$2Mill per annum. We are about to enter our third and final year of this agreement to which we will need to start discussing how we can continue this.

Re the training, it is something that has always occurred and yes will follow protocol in the future.

The relationship with the union has been long and very good which has allowed us to continue to remain competitive with what is a good EBA

393. Tom Gibbons was the national cleaning manager.⁴⁸² Steven Webber reported to Tom Gibbons, who in turn reported to Wendy Field.⁴⁸³

394. At 12.51 pm on Monday 25 June 2012 Wendy Field replied to Steven Webber's email, with a copy to Tom Gibbons, Andrew McBride and Elena Young stating:⁴⁸⁴

Thanks Steve, Please provide a copy of the approval from Julianne and advise how many years we're obligated to pay.

395. Steven Webber sought in his oral evidence to retreat from the estimate of the loss to the Cleanevent business of \$2 million per annum. However it is important to emphasis the context in which the above email was sent. As noted above Steven Webber had been

⁴⁸⁰ Steven Webber, 28/5/15, T:54.32.

⁴⁸¹ SW1, tab 19, pp 119–120.

⁴⁸² Steven Webber, 28/5/15 T:55.9.

⁴⁸³ Steven Webber, 28/5/15 T:55.12–16.

⁴⁸⁴ SW1, tab 19, p 119.

asked to give an explanation as to the basis on which an agreement had been reached to pay the AWU Vic \$25,000 per year. The explanation had been sought from very senior persons within the organisation to whom he directly reported. It is likely that he would have been careful in his email to provide a truthful and accurate account of circumstances in which this arrangement had been entered into. He agreed in his examination that he was careful in preparing his response and sought to be truthful.⁴⁸⁵

396. Steven Webber described the figure of \$2 million as his 'best guestimate' as to the savings to the business by not being required to comply with the Modern Award.⁴⁸⁶ Correspondence from Michael Robinson, referred to above, suggests that the savings to Cleanevent in 2010 were in the region of \$1.6 million. Mr Webber's estimate was provided some two years later. It is clear that Mr Webber sought to convey to his superiors that the savings to the Cleanevent business were substantial and on all available evidence the savings were substantial.

397. Mei Lin on Friday 29 June 2012 sent a further email stating:⁴⁸⁷

We have not received the payment. Could you please investigate how it is processing? It would be much appreciated if you could make the payment by today.

398. Two minutes after receiving this email, Steven Webber forwarded it to Simon Jaensch, Jeremy Johansson and Andrew McBride stating:⁴⁸⁸

This one has been going around in circles for three weeks.

This has the ability to cost us some \$2Mil if we pee them off.

Can this be finalised today!!

399. At 10.06am on Friday 29 June 2012 Andrew McBride forwarded this email to Elena Young stating:⁴⁸⁹

This invoice was with Wendy for signoff - I think this should have happened - can you recall where it went.

⁴⁸⁵ Steven Webber, 28/5/15, T:56.13–20.

⁴⁸⁶ Steven Webber, 28/5/15, T:58.45.

⁴⁸⁷ SW1, tab 17, p 114.

⁴⁸⁸ SW1, tab 17, p 113.

⁴⁸⁹ SW1, tab 17, p 113.

400. At 10.23am on Friday 29 June 2012 Simon Jaensch forwarded Steven Webber's email of 10.02am to Michael Robinson.

401. At 10.34am on Friday 29 June 2012 Elena Young responded to Andrew McBride's email stating:⁴⁹⁰

I was under the assumption that Steven was meant to provide the approval from Julianne to Wendy for her review as per the attached email? Wendy won't sign it unless she gets the information.

402. At 11.32am on Friday 29 June 2012 Michael Robinson sent an email Simon Jaensch stating:⁴⁹¹

I understand that Andrew McBride has taken carriage of gaining authorisation. Please let me know if there is anything I can do.

403. At 3.44pm on Friday 29 June 2012 Steven Webber responded to Wendy Fields' email sent to him on 25 June 2012 at 12.51pm stating:⁴⁹²

After looking through the files I can't locate a written approval I have followed up also with Julianne and HR who recall the agreement- it appears that the approval from Julianne was only a verbal approval.

We're entering our last year of the agreement so 2012/2013 will be the last year we pay for this under the current agreement.

404. At 10:00am on Friday 29 June 2012 Mei Lin sent an email to Steven Webber stating:

We have not received the payment. Could you please investigate how it is processing? It would be much appreciated if you could make payment by today.

405. At 3.09pm on Friday 29 June 2012 Simon Jaensch sent an email to Julianne Page stating:⁴⁹³

Would you please authorise the prompt payment of this invoice.

406. At 3.10 pm on Friday 29 June 2012 Julianne Page sent an email to Simons Jaensch stating simply 'approved'.⁴⁹⁴

⁴⁹⁰ SWI, tab 17, p 113.

⁴⁹¹ SWI, tab 18, p 116.

⁴⁹² SW1, tab 19, p 119.

⁴⁹³ SW1, tab 20, p 123.

407. At 3.12pm on Friday 29 June 2012 Simon Jaensch sent an email to Rosa Bugge with copy to Steven Webber and Andrew McBride stating:⁴⁹⁵

Attached is the authorisation from Julieanne Page for the prompt payment to be made today.

408. At 5.50pm on Friday 29 June 2012 Rosa Bugge sent an email to Simon Jaensch with a copy to Steven Webber and Andrew McBride stating: 'payment has been released'.⁴⁹⁶

409. At 6.06pm on Friday 29 June 2012 Steven Webber sent an email to Rosa Bugge and Simon Jaensch stating: 'Thanks Rosa'.⁴⁹⁷

410. At 6.07pm on Friday 29 June 2012 Steven Webber sent an email to Mei Lin stating: 'I was informed payment was released this afternoon'.⁴⁹⁸

The third payment

411. On 1 July 2013 the MOU expired, at least according to clause 3.1 of the MOU.⁴⁹⁹ Consistently with the MOU the letter of 13 October 2010 provided that the fee of \$25,000 per year would continue up to 30 June 2013.⁵⁰⁰

412. On or about 4 March 2013 the AWU issued tax invoice 024239 to Cleanevent, marked the attention Steven Webber seeking an amount of \$27,500 inclusive of GST in respect of what was described as 'Membership Fees for Financial Year 2012-2013'.⁵⁰¹

413. On 14 March 2014 Mei Lin sent an email to Steven Webber attaching tax invoice 024962 from AWU Vic to Cleanevent in respect of Membership fees for financial year 2013-2014 in the amount of \$27,500.⁵⁰²

⁴⁹⁴ SW1, tab 20, p 123.

⁴⁹⁵ SW1, tab 20, p 123.

⁴⁹⁶ SW1, tab 20, p 122.

⁴⁹⁷ SW1, tab 20, p 122.

⁴⁹⁸ SW1, tab 22, p 129.

⁴⁹⁹ SWI, tab 11, p 87.

⁵⁰⁰ Melhem, MFI-2.

⁵⁰¹ SW1, tab 23, p 132.

414. On 26 March 2014 Mei Lin sent a further email to Steven Webber asking when tax invoice 024962 would be paid.⁵⁰³ Steven Webber responded on 26 March 2014 stating: ‘Hi, this was sent to accounts last week for payment. Should be with you shortly.’⁵⁰⁴
415. Steven Webber gave evidence to the effect that he authorised invoice 024962 to be paid and did not notice that the term of the MOU had on its face expired.⁵⁰⁵ This is confirmed by a payment requisition form dated 19 March 2014, raised by Ashley Hill and authorised by Stephen Webber.⁵⁰⁶ The requisition is in the amount of \$27,500 payable to AWU Vic, referring to invoice number 024962. The requisition is stamped as being received by accounts payable on 28 March 2014.

Conclusions

416. The arrangements pursuant to which Cleanevent provided lists of members in exchange for payment resulted in falsely inflated membership numbers. That arises on the proper construction of the AWU Rules made under the *Fair Work (Registered Organisations Act) 2009 (Cth)*.
417. Section 166 of the *Fair Work (Registered Organisations Act) 2009 (Cth)* makes membership subject to, amongst other matters, ‘payment of any amount properly payable in relation to membership’. Neither that section nor any other section of the Act specifies how such an amount may be paid.
418. The relevant AWU rules are set out in full in Counsel Assisting’s submissions in relation to Winslow Constructors Pty Ltd.⁵⁰⁷ In summary, the relevant provisions of the AWU rules are as follows:

⁵⁰² SW1, tab 26, pp 137–138.

⁵⁰³ SW1, tab 29, p 144.

⁵⁰⁴ AWU MFI-14, 6/11/15, pp 1-2.

⁵⁰⁵ Steven Webber, witness statement, 20/5/15, para [17].

⁵⁰⁶ SW1, page 135.

⁵⁰⁷ Chapter 8 of Counsel Assisting’s submissions.

- (a) Rule 7 subsections 1 and 2 of the AWU rules provides that applications for membership shall be made by completion of a hard copy or electronic form together with an authority for deduction of payment by direct debit or payroll deduction or some other form of payment. Membership is to commence on receipt of the first membership contribution.⁵⁰⁸
- (b) Rule 9 relevantly provides that contributions ‘to be paid by members’ are those determined by the National Executive from time to time.⁵⁰⁹
- (c) Rule 10 provides for payment of either quarterly or annual contributions, to the Branch on whose register the member is enrolled. Rule 10(2) refers to annual contributions ‘payable by members’ but Rule 10(1) does not make the same reference in respect of quarterly payments.⁵¹⁰ The balance of the clause refers to recovery of debts, and payment and waiver of payment of contributions, of debts ‘owing by a member’ (Rules 10(3)-(5)) and payroll and direct debit arrangements ‘on the written authority of a member’ (Rule 10(6) and (7)). On balance, the intent evident in the clause is that membership fees are owed, and are to be paid, by members.
- (d) However, if a payment is made by an employer with the knowledge and consent of an employee then it may be that, on analysis, the payment is made by the member within the meaning of these rules because in effect, the employer is acting as the employee’s agent. On the other hand, in circumstances where an employer makes a payment purportedly for membership but without the knowledge of the employee in question it is difficult to see how the payment could in this situation be described as one in which the contributions is paid ‘by’ the member.
- (e) In the period 2008 to 2013 the relevant contribution rates set by the National Executive pursuant to clause 9 of the AWU rules were as follows:⁵¹¹

⁵⁰⁸ AWU MFI-2, 23/10/15, pp 61-62.

⁵⁰⁹ See Rule 9 (1): AWU MFI-2, 23/10/15, p 65.

⁵¹⁰ AWU MFI-2, 23/10/15, pp 66-67.

⁵¹¹ See BMD bundle, 27/5/15, p 356-360.

	1 July 2008	1 July 2011	1 July 2013
Adult	\$450	\$500	\$550
Part Time	\$374.40	\$375	\$390
Junior (under 21)	\$324.50	\$325	\$325

419. The effect of rules 9 and 10 of the AWU Rules is that a person only becomes a member of the AWU after, amongst other things, he or she makes a membership contribution payment. As discussed above, there are difficulties with a person becoming a member by virtue of a payment made by his or her employer, particularly where, as in the case of the employees on the lists randomly compiled at the request of Steven Webber, the employees had no idea membership was being paid on their behalf and cannot be taken to have authorised it.
420. An additional problem that arises, fairly obviously, from an arrangement pursuant to which an employer pays the membership contributions of an employee and does not tell the employee is that the employee is not in a position to take advantage of many of the benefits of membership of the union for which the employer is paying.
421. The evidence discloses that amounts less than the required amounts under rules 9 and 10 of the AWU rules were paid by way of membership contributions. As is apparent from the terms of those rules, the amount of the contribution that has to be paid is fixed by the National Executive. Only the National Executive has the power to vary or waive that contribution amount.⁵¹² A person can only become a member if the amount of that contribution is paid. It is clear from the terms of Claire Raimondo's emails to Angela Leo of 30 May 2011 that the amounts allocated to each member for a full years' membership were far below the prescribed contributions.
422. Thus, in the case of the 100 persons referred to in the email of 30 May 2011, those persons would not have become members at all if the payment was applied as their first membership contribution. In the case of those persons who were already members, the effect of the payment depends upon the operation of rule 15(3). That rule provides that a member is deemed to have resigned if he or she has not paid the annual contribution

⁵¹² Melhem MFI-1, 1/6/15.

for a continuous period of 24 months.⁵¹³ However, if the existing member was up-to-date with membership contributions, by way of payroll deductions or direct debit, he or she would be entitled to a refund or credit against future membership contributions to the extent of the overpayment.

423. There is no evidence that steps were taken to obtain from the employees in question signed membership applications as required under rule 9 of the AWU rules. Ms Leo, who has been Team Leader of the Membership department since 30 September 2009, gave evidence that it was the practice of the membership department, in relation to Company Paid membership, to enter names into the membership roll on the basis of lists provided by the company to the AWU, even if persons on the list had not filled out membership applications.⁵¹⁴

424. The Commission has performed an analysis of the membership status of 95 of the named employees provided by Cleanevent to the AWU on 30 May 2011.⁵¹⁵ The reconciliation shows the following:

- (a) All 95 names were recorded in the membership register;
- (b) 94 were recorded as having joined the AWU on 1 January 2011.
- (c) Of these 94:
 - (i) Each is recorded as having last paid membership contributions on 30 June 2011;
 - (ii) 93 were archived from the membership register on 14 August 2014;
 - (iii) 93 had their address listed as the address of Cleanevent rather than their personal address; and

⁵¹³ Melhem, MFI-7, 2/6/15, p 66.

⁵¹⁴ Angela Leo, 21/10/15, T:785.33 - .44; 796.37-.41.

⁵¹⁵ Melhem MFI-10, 2/6/2010.

- (iv) No membership applications were produced by the AWU in respect of those names.

425. One name on the list was recorded in the membership register as having joined the AWU on 14/12/2011. The register records the member as being paid (as at June 2015) up to September 2014, and the address recorded in the register is the member's personal address. An application form has been produced for this member.
426. Other members of the AWU recorded on the list have given evidence that they were members of the AWU NSW Branch and paid contributions by payroll deduction.⁵¹⁶ They were not aware that the AWU Vic Branch was also paying membership fees on their behalf.⁵¹⁷ Their membership was not previously recorded on the AWU Vic Branch register (rather, it was recorded on the register of a different branch) and therefore they are listed as AWU members twice. One member gave evidence that he was not, to his knowledge, ever a member of the AWU and had no dealings with the AWU while employed at Cleanevent.⁵¹⁸
427. A similar analysis has been performed by the Commission in respect of a list of 100 names provided by Cleanevent on 20 April 2012.⁵¹⁹ The reconciliation with the AWU's membership register reveals the following:
- (a) All 100 names were recorded on the membership register;
 - (b) 21 were recorded as having authorised payment of membership contributions by payroll deduction;
 - (c) AWU produced membership applications in respect of 5 of the names;

⁵¹⁶ Robyn Cubban, witness statement, 26 May 2015, [5]-[7]; Colleen Ellington, witness statement, 29 May 2015, [8]-[9], Shalee-Nicole Allemedine, witness statement, 29 May 2015, [6]-[7].

⁵¹⁷ Robyn Cubban, witness statement, 26 May 2015, [8]; Colleen Ellington, witness statement, 29 May 2015, [12]; Shalee-Nicole Allemedine, witness statement, 29 May 2015, [12].

⁵¹⁸ Nayan Debnath, witness statement, 20 May 2015, [5]-[7].

⁵¹⁹ Melhem MFI-11, 2/6/2010.

- (d) For each of the names referred to in (b) and (c) above, the date on which they were recorded as having joined varied, and the address recorded in the register was a personal address;
- (e) 65 became members on 27 April 2012, none of whom responded to the descriptions in (b) and (c) above. Of these 65 names:
 - (i) 64 had their address listed as the address of Cleanevent rather than their personal address;
 - (ii) all of the names were recorded as having last paid membership on 27 March 2014;
 - (iii) no membership application forms were produced in respect any of them.

428. Thus, the arrangement with Cleanevent has resulted in a significant number of persons becoming recorded as members of the AWU when in truth they are not members under the rules, and in circumstances in which some of the employees on the list were already paying members of the AWU, and others did not know that they had become members.

I COMPARISON OF THE MOU AND THE MODERN AWARD

429. It is obvious why Cleanevent wanted the MOU to govern the terms and conditions of its employees instead of the Modern Award. Under the terms of the MOU, Cleanevent benefitted by saving substantial labour costs. Overtime, penalty rates and loadings in respect of permanent or casual staff are significantly lower under the MOU than the Modern Award. The majority of Cleanevent's casual workforce were likely to be often engaged to work at times when overtime and penalty rates would be payable under the Modern Award.

430. For the purposes of these comparisons only employees working in New South Wales and Victoria are considered. Employees working outside of those states receive lower rates therefore these calculations are a best case scenario for employees.

431. For the purposes of these comparisons the following employee classifications⁵²⁰ are used as comparators:

- (a) Level 1 under the MOU most closely aligns to Level 1 under the Modern Award;
- (b) Level 2 under the MOU most closely aligns to Level 1 under the Modern Award;
- (c) Level 3 under the MOU most closely aligns to Level 2 under the Modern Award; and
- (d) Level 4 under the MOU most closely aligns to Level 3 under the Modern Award.

Permanent employees

432. On face value⁵²¹ the base rates of pay in the MOU are higher when compared to the Modern Award.

433. For permanent employees the Modern Award base rate ranges from approximately 3% to 19.5% lower in comparison to the MOU during the 2010 to 2014 financial years.

⁵²⁰ Schedule D of the Modern Award; clause 15 of the 2006 EBA.

⁵²¹ That is, without taking into account the effect of transitional phasing in the Modern Award which may affect these calculations.

MOU vs. Modern Award (permanent base rate Monday to Friday)

Classification		1.07.2010		1.07.2011		1.07.2012		1.07.2013		1.07.2014	
MOU	Modern Award	MOU	MA ⁵²²	MOU	MA ⁵²³	MOU	MA ⁵²⁴	MOU	MA ⁵²⁵	MOU	MA ⁵²⁶
Level 1	Level 1	632.32 (3.86% higher than MA Lev. 1)		656.64 (4.3% higher than MA Lev. 1)		682.10 (5.2% higher than MA Lev. 1)					
Level 2	Level 1	657.40	608.80 (7.98% lower)	682.86	629.49 (8.47% lower)	709.08	647.80 (9.45% lower)	-	666.59 (6.37% lower than 2012 MOU)	-	686.58 (3.27% lower than 2012 MOU)
Level 3	Level 2	717.82	629.90 (13.9% lower)	753.16	651.31 (15.63% lower)	774.44	647.80 (19.5% lower)		689.64 (12.2% lower than 2012 MOU)		710.32 (9% lower than 2012 MOU)
Level 4	Level 3	773.68	663.60 (16.5% lower)	803.32	686.16 (17% lower)	834.10	706.10 (18.1% lower)	-	726.58 (14.7% lower than 2012 MOU)	-	748.37 (11.4% lower than 2012 MOU)

434. Whilst the base rates of pay for permanent employees under the MOU are higher in comparison to the Modern Award, shift work, weekend and public holiday penalties and overtime are significantly lower.

⁵²² *Cleaning Services Award 2010* as at 30 June 2010 which provides wages for the 2010-11 financial year, Fair Work Ombudsman, <http://awardviewer.fwo.gov.au/award/Version/312343>, accessed 5/11/2015.

⁵²³ *Cleaning Services Award 2010* as at 23 June 2011 which provides wages for 2011-12 financial year, Fair Work Ombudsman, <http://awardviewer.fwo.gov.au/award/Version/351866>, accessed 5/11/2015.

⁵²⁴ *Cleaning Services Award 2010* as at 21 June 2012 which provides wages for 2012-13 financial year, Fair Work Ombudsman, http://awardviewer.fwo.gov.au/award/Version/363596#_Ref208655928, accessed 5/11/2015.

⁵²⁵ *Cleaning Services Award 2010* as at 27 June 2013 which provides wages for 2013-14 financial year, Fair Work Ombudsman, <http://awardviewer.fwo.gov.au/award/Version/383236>, accessed 5/11/2015.

⁵²⁶ *Cleaning Services Award 2010* as at 27 June 2014 which provides wages for 2014-15 financial year. Fair Work Ombudsman, <http://awardviewer.fwo.gov.au/award/Version/394810>, accessed 5/11/2015.

Overtime

435. Clause 2.8 of the MOU provides that all time worked by permanent employees in excess of 76 hours in a fortnight will be paid overtime at the rates attached in the schedules. These overtime rates equate to a fixed 33% loading on the permanent base rate regardless of when the overtime is worked.
436. Clause 24 of the Modern Award provides that the ordinary hours of full-time employees will not exceed 38 hours per week, to be worked in period of not more than 7.6 hours per day, in not more than 5 days, on any day Monday to Sunday inclusive.
437. Clause 28 of the Modern Award provides that all time worked outside a permanent employees rostered hours is overtime and all time worked in excess of 7.6 hours per day, five days per week or 38 hours in any week by part-time employees is overtime. Overtime worked from Monday to Saturday will be paid at the rate of time and a half for the first two hours and double time thereafter. Overtime worked on Sundays will be paid at the rate of double time. Overtime worked on public holidays will be paid at the rate of double time and one half.
438. Whilst the base rates in the MOU for permanent employees are higher than those in the Modern Award, the rate and entitlement to overtime in the MOU, particularly for overtime worked on weekends and public holidays, is less than that provided for in the Modern Award.

Penalties and allowances

439. The pay rates included in the schedules to the MOU do not provide any shift work, weekend or public holiday percentage loading for permanent employees. Rather the continued operation of clause 22 of the 2006 EBA provides a fixed payment of \$55 for permanent employees who work 7.6 hours on a public holiday.⁵²⁷

⁵²⁷ This equates to an additional \$7.23 per hour over 7.6 hours. This calculation has not been incorporated into the comparison tables in this section.

440. In comparison, clause 27 of the Modern Award provides that early morning, afternoon and non-permanent shift workers are paid an additional 15% loading on their ordinary hourly rate. Employees who work permanent night shifts are entitled to an additional 30% loading.⁵²⁸ Employees are also entitled to time and a half on Saturday, double time on Sunday and double time and a half on Public Holidays.
441. Clause 18 of the 2006 EBA provides that employees staying away from home for an event are entitled to accommodation, meals and an out of pocket expense allowance. Employees are also entitled to a one off first aid allowance of \$250 plus the fees for their first aid qualification. Under the Modern Award, employees are entitled to 11 different allowances as set out in clause 17.⁵²⁹
442. Permanent employees who work shift work, weekends, public holidays or overtime would be better off under the Modern Award in comparison to the MOU.

Casual employees

443. The MOU does not provide for penalties for work on weekends, public holidays or shift work for casual employees who work at events. These employees also receive a lower rate (up to 10%) in comparison to casuals who do not work at events.
444. The Modern Award does not delineate between casual work at events or otherwise. This results in the base rates for casuals working at events under the MOU ranging from approximately 1% to 19% lower in comparison to the base rates under the Modern Award from the 2010 financial year.

⁵²⁸ These shift loadings have not been incorporated into the comparison tables in this section.

⁵²⁹ These allowances have not been incorporated into the comparison tables in this section.

MOU vs. Modern Award – Minimum casual rate (Monday to Friday at events)

Classification		1.07. 2010		1.07.2011		1.07.2012		1.07.2013		1.07.2014	
MOU	Modern Award (MA)	MOU	MA	MOU	MA	MOU	MA	MOU	MA	MOU	MA
Level 1	Level 1	18.05 (11.1% lower than MA Lev.1)		18.59 (11.4% lower than MA Lev. 1)		19.15 (11.2% lower than MA Lev. 1)					
Level 2	Level 1	18.14	20.07 (10.6% higher)	18.50	20.71 (11.9% higher)	18.87	21.31 (12.9% higher)		21.86 (15.8% higher than 2012 MOU)		22.51 (19.2% higher than 2012 MOU)
Level 3	Level 2	19.86	20.72 (4.3% higher)	20.26	21.42 (1.25% higher)	20.87	22.05 (5.65% higher)		22.61 (8.3% higher than 2012 MOU)		23.3 (11.6% higher than 2012 MOU)
Level 4	Level 3	21.58	21.83 (1.15% higher)	22.29	22.57 (1.15% higher)	22.74	23.22 (2.1% higher)		23.83 (4.7% higher than 2012 MOU)		24.55 (7.9% higher than 2012 MOU)

445. Casual base rates (Monday to Friday) for casuals not working at events under the MOU are also lower for employees classified as Levels 1 and 2 in comparison to the Modern Award from the 2010 financial year.

446. Casuals employed under Levels 3 and 4 receive a higher base rate under the MOU in comparison to the Modern Award for the 2010-2013 financial years.

447. From 1 July 2014, all casual base rates for all classifications regardless of whether they are working at an event or not are higher under the Modern Award.

MOU vs. Modern Award – Minimum casual rate (Monday to Friday not at events)

Classification		1.07.2010		1.07.2011		1.07.2012		1.07.2013		1.07.2014	
MOU	Modern Award (MA)	MOU	MA	MOU	MA	MOU	MA	MOU	MA	MOU	MA
Level 1	Level 1	19.22 (4.4% lower than MA Level 1)		19.50 (6.2% lower than MA level 1)		19.89 (7.1% lower than MA level 1)					
Level 2	Level 1	20.02	20.07 (0.2% higher)	20.42	20.71 (1.42% higher)	20.83	21.31 (2.3% higher)		21.86 (4.9% higher than MOU in 2012)		22.51 (8% higher than MOU in 2012)
Level 3	Level 2	21.82	20.72 (5.3% lower)	22.28	21.42 (4% lower)	22.71	22.05 (2.9% lower)		22.61 (0.44% lower than MOU in 2012)		23.3 (2.59% higher)
Level 4	Level 3	23.53	21.83 (7.78% lower)	24.00	22.57 (6.3% lower)	24.45	23.22 (5.2% lower)		23.83 (2.5% lower than the MOU in 2012)		24.55 (0.4% higher)

448. Casuals who work on weekends or public holidays but not at events receive approximately a 12.8% loading on their base rate. This 12.8% loading applies regardless of whether the casual employee works on a Saturday, Sunday or public holiday. In comparison, clause 27 of the Modern Award provides that casuals are entitled to the Saturday, Sunday and public holiday penalties which are significantly higher than the 12.8% loading set out above. Therefore they are disadvantaged under the MOU.

449. Casuals who work at events which fall on weekends or public holidays are the most disadvantaged by having their employment regulated by the MOU instead of the Modern Award. For example, casuals who work at events on a Saturday have rates which range from approximately 146% to 167% lower in comparison to the rates they would receive if they were covered by the Modern Award.

*MOU (casuals at events) vs. Modern Award (Saturday casual rate)*⁵³⁰

Classification		1.07.2010		1.07.2011		1.07.2012		1.07.2013		1.07.2014	
MOU	Modern Award	MOU	MA	MOU	MA	MOU	MA	MOU	MA	MOU	MA
Level 1	Level 1	18.05 (166.7% lower than MA Lev. 1)		18.59 (167% lower than MA Lev. 1)		19.15 (166.8% lower than MA Lev. 1)					
Level 2	Level 1	18.14	28.03 (154.5% higher)	18.50	28.98 (156.6% higher)	18.87	29.83 (158% higher)		30.69 (162% higher than MOU 2012)		31.61 (167% higher than MOU in 2012)
Level 3	Level 2	19.86	29 (146% higher)	20.28	29.99 (147% higher)	20.87	30.86 (147% higher)		31.75 (152% higher than 2012 MOU)		32.71 (156% higher than 2012 MOU))
Level 4	Level 3	21.58	32.74 (151% higher)	22.29	33.85 (151% higher)	22.74	34.83 (153% higher)		35.74 (157% higher than 2012 MOU))		36.82 (161% higher than 2012 MOU)

450. Casuals who work at events on a Sunday have rates which range from approximately 182% to 215% lower in comparison to the rates they would receive if they were covered by the Modern Award.

⁵³⁰ Calculated by multiplying the permanent base rate by 1.75 (casual loading of 25% (cl.12.5(a)) plus Saturday loading of 150% (cl. 27.2(a)).

*MOU (casuals at events) vs. Modern Award (Sunday casual rates)*⁵³¹

Classification		2010		2011		2012		2013		2014	
MOU	Modern Award	MOU	MA	MOU	MA	MOU	MA	MOU	MA	MOU	MA
Level 1	Level 1	18.05 (199% lower than MA Lev 1)		18.59 (200% lower than MA Lev 1)		19.15 (200% lower than MA Lev 1)					
Level 2	Level 1	18.14	36.04 (198% higher)	18.50	37.27 (201% higher)	18.87	38.35 (203% higher)	-	39.46 (209% higher)	-	40.65 (215% higher than 2012 MOU)
Level 3	Level 2	19.86	37.29 (187% higher)	20.28	38.56 (190% higher)	20.87	39.68 (190% higher)	-	40.83 (195% higher than 2012 MOU)	-	42.05 (201% higher than 2012 MOU)
Level 4	Level 3	21.58	39.29 (182% higher)	22.29	40.62 (182% higher)	22.74	41.80 (183% higher)	-	43.00 (189% higher than 2012 MOU)	-	44.31 (194% higher than 2012 MOU)

451. Casuals who work at events on a public holiday have rates which range from approximately 22% to 263% lower in comparison to the rates they would receive if they were covered by the Modern Award.

*MOU (casuals at events) vs. Modern Award (Public Holiday casual rates)*⁵³²

Classification		2010		2011		2012		2013		2014	
MOU	Modern Award	MOU	MA	MOU	MA	MOU	MA	MOU	MA	MOU	MA
Level 1	Level 1	18.05 (244% lower than MA Lev 1)		18.59 (244% lower than MA Lev 1)		19.15 (244% lower than MA Lev 1)					
Level 2	Level 1	18.14	44.05 (242% higher)	18.50	45.54 (246% higher)	18.87	46.86 (248% higher)	-	48.23 (255% higher)	-	49.66 (263% higher)

⁵³¹ Calculated by multiplying the permanent base rate by 2.25 (casual loading of 25% (cl.12.5(a)) plus Sunday loading of 200% (cl. 27.2(b)).

⁵³² Calculated by multiplying the permanent base rate by 2.75 (casual loading of 25% (cl. 12.5(a)) plus public holiday loading of 250% (cl.27.3).

									than 2012 MOU)		than 2012 MOU)
Level 3	Level 2	19.86	45.37 (228% higher)	20.28	47.10 (232% higher)	20.87	48.48 (232% higher)	-	49.88 (239% higher than 2012 MOU)	-	51.39 (246% higher than 2012 MOU)
Level 4	Level 3	21.58	48.01 (222% higher)	22.29	49.63 (222% higher)	22.74	51.09 (224% higher)	-	52.52 (230% higher than 2012 MOU)	-	54.14 (238% higher than 2012 MOU)

452. It has been suggested that the disadvantages identified above would not in fact pertain to the rates payable under the MOU because:

- (a) The transitional provisions in the Modern Award would provide for a lower escalation of rates over time; and
- (b) Item 13 of Schedule 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) and the s 16 of the Fair Work Act provide that where the base rate of pay in an instrument such as the 2006 EBA is lower than the Modern Award, the Modern Award base rate of pay applies.

453. Neither of these matters operate to remove the relevant disadvantage where Cleanevent employees are concerned. This is because:

- (a) None of the above provisions operate to entitle casual workers to penalty rates and loadings where these are not provided for under the MOU;
- (b) There is no evidence to show that Cleanevent employees were paid differently to the rates of pay provided for in the MOU, subject to any uplifted adjustments to those rates;⁵³³

⁵³³ Steven Webber's evidence is that Cleanevent has, consistently with the MOU, increased pay rates. Most recently this was said to have been done by the same margin as the Fair Work Commission safety net adjustments handed down the previous year. Webber said that this was because the MOU had the effect of extending the industrial instrument and 'it seemed a fair thing to do.' Steven Webber, witness statement, 20/5/2015, para [16].

- (c) There is no evidence to show that the AWU took any steps to ensure that the safety net provisions were being applied in relation to Cleanevent workers; and
- (d) It is extremely unlikely that rates applicable to the Modern Award were paid by Cleanevent in circumstances in which there was a dispute between Cleanevent and the AWU as to which Modern Award was the appropriate award to cover the employees.⁵³⁴

J MEMBERSHIP ARRANGEMENTS: OPT-OUT CLAUSES

454. The evidence traversed above shows that, for some time, Cleanevent included in its employment application forms an ‘opt out clause’ for AWU membership. The effect of the clause was that, if the employee did not tick the box next to the clause when completing the application form, he or she was deemed to have joined the AWU.
455. Steven Hunter’s evidence is that, at the time he was employed at Cleanevent, the employment application forms that he provided to applicants contained an ‘opt out’ clause requiring the prospective employee to tick a box if he or she did not wish to become a member of the AWU. If the box was left blank, it was assumed that the employee did not wish to become a member.⁵³⁵ If an employee did not tick the opt out box, the form was remitted to payroll and membership fees would be deducted from members’ wages according to whatever calculation applied.⁵³⁶ Steven Hunter said that the form was in use from 1996 through to about 2001.⁵³⁷
456. Steven Hunter gave evidence that the genesis of the opt-out clause was a national management seminar held in about 1998.⁵³⁸ Bill Shorten attended the seminar and gave a presentation in relation to industrial relations policies, but Steven Hunter’s evidence was that the opt-out clause was not discussed during that presentation.⁵³⁹ Steven Hunter

⁵³⁴ Shorten MFI-5, Vol 2, page 210.

⁵³⁵ Steven Hunter, witness statement, [8]; Steven Hunter, 19/10/15, T591.39-45, T592.6-18.

⁵³⁶ Steven Hunter, 19/10/15, T592.33-38.

⁵³⁷ Steven Hunter, 19/10/15, T591.29.30.

⁵³⁸ Steven Hunter, 19/10/15, T592.45-47, T594.3-7.

⁵³⁹ Steven Hunter, 19/10/15, T594.9-13, 24-28.

sad that the topic of opt-out clauses was raised by either Craig Lovett or Paul Lovett, with the suggestion that it would increase numbers of membership.⁵⁴⁰

457. When asked whether Cleanevent employees were recruited to AWU membership via an opt-out arrangement, Bill Shorten said that:⁵⁴¹

I believe that members at Cleanevent would have been enrolled in the same way which we did it everywhere else and that policy was that we would seek employers to provide membership forms when people started work. Alternatively, where the employer was neutral and didn't really want to encourage Union membership, our delegates would hand out forms to new starters. I often thought it was a good idea in the first few days that the delegates spoke to new starters. Sometimes where the employer was downright hostile to Union membership then it would be a lot more difficult process to be able to talk to people. I could well imagine and believe that at Cleanevent, as part of an induction, by induction, you know, the new employee turns up, you fill out your superannuation paperwork, you fill out all your pay details, that the employer would hand a Union membership application. I am definitely sure that it wasn't a closed shop.

458. Bill Shorten stated that he 'may well have aspired to an opt-out arrangement' during his time as a Cleanevent organiser, but that he would have to see the membership forms to confirm whether that arrangement was in place.⁵⁴² He denied that the AWU was forcing people to be in the union.⁵⁴³

459. Cesar Melhem also gave evidence that there was an opt-out arrangement in place.⁵⁴⁴

The opt out arrangement was discussed because that was there up to about 2009. There was an opt out provision in the Cleanevent contract of employment where unless specifically an employee tick a box then - and that's particularly in relation to the casuals, they were to be marked here as members. There was an opt out provision in their contract of employment and if they tick a box then they've indicated they don't wish to be members of the Union, and that was fair enough. If that box wasn't ticked then they were deemed to be members of the Union.

460. It is evident that, by 2010, this practice was no longer in place. Julianne Page said that she did not believe that opt-out forms were ever put into practice. To her understanding, the application forms for Spotless workers always had an area for them to join any union.⁵⁴⁵

⁵⁴⁰ Steven Hunter, 19/10/15, T594.38-46.

⁵⁴¹ Bill Shorten, 8/7/2015, T58.15-37.

⁵⁴² Bill Shorten 8/7/2015, T59/6-8.

⁵⁴³ Bill Shorten 8/7/2015, T59/14-15.

⁵⁴⁴ Cesar Melhem, 22/10/15, T887.24-36.

⁵⁴⁵ Julianne Page, Private Hearing, 29/09/2015, T8.43-47, T9.3-4.

461. Logic dictates that if the application forms did contain an opt-out clause at this time, there would be no reason for the AWU to be requesting them as referred to in Michael Robinson's 17 May 2010 email.
462. Moreover, it appears that the issue of opt-out clauses was still being pursued in late 2012. On 7 September 2012 the executive assistant to Cesar Melhem sent an email to Michael Robinson proposing a meeting with Cesar Melhem and John-Paul Blandthorn at the offices of AWU Vic.⁵⁴⁶ Several dates for the meeting are proposed between 17 September 2012 and 25 September 2012. On 8 October 2012 John-Paul Blandthorn sent an email to Steven Webber, copied to Cesar Melhem, stating:⁵⁴⁷

As per our discussions attached is a clause drafted by our lawyers to be included in the letter of offer to employees.

Cleanevent has a sound, cooperative and collaborative relationship with the Australian Workers' Union. Together, Cleanevent and the AWU strive towards best practice standards for service to clients and working terms and conditions for all workers. Cleanevent promoted full AWU membership across its workforce. By accepting your offer of employment you agree to become a member of the AWU, unless you advise Cleanevent to the contrary, by ticking the box below.

I do not wish to become a member of the AWU.

463. Cesar Melhem again affirmed that this issue was raised in 2012 and that the AWU Victorian Branch sought legal advice in relation to the clause at that time.⁵⁴⁸
464. There are a number of issues with the adoption of opt-out clauses.
465. *First*, the adoption of such forms, particularly in circumstances in which applicants for casual cleaning work might be transient and may well not be sophisticated in matters of industrial relations, carries a risk of denying workers an informed choice as to whether to join a union that is inconsistent with right of free association.
466. *Second*, depending on the wording of the form, the worker may not be properly informed about the financial consequences of membership. If payroll deductions or direct debits are processed without some express written authorisation of the worker

⁵⁴⁶ Cleanevent MFI-1, page 330.

⁵⁴⁷ Cleanevent MFI-1, page 331.

⁵⁴⁸ Cesar Melhem, 22/10/15, T887.40-45.

(rather than a failure to tick a box on an unrelated form) it is likely that AWU rules 10(6) and (7) would not be complied with.

467. *Third*, there are obvious privacy issues associated with a third party populating the membership register with personal information provided to an employer without the consent of the worker.
468. The use of opt-out forms to secure inflated membership is beset with many of the problems associated with payment of membership contributions by an employer, discussed in section G above.

K THE FATE OF THE 2006 EBA

469. Despite the fact that the term of the MOU and the obligations under the letter of 13 October 2010 appeared on their face to have come to an end, Steven Webber gave evidence that the AWU and Cleanevent proceeded on the basis that it was still on foot following 1 July 2013.⁵⁴⁹

470. On 4 July 2013 Steven Webber sent an email to John-Paul Blandthorn stating:⁵⁵⁰

A note to inform you that we have made a decision to pass on to all staff under the EBA a 2.6% increase pending finalisation of our agreement.

Once we finalise all staff will be back payed [sic] any short pay.

I am sure you will receive some calls on this so I wanted to ensure you were fore armed with our position.

471. John-Paul Blandthorn responded on 4 July 2013, attaching the 1999 Award and noting that the rates were 'not right'.⁵⁵¹

472. On 7 July 2013, Steven Webber sent an email to John-Paul Blandthorn attaching a letter from the Fair Work Commission and stating that he would ring John-Paul Blandthorn on Monday to discuss.⁵⁵² The letter, dated 3 July 2013, refers to the 1999 Award and

⁵⁴⁹ Steven Webber, witness statement, 20/5/2015, para [16].

⁵⁵⁰ Cleanevent MFI-1, page 334.

⁵⁵¹ Cleanevent MFI-1, pages 334-372.

⁵⁵² Cleanevent MFI-1, page 373.

advises that, by operation of Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), the 1999 Award will be terminated unless an application to modernise the Award is made and granted by 31 December 2013.⁵⁵³

473. John-Paul Blandthorn responded on 8 July 2013, stating:⁵⁵⁴

This is what I was talking to you guys about.

You have a short window of opportunity to make a new agreement with this as the reference award before you fall under the Modern award.

It is unlikely you will get the Enterprise Award extended because United Voice will easily be able to knock it off by claiming the Modern Award already deals with it.

I am around tomorrow if you want to catch up.

474. It appears that, following this exchange, John-Paul Blandthorn and Steven Webber continued negotiations with a view to agreeing an EBA with the 1999 Award as the relevant award, prior to the termination deadline. A diary invitation sent from Steven Webber to John-Paul Blandthorn and Ryan Murphy proposed an 'EBA Workshop' at Cleanevent's offices at 9:30 on 31 July 2013.⁵⁵⁵

475. On 31 July 2013 at 8:25 am, John-Paul Blandthorn sent an email to Steven Webber, confirming that the correct industrial instrument for the then applicable Better Off Overall Test was the 1999 Award, and setting out a table showing the weekly increases in weekly and hourly pay rates for level 1 and 2 employees following the increases granted by the Australian Fair Pay Commission and Fair Work Australia. The email concluded 'see you shortly.'⁵⁵⁶

476. It is evident from the above exchange that John-Paul Blandthorn continued to be alive to the commercial attractiveness of retaining the rates in the 1999 Award as the comparator, compared with the Modern Award. The fact that he actively sought to assist Cleanevent to extend its advantage in the face of a clear legislative intention that Cleanevent's employees should be benefiting from a more generous industrial regime

⁵⁵³ Cleanevent MFI-1, page 378.

⁵⁵⁴ Cleanevent MFI-1, page 394.

⁵⁵⁵ AWU MFI-14, 6/11/15, p 3.

⁵⁵⁶ Cleanevent MFI-1, page 395.

evidences the depth of the conflict of interest affecting the AWU in its relationship with Cleanevent, as discussed further in the next section of these submissions.

477. The next dealing between the AWU and Cleanevent appears to have occurred in June 2014, when Cleanevent approached the AWU seeking approval of a proposed EBA underpinned by the *Amusements, Events and Recreation Award 2010*.⁵⁵⁷ The proposed agreement was circulated nationally and officials of several branches expressed concern about the terms of the proposed EBA. On 27 June 2014 Daniel Walton, Assistant National Secretary of the AWU, informed Steven Webber that the AWU would not sign the agreement and would oppose approval by the Commission.⁵⁵⁸ It appears, from submissions to the Fair Work Commission on the AWU's application to terminate the EBA, that further negotiations proceeded between Cleanevent and the AWU after this time.⁵⁵⁹
478. Ben Davis gave evidence to the Commission that he first became aware of the side letter when he came upon it when preparing documents in response to a Notice to Produce issued by the Commission.⁵⁶⁰ After that, he spoke with Mr Douglas of Cleanevent on about 13 March 2015 and told him that the arrangement was off.⁵⁶¹ Ben Davis's evidence is that he did so because he believed that the arrangement was 'untoward', because 'As well as the whole notion of paying - the employer paying membership fees, the fact that it was attached to the MOU.'⁵⁶²
479. On 4 June 2015 the AWU filed with the Fair Work Commission and served on Cleanevent an application to terminate the 2006 EBA.⁵⁶³ The letter of service advised that the AWU's position was that the *Cleaning Services Award 2010* was the relevant Modern Award, and not the *Amusements, Events and Recreation Award 2010*.

⁵⁵⁷ Shorten MFI-5, Vol 2, pages 196.

⁵⁵⁸ Shorten MFI-5, Vol 2, page 197.

⁵⁵⁹ Shorten MFI-5, Vol 2, pages 200-201.

⁵⁶⁰ Ben Davis, 4/6/2015, T647.12-27.

⁵⁶¹ Ben Davis, 4/6/2015, T647.29-46; T653.27-40.

⁵⁶² Ben Davis, 4/6/2015, T648.109.

⁵⁶³ Shorten MFI-5, Vol 2, page 177.

480. In the submissions filed with the Fair Work Commission, the AWU contended:⁵⁶⁴

Employees covered by the 2006 Agreement are currently being denied access to the safety net contemplated by the Fair Work Act 2009.

This is because their employment conditions are still governed by the 2006 Agreement which was negotiated under predecessor legislation which did not require an assessment of whether employees would be better off overall under the proposed agreement than they otherwise would be under the relevant Modern Award.

481. The submission also noted that the casual loading and rates of pay in the 2006 EBA both fell below the 2014 National Minimum Wage Order.⁵⁶⁵

482. On 12 June 2015, the 2006 EBA was terminated by order of the Fair Work Commission.⁵⁶⁶

483. Bill Shorten accepted that there was no reason to disagree with the submissions put forward by the AWU and accepted by the Fair Work Commissioner in seeking to terminate the 2006 EBA in June 2015.⁵⁶⁷ Those submissions included statements to the effect that:

- (a) The view of the AWU, and employees the AWU has spoken with, is that the 2006 EBA should be terminated;
- (b) Under the 2006 EBA, employees working at events do not receive higher rates when they work on weekends and public holidays;
- (c) Although the termination of the 2006 EBA might result in higher operating costs for the employer, the Award rates have been carefully determined by the Fair Work Commission and are presumably being paid by Cleanevent's competitors; and

⁵⁶⁴ Shorten MFI-5, 8/7/15, Vol 2, pp 189, para 11-12.

⁵⁶⁵ Shorten MFI-5, 8/7/15, Vol 2, p 189, para 15.

⁵⁶⁶ Shorten MFI-5, 8/7/15, Vol 2, pp 217-221.

⁵⁶⁷ Bill Shorten 8/7/15, T:63.43, 65.18-25, 41, Shorten MFI-5, 8/7/15m Vol 2, pp189-190, 208, 219, paras 15, 17-18.

- (d) There does not seem to be any real benefit for an employee from the 2006 EBA remaining operative, the only purpose of which is to deny employees, particularly casual employees, access to penalty rates.⁵⁶⁸

L CONCLUSIONS

Conflict of interest

484. From 1 July 2009, s 176 of the *Fair Work Act 2009* (Cth), provided that a union is automatically a ‘bargaining representative’ for each employee who is a member of the union who will be covered by a proposed enterprise agreement which is not a ‘greenfields agreement’ (the union member employees), provided that the union is entitled to represent the industrial interests of the employees in relation to work that will be performed under the agreement: ss 176(1)(b), 176(3).
485. A union member employee who will be covered by the proposed agreement may appoint another person as his or her bargaining representative, but in the absence of such appointment the union will be the bargaining representative of the union member employee: ss 174(3), 176(1)(b).
486. The role of a union bargaining representative is to engage in ‘good faith bargaining’ with employer bargaining representatives. While s 228 of the *Fair Work Act 2009* (Cth) is directed in the main at the conduct of a bargaining representative with respect to his or her employer counterpart, it is an inherent aspect of the process of enterprise bargaining that during negotiations the union, through its relevant officers, acts on behalf of and represents the interests of the union member employees. This places the union officer acting as a bargaining representative in a different position to the union officer acting in the capacity as an officer of a union (and thereby, analogously to the position of a company director whose duties are owed to the company and not its members: see *Allen v Townsend* (1977) 31 FLR 431 at 483-485; *Scott v Jess* (1984) 3 FCR 263 at 287; *General Manager of The Fair Work Commission v Thomson (No 3)* [2015] FCA 1001 at [76]), with the result that the fiduciary duties are owed to the employee members directly. This is because the official undertakes to enter into negotiations to secure

⁵⁶⁸ Shorten MFI-5, 8/7/15, Vol 2, pp 189-190, 208.

terms of the proposed EBA on behalf of the members, subject to the members' rights to vote on the agreement.⁵⁶⁹ As a matter of practicality, the official has conferred on him or her a discretion to reach terms with the employer, acting in the interests of members.⁵⁷⁰

487. Consequently, union officials have duties when acting in the role of bargaining representative to:

(a) avoid a position where there is a conflict, or a sensible, real or substantial possibility of conflict, between their interest and duty or between their duties;⁵⁷¹ and

(b) avoid using their positions to confer an advantage on themselves or someone else or to act to the detriment of the members.⁵⁷²

488. John-Paul Blandthorn accepted that when undertaking negotiations for the EBA and the MOU, he was acting on behalf of the AWU members employed by Cleanevent.⁵⁷³ Cesar Melhem said that in that capacity he was acting for the members, the employees and the enterprise.⁵⁷⁴

489. Mr Melhem accepted that, at the time of execution of the MOU and the side letter, the AWU could have pressed for the application of the Modern Award, although he did not accept that the workers would be better off as a consequence, due to the application of the transitional provisions operating at the time.⁵⁷⁵ Cesar Melhem also rejected the

⁵⁶⁹ *Fair Work Act 2009* (Cth) ss 181-182.

⁵⁷⁰ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96.

⁵⁷¹ *Breen v Williams* (1996) 186 CLR 71 at 113; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 197 [74], 198 [77]–[79]; *Clay v Clay* (2001) 202 CLR 410 at 436; *Howard v FCT* (2014) 88 ALJR 667 at 677 [33], 681 [56], [59], [61].

⁵⁷² *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

⁵⁷³ John-Paul Blandthorn, 20/10/15, T758.29-31.

⁵⁷⁴ Cesar Melhem, 22/10/15, T:889.1-5.

⁵⁷⁵ Cesar Melhem, 22/10/15, T:889.25-47.

proposition that Cleanevent agreed to the side deal to obtain favourable treatment from the AWU, stating ‘They did that to help their casual workforce to get representation.’⁵⁷⁶

490. Mr Blandthorn accepted that, at the time the agreement to pay \$25,000 to the AWU was reached, there had been no particular members in respect of which the payment would be allocated.⁵⁷⁷ He said that he did not believe that it was the Union’s motivation in seeking the side deal to secure the agreement to the MOU.⁵⁷⁸
491. The payments procured by Mr Blandthorn and Mr Melhem from Cleanevent were not procured for their own benefit, but for the benefit of the AWU Vic Branch. Cesar Melhem said that the \$25,000 payment could not be a benefit to the AWU because the union’s resource commitment outweighed the money that was received.⁵⁷⁹ John-Paul Blandthorn disputed the proposition that by negotiating the \$25,000 side deal he was endeavouring to obtain a benefit for the AWU. His reason for this was as follows:⁵⁸⁰

It was to compensate for the extra work the AWU was doing servicing people who were not members of the Union.

I’m not necessarily sure it was a benefit to the AWU for the amount of time and effort. I mean, it could be well argued by the AWU that the time and effort put in was at the cost of \$100,000 or \$5 million and that receiving \$25,000 went nowhere near to making it a benefit.

492. This evidence should not be accepted. Leaving aside whether the payments did or did not serve some compensatory purpose and if so how much, they were a receipt of funds that was not to be deployed for any particular purpose other than to increase the wealth of the AWU Vic Branch. In that sense, it was a benefit.
493. Those payments were procured in the course of a process whereby both officials, and the AWU, were supposed to be acting in the interests of AWU members who were Cleanevent employees in securing an agreement relating to the terms and conditions of those members’ employment.

⁵⁷⁶ Cesar Melhem, 22/10/15, T:892.9-13.

⁵⁷⁷ John-Paul Blandthorn, 20/10/15, T:759.5-10.

⁵⁷⁸ John-Paul Blandthorn, 20/10/15, T:760.13-16.

⁵⁷⁹ Cesar Melhem, 22/10/15, T:889.7-17.

⁵⁸⁰ John-Paul Blandthorn, 20/10/15, T:758.38-47, 759.103.

494. There was a conflict between the interests of the AWU, on the one hand, and an interest of AWU members who were Cleanevent employees, on the other. Moreover, in securing agreement to the side deal Mr Blandthorn and Mr Melhem used their positions (and in particular their bargaining power in committing their members to the MOU) to confer an advantage on the AWU.
495. It was in the interests of the AWU to receive almost \$25,000 and inflated membership numbers. That is so even if Mr Melhem's explanation that the payment was a 'service fee' is accepted, because there is no evidence that the payment would have been agreed to unless it was contingent on the AWU's agreement to the MOU. Indeed, the May 2010 correspondence of Michael Robinson suggests entirely there was no prospect of agreeing to the payment were it not for the savings created by the MOU.
496. The payment was not in the interests of AWU members for a number of reasons. First, because it was the price for entry into the MOU, it weakened the AWU's bargaining position in respect of the MOU. Secondly, the payments extracted from Cleanevent money that on account of memberships when there is no evidence that the members in respect of whom the payments were made had any access to the benefits of membership. Additionally, the payments were made to secure an agreement that substantially disadvantaged the workers when compared with their entitlements under the Modern Award.
497. The AWU Cleanevent workers, not being informed of the arrangement, were deprived of any choice about whether the arrangement would be entered into or the payments made. Assuming that the workers were informed of the side deal, it would be cold comfort to learn that that was the cost of extending an EBA that deprived them of penalty rates to which they were otherwise entitled.
498. For the above reasons, Mr Melhem and Mr Blandthorn by their conduct, may have breached their fiduciary duties (or alternatively, the AWU may have breached its fiduciary duties) to members employed by Cleanevent in entering into and performing the arrangement pursuant to which \$25,000 was paid in exchange for lists of members.

Circumventing the proper industrial relations framework

499. The other troublesome aspect of the conduct described above is that it, taken with the history of the AWU's dealings with Cleanevent on behalf of its members, represents a willingness to circumvent the controls in the industrial relations process that are designed to benefit the workers that the AWU represents. In 2004, officers of the AWU failed to disclose to the AIRC terms of the 2004 EBA that they knew were less advantageous than the 1999 Award. In 2010, officials of the AWU secured an agreement that extends the operation of a Workchoices-era agreement well into the period in which it could have ensured that the Cleanevent workers enjoyed the benefits of the Fair Work legislative regime. In 2013, another attempt is made by the AWU to extend the operation of older instruments to avoid the Modern Award.
500. Against this background, and having regard to the vulnerability of the casual workers that made up much of Cleanevent's workforce, the possible breaches of duty identified above are particularly serious.

Membership issues

501. Turning to the facilitation of the scheme by which lists of members were provided so as to account for the payments received from Cleanevent, the following potential contraventions arise.
502. By the AWU recording the payments as membership contributions and thereby falsely inflating membership numbers, AWU Vic Branch may have engaged in the following contraventions of the *Fair Work (Registered Organisations) Act 2009* (Cth).
- (a) Section 253(3) of the *Fair Work (Registered Organisations) Act 2009* (Cth) in that, by recording as membership income the payments received by Cleanevent when they were not in fact in respect of genuine memberships, the financial statement of the Branch for the relevant financial years did not give a true and fair view of the financial position and performance of the Branch.

- (b) Section 230 of the *Fair Work (Registered Organisations) Act 2009* (Cth) in that the AWU Vic Branch failed to keep records of the members of the AWU so as to record persons who had in fact become members.

503. Moreover, Mr Melhem may have contravened s 285 of the *Fair Work (Registered Organisations) Act 2009* (Cth). In procuring the payment of the amounts received by Cleanevent, and in making directions as to how the membership records were to be treated in relation to those payments, Mr Melhem was acting in the exercise of the powers or duties his office in relation to the financial management of the Branch. He did so recklessly and contrary to the requirements of the AWU Rules, including the rules requiring payment by members of prescribed membership contributions. He also acted so as to expose the AWU Vic Branch to civil penalties arising from contraventions of the above provisions of the *Fair Work (Registered Organisations) Act 2009* (Cth).

504. Mr Melhem also may have contravened s 286 of the *Fair Work (Registered Organisations) Act 2009* (Cth), in that he acted other than in good faith and for an improper purpose in falsely inflating the membership numbers of the AWU Vic Branch at the expense of the other branches of the AWU. In the circumstances in which his conduct exposed the Union to a penalty, and operated to disadvantage the other branches of the AWU, it would not be accepted that Mr Melhem genuinely believed he was acting in the best interests of the Union by falsely inflating its membership.

Unlawful commissions

505. Section 176 of the *Crimes Act 1958* (Vic) relevantly provides:

- (1) Whosoever being an agent corruptly receives or solicits from any person for himself or for any other person any valuable consideration—
- (a) as an inducement or reward for or otherwise on account of doing or forbearing to do or having done or forborne to do any act in relation to his principal's affairs or business; or
 - (b) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business; or

shall be guilty of an indictable offence, and shall be liable if a corporation to a level 5 fine and if any other person to level 5 imprisonment (10 years maximum) or a level 5 fine or both.

506. The term ‘agent’ is defined in s 175(1) to include:⁵⁸¹
- any corporation or other person acting or having been acting or desirous or intending to act for or on behalf of any corporation or other person whether as agent partner co-owner clerk servant employee banker broker auctioneer architect clerk of works engineer legal practitioner surveyor buyer salesman foreman trustee executor administrator liquidator trustee within the meaning of any Act relating to bankruptcy receiver director manager or other officer or member of committee or governing body of any corporation club partnership or association or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or otherwise and a person serving under the Crown
507. The term ‘principal’ is defined in the same section to include ‘a corporation or other person for or on behalf of whom the agent acts has acted or is desirous or intending to act’.
508. The Full Court of the Supreme Court of Victoria observed in *R v Gallagher* [1986] VR 219 observed (at 224) that ‘it is clear that the definition [of agent] includes many who would not be within the common law concept of an agent’. Indeed, in *Gallagher* itself a union official engaged in negotiating terms of industrial agreements for members was found to be their ‘agent’ within the meaning of s 176 (notwithstanding that he was also, at the same time, the agent of his union).
509. The reference in ss 176(1)(b) to ‘would in any way tend to influence’ invites attention to whether the benefit would objectively have that tendency, whether it influences the agent or not.⁵⁸²
510. In relation to the offence under s 176(1)(b), a number of decisions have held that an agent acts ‘corruptly’ within the meaning of the statute if ‘he receives a benefit in the belief that the giver intends that it shall influence him to show favour in relation to the principal’s affairs’.⁵⁸³ It is not necessary for the agent to have an actual intention to be influenced by the payment.⁵⁸⁴ The New South Wales Court of Criminal Appeal has, however, qualified the Victorian approach in holding that it is necessary to establish that

⁵⁸¹ This is the present definition. In 2005 the term ‘legal practitioner’ was inserted to replace ‘barrister or solicitor’. The amendment is immaterial.

⁵⁸² *Mehajer v R* [2014] NSWCCA 167 at [100].

⁵⁸³ *R v Dillon and Riach* [1982] VR 434 at 436; *R v Gallagher* [1986] VR 219 at 231 (FC); *R v Jamieson* [1988] VR 879 (FC). See also *R v Nuttall* [2011] 1 Qd R 270 at [36].

⁵⁸⁴ *R v Dillon and Riach* [1982] VR 434 at 436; *Mehajer v R* [2014] NSWCCA 167 at [101].

the benefit is corrupt according to standards of conduct generally held.⁵⁸⁵ A payment or receipt without the knowledge of the principal for one of the proscribed purposes would generally be regarded as corrupt according to such standards.⁵⁸⁶ That is, assuming the position under the New South Wales analogue was the law in Victoria, secrecy and a tendency of the payment to interfere with the principal-agent relationship are essential to the offence.

511. The consequence of the above construction is that s 176 is of potentially very broad application. It may, for example, apply to conduct that may not immediately be considered criminal because the relevant benefit was not obtained personally. So much was recognised by the New South Wales Court of Appeal in *Mehajer v R* [2014] NSWCCA 167 at [44]:

The Second Reading Speech of the Bill added the following remarks:

"The target of the bill ... is the corrupt activities of those agents who either accept bribes in relation to their principals' affairs, or who do not make full disclosure to their principals of matters which may affect the carrying out of the agents' duties ... Because these offences are very broad in their scope, and could cover activity which it is not intended to cover, and which few people would consider criminal, the present provision, which allows a court to dismiss a charge which is trivial or purely technical, has been retained ... This bill brings the offences covered by this legislation into line with other comparable offences of dishonesty ... The aim...is to ensure that corrupt practices by agents, such as the receiving or the soliciting of bribes, are dealt with..."

512. In the present case, Mr Melhem and Mr Blandthorn were bargaining representatives for Cleanevent AWU members in respect of negotiations for the MOU (and any equivalent enterprise agreement) and was, consistently with authority, an 'agent' within the meaning of s 176.
513. In light of the substantial advantages to Cleanevent in securing an enterprise agreement on the terms of the 2006 EBA for a further period, there are good reasons to think that the payments comprehended by the side letter:
- (a) would objectively tend to influence Mr Melhem and Mr Blandthorn to show favour to Cleanevent in respect of the MOU negotiations; and

⁵⁸⁵ *Mehajer v R* [2014] NSWCCA 167 at [59]–[63].

⁵⁸⁶ *Mehajer v R* [2014] NSWCCA 167 at [59]–[63].

(b) was actually intended by Michael Robinson and others at Cleanevent to influence Mr Melhem and Mr Blandthorn to show favour to Cleanevent (so much arises from Mr Robinson's correspondence of 17 and 27 May 2010).

514. It is evident that the 'favour' sought in the present case is agreement to the MOU: that is why, in John-Paul Blandthorn's email dated 13 October 2015 he states 'the \$25,000 needs to remain ... This is as far as the AWU is prepared to move from the attached documents.' Payment of the AWU's nominated sum was effectively the price of assent to the MOU, thus satisfying s 176(1)(b).
515. Further, the identification, in the terms of the side letter, of the things that the AWU agreed to refrain from doing (namely, commencing enterprise bargaining or seeking termination of the 2006 EBA or the MOU), being things that the union was entitled to do in the interests of its members and in relation to their affairs, is sufficient to fall within s 176(1)(a).
516. There is also a strong inference that Mr Melhem and Mr Blandthorn would have understood that Mr Robinson and Mr Webber agreed to make the payments comprehended by the side deal for the desired purpose of those officials showing favour towards Cleanevent, or refraining from doing the things identified in the final paragraph of the side letter. As noted above, for the purposes of an offence against s 176(1)(b) it does not matter whether either of the officials had any intention to show favour.
517. The fairly elaborate scheme which was implemented to disguise the payment as payments for membership, and to conceal the arrangement from the workers, and from the National Office and other branches, supports the position (should that be necessary) that the payment was 'corrupt' according to ordinary standards of conduct.
518. Finally, the AWU is and was a body corporate by operation of s 27 of the *Fair Work (Registered Organisations) Act 2009* (Cth) and its predecessor legislation. The conduct and position of Mr Melhem, being at the relevant time the Branch Secretary and the person who provided the directions to enter into the side deal and issue the invoices pursuant to the side deal, is a sufficient basis on which to find that for the purposes of

soliciting the payments, he was the ‘directing mind and will’ of that organisation.⁵⁸⁷ The AWU on any view adopted Mr Melhem’s conduct by receiving the payments in question and dealing with them for its own benefit.⁵⁸⁸

519. Accordingly, the Commission should conclude that:

- (a) Mr Melhem may have committed an offence against s 176(1)(a) and/or (b) of the *Crimes Act* 1958 (Vic) by soliciting a corrupt commission; and
- (b) The AWU may have committed an offence against s 176(1)(a) and/or (b) of the *Crimes Act* 1958 (Vic) by soliciting a corrupt commission.

⁵⁸⁷ See *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530 at [82]; *Tesco Supermarkets v Natrass* [1972] AC 153 at 170.

⁵⁸⁸ See *Grocon v CFMEU* [2013] VSC 275 at [60] (adopting Brennan J’s analysis in *Environment Protection Authority v Caltex Refinery Co Pty Ltd* (1993) 178 CLR 477 at 514-515).

**COMPARISON OF CLEANING AWARD 1999⁵⁸⁹
AND 2004 AGREEMENT RATES⁵⁹⁰**

PERMANENT EMPLOYEES⁵⁹¹

1999 Award rates

Level	Ordinary (cl. 9.1)⁵⁹²	Saturday (time and a half: cl 14.1)⁵⁹³	Sunday (double time: cl. 14.2)⁵⁹⁴	Public holiday (double time and a half: cl. 14.9)⁵⁹⁵
Level 1	\$13.02 (\$495.10/38)	\$19.53 (\$13.02 x 1.5)	\$26.04 (\$13.02 x 2)	\$32.50 (\$13.02 x 2.5)
Level 2	\$13.88 (\$527.50/38)	\$20.82 (\$13.88 x 1.5)	\$27.76 (\$13.88 x 2)	\$34.70 (\$13.88 x 2.5)

2004 Agreement rates (employed on a weekly basis)

Level	Ordinary rate (cl. 8.1)⁵⁹⁶	Saturday rate (Award applies)⁵⁹⁷	Sunday rate (Award applies)	Public holiday rate (Award applies)
1	\$13.42 (\$510.10/38)	\$20.13 (13.42 x 1.5)	\$26.84 (13.42 x 2)	\$33.55 (13.42 x 2.5)
2	\$13.96 (\$530.50/38)	\$20.94 (13.96 x 1.5)	\$27.92 (13.96 x 2)	\$34.90 (13.96 x 2.5)
3	\$15.24 (\$579.10/38)	\$22.86 (15.24 x 1.5)	\$30.48 (15.24 x 2)	\$38.10 (15.24 x 2.5)

⁵⁸⁹ Winter MFI-1, 20/10/15.

⁵⁹⁰ Shorten MFI-5, 8/7/15, Volume 2, p 1.

⁵⁹¹ As at 15 December 2004, the date the 2004 EBA was certified.

⁵⁹² Winter MFI-1, 20/10/15, p 6; Shorten MFI-5, 8/7/15, volume 2, p 255.

⁵⁹³ Winter MFI-1, 20/10/15, pp 9-10.

⁵⁹⁴ Winter MFI-1, 20/10/15, p 10.

⁵⁹⁵ Winter MFI-1, 20/10/15, p 11.

⁵⁹⁶ Shorten MFI-5, 8/7/15, volume 2, p 4.

⁵⁹⁷ The 2004 EBA is silent on whether permanent employees employed on a weekly basis are entitled to weekend and public holiday penalty rates. Whilst it is a matter of construction the operation of section 170LY of the *Workplace Relations Act 1996* and clause 6.1 of the 2004 EBA may result in weekend and public holiday penalty rates in the 1999 Award applying to permanent employees employed on a weekly basis.

2004 Agreement rates (employed on a yearly basis)

Level	Ordinary rate (cl. 8.2) ⁵⁹⁸	Saturday rate (cl. 8.2.1) ⁵⁹⁹	Sunday rate (cl. 8.2.1)	Public holiday rate (cl. 8.2.1)
2	\$17.64 (\$34,870/52/38)	\$17.64	\$17.64	\$17.64
3	\$19.26 (\$38,064/52/38)	\$19.26	\$19.26	\$19.26

CASUAL EMPLOYEES⁶⁰⁰

1999 Award rates

Level	Ordinary rate (cl. 6.3 ⁶⁰¹ & 9.1 ⁶⁰²)	Saturday rate (time and a half: cl 14.1) ⁶⁰³	Sunday rate (double time: cl. 14.2) ⁶⁰⁴	Public holiday rate (double time and a half: cl. 14.9) ⁶⁰⁵
Level 1	\$15.63 (495.10/ 38 x 1.2)	\$22.14 (13.02 x 1.7)	\$28.64 (13.02 x 2.2)	\$35.15 (13.02 x 2.7)
Level 2	\$16.65 (527.50/38 x 1.2)	\$23.59 (13.88 x 1.7)	\$30.53 (13.88 x 2.2)	\$37.47 (13.88 x 2.7)

2004 Agreement non-event casual rates

Level	Ordinary rate (cl. 8.3) ⁶⁰⁶	Saturday rate (cl. 8.5) ⁶⁰⁷	Sunday rate (cl. 8.5)	Public holiday rate (cl. 8.5)
1	\$16.28	\$19.17	\$19.17	\$19.17
2	\$16.94	\$19.17	\$19.17	\$19.17
3	\$18.49	\$19.17	\$19.17	\$19.17

2004 Agreement event casual rates

Level	Ordinary rate (cl. 8.4) ⁶⁰⁸	Saturday rate (cl. 8.4)	Sunday rate (cl. 8.4)	Public holiday rate (cl. 8.4)
1	\$16.28	\$16.28	\$16.28	\$16.28

⁵⁹⁸ Shorten MFI-5, 8/7/15, volume 2, p 4.

⁵⁹⁹ Shorten MFI-5, 8/7/15, volume 2, p 4.

⁶⁰⁰ As at 15 December 2004, the date the 2004 EBA was certified.

⁶⁰¹ Winter MFI-1, 20/10/15, p 3.

⁶⁰² Shorten MFI-5, 8/7/15, volume 2, p 255.

⁶⁰³ Winter MFI-1, 20/10/15, pp 9-10.

⁶⁰⁴ Winter MFI-1, 20/10/15, p 10.

⁶⁰⁵ Winter MFI-1, 20/10/15, p 11.

⁶⁰⁶ Shorten MFI-5, 8/7/15, volume 2, p 4.

⁶⁰⁷ Shorten MFI-5, 8/7/15, volume 2, p 4.

⁶⁰⁸ Shorten MFI-5, 8/7/15, volume 2, p 4.

				(\$23.51) ⁶⁰⁹
2	\$17.44	\$17.44	\$17.44	\$17.44 (\$24.67)
3	\$18.44	\$18.44	\$18.44	\$18.44 (\$25.67)

⁶⁰⁹ Clause 8.6.3 of the 2004 EBA provides that event casuals who work 7.6 hours on a public holiday are paid a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, volume 2, p 5.

N ANNEXURE 2 TO CHAPTER 2

**COMPARISON OF CLEANING AWARD 1999⁶¹⁰
AND 2006 AGREEMENT⁶¹¹**

PERMANENT EMPLOYEES

1999 Award rates

Level	Ordinary rate (cl. 9.1)⁶¹²	Saturday rate (time and a half: cl. 14.1)⁶¹³	Sunday rate (double time: cl. 14.2)⁶¹⁴	Public holiday rate (double time and a half: cl. 14.9)⁶¹⁵
Level 1	\$13.47 (\$512.10/38)	\$20.20 (\$13.47 x 1.5)	\$26.94 (\$13.47 x 2)	\$33.67 (\$13.47 x 2.5)
Level 2	\$14.32 (\$544.50/38)	\$21.48 (\$14.32 x 1.5)	\$28.64 (\$14.32 x 2)	\$35.80 (\$14.32 x 2.5)

2006 Agreement rates in NSW and VIC (employed on a weekly basis)

⁶¹⁰ As at 22 December 2006, the date the 2006 EBA was certified; Shorten MFI-5, 8/7/15, volume 2, p 260.

⁶¹¹ Shorten MFI-5, 8/7/15, volume 2, p 127. As a sample, rates applicable are for the period to 1 December 2006 to 1 July 2007.

⁶¹² Shorten MFI-5, 8/7/15, volume 2, p 266.

⁶¹³ Shorten MFI-5, 8/7/15, volume 2, p 269.

⁶¹⁴ Shorten MFI-5, 8/7/15, volume 2, p 270.

⁶¹⁵ Shorten MFI-5, 8/7/15, volume 2, p 271.

Level	Ordinary rate (cl. 16.2)⁶¹⁶	Saturday rate (cl. 16.2 & 39)⁶¹⁷	Sunday rate (cl. 16.2 & 39)	Public holiday rate (cl. 16.2, 22.10 & 39)
1	\$14.24	\$14.24	\$14.24	\$14.24 (\$21.63) ⁶¹⁸
2	\$14.81	\$14.81	\$14.81	\$14.81 (\$22.04)
3	\$16.17	\$16.17	\$16.17	\$16.17 (\$23.40)
4	\$17.43	\$17.43	\$17.43	\$17.43 (\$24.66)

2006 Agreement rates in NSW and VIC (employed on a yearly basis)

Level	Ordinary rate (cl. 16.3)⁶¹⁹	Saturday rate (cl. 16.4)	Sunday rate (cl. 16.4)	Public holiday rate (cl. 16.4)
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⁶¹⁶ Shorten MFI-5, 8/7/15, volume 2, p 137.

⁶¹⁷ Shorten MFI-5, 8/7/15, volume 2, pp 137, 158.

⁶¹⁸ Clause 22.10 of the 2006 EBA provides permanent employees who work 7.6 hours on a public holiday receive a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, volume 2, p 143.

⁶¹⁹ Shorten MFI-5, 8/7/15, volume 2, p 137.

2	\$18.89 (37,346/ 52 / 38)	\$18.89	\$18.89	\$18.89
3	\$20.63 (40,766/ 52 / 38)	\$20.63	\$20.63	\$20.63
4	\$22.23 (43,940/ 52 / 38)	\$22.23	\$22.23	\$22.23

2006 Agreement rates in other States (employed on a weekly basis)

Level	Ordinary rate (cl. 16.11) ⁶²⁰	Saturday rate (cl. 16.11 & 39) ⁶²¹	Sunday rate (cl. 16.11 & 39)	Public holiday rate (cl. 16.11, 22.10 & 39)
1	\$13.53 (\$514.05/38)	\$13.53	\$13.53	\$13.53 (\$20.76) ⁶²²
2	\$14.20 (\$539.46/38)	\$14.20	\$14.20	\$14.20 (\$21.43)

⁶²⁰ Shorten MFI-5, 8/7/15, volume 2, pp 138-139.

⁶²¹ Shorten MFI-5, 8/7/15, volume 2, pp 138-139, 158.

⁶²² Clause 22.10 of the 2006 EBA provides permanent employees who work 7.6 hours on a public holiday receive a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, volume 2, p 143.

3	\$15.36 (\$583.63/38)	\$15.36	\$15.36	\$15.36 (\$22.59)
4	\$16.56 (\$629.19/38)	\$16.56	\$16.56	\$16.56 (\$23.79)

2006 Agreement rates in other States (employed on a yearly basis)

Level	Ordinary rate (cl. 16.12)	Saturday rate (cl. 16.13 & 39)	Sunday rate (cl. 16.13 & 39)	Public holiday rate (cl. 16.13 & 39)
2	\$17.95 (\$35,479/ 52 / 38)	\$17.95	\$17.95	\$17.95
3	\$19.59 (\$38,728/ 52 / 38)	\$19.59	\$19.59	\$19.59
4	\$21.12 (\$41,743/ 52 / 38)	\$21.12	\$21.12	\$21.12

CASUAL EMPLOYEES

<u>1999</u> <u>Award</u> <u>rates</u> Level	Ordinary rate (cl. 6.3 & 9.1) ⁶²³	Saturday rate (time and a half: cl. 14.1) ⁶²⁴	Sunday rate (double time: cl. 14.2) ⁶²⁵	Public holiday rate (double time and a half: cl. 14.9) ⁶²⁶
1	\$16.17 (512.10/ 38 = \$13.47 x 1.2)	\$22.89 (13.47 x 1.7)	\$29.63 (13.47 x 2.2)	\$36.36 (13.47 x 2.7)
2	\$17.19 (544.50/38 = 14.32 x 1.2)	\$24.34 (14.32 x 1.7)	\$31.50 (14.32 x 2.2)	\$38.66 (14.32 x 2.7)

2006 Agreement non-event rates for NSW and VIC

Level	Ordinary rate (cl. 16.6) ⁶²⁷	Saturday rate (cl. 16.8) ⁶²⁸	Sunday rate (cl. 16.8)	Public holiday rate (cl. 16.8)
1	\$17.80	\$20.09	\$20.09	\$20.09
2	\$18.54	\$20.90	\$20.90	\$20.90

⁶²³ Shorten MFI-5, 8/7/15, volume 2, pp 263, 266.

⁶²⁴ Shorten MFI-5, 8/7/15, volume 2, pp 269-270.

⁶²⁵ Shorten MFI-5, 8/7/15, volume 2, p 270.

⁶²⁶ Shorten MFI-5, 8/7/15, volume 2, p 271.

⁶²⁷ Shorten MFI-5, 8/7/15, volume 2, p 138.

⁶²⁸ Shorten MFI-5, 8/7/15, volume 2, p 138.

3	\$20.21	\$22.81	\$22.81	\$22.81
4	\$21.50	\$24.27	\$24.27	\$24.27

2006 Agreement event rates for NSW and VIC

Level	Ordinary rate (cl. 16.7)⁶²⁹	Saturday rate (cl. 16.7)	Sunday rate (cl. 16.7)	Public holiday rate (cl. 16.7 & 22.9)
1	\$16.28	\$16.28	\$16.28	\$16.28
2	\$17.44	\$17.44	\$17.44	\$17.44 (\$24.67) ⁶³⁰
3	\$18.44	\$18.44	\$18.44	\$18.44 (\$25.67)
4	\$20.00	\$20.00	\$20.00	\$20.00

2006 Agreement non-event rates for other States

Level	Ordinary rate (cl. 16.15)⁶³¹	Saturday rate (cl. 16.17)⁶³²	Sunday rate (cl. 16.17)	Public holiday rate (cl. 16.17)

⁶²⁹ Shorten MFI-5, 8/7/15, Vol 2, p 138.

⁶³⁰ Clause 22.9 of the 2006 EBA provides that Level 2 and 3 casuals who work 7.6 hours at an event on a public holiday are paid a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, volume 2, p 143.

⁶³¹ Shorten MFI-5, 8/7/15, Vol 2, pp 139-140.

⁶³² Shorten MFI-5, 8/7/15, Vol 2, p 140.

1	\$16.91	\$19.08	\$19.08	\$19.08
2	\$17.59	\$19.85	\$19.85	\$19.85
3	\$19.20	\$21.67	\$21.67	\$21.67
4	\$20.43	\$23.05	\$23.05	\$23.05

2006 Agreement event rates for other States

Level	Ordinary rate (cl. 16.16)⁶³³	Saturday rate (cl. 16.16)	Sunday rate (cl. 16.16)	Public holiday rate (cl. 16.16 & 22.9)
1	\$16.16	\$16.16	\$16.16	\$16.16
2	\$17.04	\$17.04	\$17.04	\$17.04 (\$24.27) ⁶³⁴
3	\$18.06	\$18.06	\$18.06	\$18.06 (\$25.29)
4	\$19.00	\$19.00	\$19.00	\$19.00

⁶³³ Shorten MFI-5, 8/7/15, Vol 2, pp 139-140.

⁶³⁴ Clause 22.9 of the 2006 EBA provides that Level 2 and 3 casuals who work 7.6 hours at an event on a public holiday are paid a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 143.

