THE GREENFIELDS' LEGAL FEES

A. INTRODUCTION

1. Under a direction from the Administrator to investigate criminal conduct and corruption in the Construction and General Division of the CFMEU, I have examined:

   (a) The circumstances in which a payment of $3,150,969.50 was made by the CFMEU to a firm of solicitors, McGirr & Associates, on 19 July 2024;

   (b) The identity of the persons who approved the payment; and

   (c) The purpose of the payment.

2. It is common ground that the $3,150,969.50 was intended to cover the further legal expenses being incurred by the Secretary of the CFMEU Construction and General Division NSW Divisional Branch, Darren Greenfield, and his son the Assistant Secretary, Michael Greenfield. The legal fees were being incurred by the Greenfields in defending criminal charges. The NSW Divisional Branch resolved, in effect, to give an unlimited indemnity to the Greenfields in respect of their legal expenses. Nearly $1,000,000 has already been paid out on behalf of the Greenfields and, had the matter progressed as intended, at least $4,000,000 of union funds would eventually have been spent.

3. My investigation raised questions as to the legality and propriety of the actions of several persons, including the four senior members of the NSW Divisional Branch executive – the President Rita Mallia, the Secretary Darren Greenfield, an Assistant Secretary Rob Kera, and another Assistant Secretary, Michael Greenfield.

4. This is my report of the result of the investigation. I was assisted in the investigation and the making of this report by Diana Tang of Counsel.

My conclusions in summary

5. The facts lead me to these conclusions on the principal issues:

   (a) Each of the President, Rita Mallia, the Secretary, Darren Greenfield, an Assistant Secretary, Rob Kera, and another Assistant Secretary, Michael Greenfield committed multiple serious contraventions of the duties they owed to the members of their union.

   (b) Each of them breached their duty of care and diligence in relation to the financial management of their union.

   (c) Each of them breached their duty of good faith owed to their union in relation to the financial management their union.

   (d) In addition, Darren Greenfield and Michael Greenfield also breached their duty to their union by using their position to gain an advantage for themselves.

   (e) Each of these contraventions were serious and warrant prosecution and the imposition of substantial civil penalties.

(f) Each of these contraventions caused the union and its members damage. Had the matter progressed as intended that damage could have risen as high as $4 million. The union is entitled to recover several hundreds of thousands of dollars from Rita Mallia, Darren Greenfield, Rob Kera and Michael Greenfield for the damage which they caused.

(g) In the instance of Darren Greenfield, the contraventions are more serious and warrant his prosecution on criminal charges for recklessly failing to discharge his duties in good faith and using his position dishonestly with the intention of directly gaining an advantage for himself and his son.

(h) Contraventions should be referred to the Fair Work Commission (FWC) to consider commencing proceedings for the imposition of civil penalties on members of the Executive, as well as those, possibly including legal representatives identified in this report, who were involved in such contraventions.

A lack of co-operation

6. The investigation was hindered, but not compromised, by a lack of co-operation.

7. Rita Mallia, Darren Greenfield, Michael Greenfield, Rob Kera, and a solicitor, Paul McGirr of McGirr & Associates, declined to comply with a notice under clause 9 of Schedule 6 of the *Industrial Relations Act 1996* (NSW). Their refusal may make them liable for a civil penalty under that provision.[1] I then sent letters to each to give an opportunity to them to address relevant issues, but again they declined to assist.

8. Another solicitor, Peter Hodges of Mills Oakley, was given a statutory notice requiring him, as a former service provider of the NSW Divisional Branch, to produce a single document. Despite the notice, Mr Hodges declined to assist.

9. Notwithstanding these attempts to frustrate the investigation, there was still ample documentary material, which, together with information provided from co-operative witnesses, permitted the investigation to be completed.

B. THE CFMEU

10. The structure of the CFMEU is complex. There are three bodies relevant to this investigation. There is the national organisation – which will be referred to as the CFMEU. Within the CFMEU, the Construction and General Division has a branch operating in NSW – which will be referred to as the NSW Divisional Branch. Then there is a State registered organisation – which will be referred to as the NSW Union.

11. The CFMEU is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth). The nationally registered CFMEU has three Divisions, one of which is the Construction and General Division.[2] The Construction and General Division is further divided

[1] A copy of this report should be provided to the relevant regulator in NSW.
[2] The CFMEU Construction and General Division is established by rule 27 of the National Rules.

into State and Territory branches, which relevantly includes the NSW Divisional Branch.[3] The NSW Union is a separate organisation registered under the *Industrial Relations Act 1996* (NSW).

12. The NSW Divisional Branch is governed by a combination of four employed officials and a Committee of Management. The four full-time officials are the President, the Secretary, and two Assistant Secretaries – it will be convenient to refer to this group as the Executive. The Committee of Management – which will be referred to as the COM – is a body comprised of the Executive and 26 persons elected by and from the members of the Divisional Branch.[4] Generally speaking, the non-executive members of the COM are union delegates.

The relationship between the Executive and the COM

13. A number of non-executive members of the COM came forward to provide assistance. There was a similarity between several of the accounts: the Executive dominated the COM, provided it with insufficient information, shut down discussion, and quashed dissent – and this had been the case for the last four to five years.

14. The non-executive members of the COM were not supplied with any information before meetings.[5] Upon arrival at meetings, the COM were supplied with some paperwork, but there was no time to read it, much less digest it. The items on the agenda were only identified by the Executive after the meeting commenced. On important issues the non-executive members of the COM were handed a resolution composed by the Executive and just asked to vote on it. Only members of the Executive spoke at COM meetings; ordinary members were of the view that if they spoke up it would be held against them, and there would be consequences. Some told me they had never heard a member of the COM speak against proposals put forward by the Executive.

15. I was told the potential *"consequences*" did not include physical intimidation: it was more subtle than that.

16. The pressure which was applied to the non-executive members of the COM was an extension of pressure which was placed by the Executive onto delegates generally. Appointment as a delegate is much sought after in the NSW Divisional Branch. Although delegates are notionally selected by democratic means, it has always been the case that the Executive could exercise significant control over who would, and who would not, receive an appointment as a delegate. An appointment as a delegate could be terminated as easily as a member of the Executive having a word with the delegate's employer. It was also known that organisers would denigrate an out-of-favour delegate's performance with the other union members on site. Organisers were capable of embarrassing delegates by stirring up a dispute on the worksite for which the delegate was responsible.

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[3] The NSW Divisional Branch of the CFMEU Construction and General Division is established by rule 18 of the C&G Division Rules.
[4] Divisional Branch Rules, r 42(a)(i).
[5] Some said they occasionally received an agenda a day or two before the meeting.

17. Further, though nominally a democracy, there have not been contested elections for decades in the NSW Divisional Branch (at least since 2010). There were around 95 elected offices in the branch. In the 570 quadrennial elections since 2000 there was not one contested election. The secretary's position was never contested, nor were the positions of any other members of the Executive, or COM members. Even casual vacancies did not give rise to contested elections. Every COM member who was serving in 2024 had been selected by Darren Greenfield, were supported by him and owed their positions to him. Each four years, a ticket headed up by the Greenfields and Ms Mallia were the only nominees for the election. To be elected as a COM member on the ticket, a delegate needed to retain the support of the Greenfields. By these two means, control of the Executive over the members of the ticket and influence over the continued employment of delegates, Darren Greenfield and the Executive were able to dominate and control the COM.

18. It was for these reasons that the non-executive members of the COM felt constrained *not* to speak against the Executive. No-one was willing to cross swords with the Executive. The Executive ran the NSW Divisional Branch as they wished; the COM had become the Executive's catspaw.

C. THE UNION RULES

19. All federally registered organisations are required to have rules in accordance with Chapter 5 of the Registered Organisations Act. The CFMEU is subject to the National Rules. The Construction and General Division is subject to the National Rules[6] as well as the separate Construction and General Division Rules.[7] The Division Rules also include Divisional Branch Rules[8] which are applicable to the NSW Divisional Branch.[9]

20. Accordingly, the relevant obligations regarding the use of funds by the NSW Divisional Branch are found in the National Rules, the Division Rules, and the Divisional Branch Rules.

21. When construing union rules special interpretation methods apply. One is that there needs to be an acknowledgment that the rules have "*more likely than not, been drawn by a layperson familiar with the union and its objects, rules, operations in practice and role, which includes but is not confined to participation in the industrial relations system, its membership and the industries in which those members work, rather than by a legally trained draftsman*".[10] Another is that, where the text of a union rule permits constructional choices, a construction which furthers, or is at least consistent with, any evident purpose of the authorising rule is to be preferred.[11]

22. The National Rules provide that the funds of the Divisional Branch are under the control of the COM and are to be used in accordance with the rules.[12] The COM, subject to review by the

[6] National Rules, r 26.
[7] C&G Division Rules, r 17.
[8] C&G Division Rules, r 19; the Divisional Branch Rules commence at p 24 of the C&G Division Rules.
[9] C&G Division Rules, 17.
[10] *General Manager of the Fair Work Commission v Smyth* [2024] FCA 304, [34]-[35].
[11] *General Manager of the Fair Work Commission v Smyth* [2024] FCA 304, [38].
[12] National Rules, r 23(vii), expressed that way the COM includes the Executive.

Divisional Branch Council,[13] has the "*care, control, superintendence, management and administration in all respects of the affairs, funds and property of the Divisional Branch*".[14]

23. The key rule for present purposes is r 35 of the Divisional Branch Rules which deals with the funds of the Divisional Branch:

> 35 – FUNDS OF THE DIVISIONAL BRANCH
>
> (a) All moneys subscribed shall be held for the administration of the Divisional Branch in accordance with Rules and banked by its officers in such bank or banks as the Divisional Branch Council shall decide.
>
> (b) All expenditure from the funds shall be in accordance with the Rules of the Divisional Branch and no expenditure shall be permitted for any other purpose.
>
> (c) APPLICATION OF FUNDS - The funds of the Divisional Branch shall be used only for the carrying out of the objects of the Union and in necessary expenses of management.
>
> …
>
> (e) All expenditure for ordinary purposes, i.e., incurred in directly furthering the objects and for expenses of management, may be disbursed by direction of the Divisional Branch Management Committee and any other expenditure by direction of the Divisional Branch Council.
>
> …
>
> (k) Notwithstanding sub-rules (e) and (g) hereof, in the NSW Divisional Branch all expenditure for ordinary purposes, i.e. incurred in directly furthering the objects of the union and for expenses of management of the Divisional Branch may be disbursed by decision of the Divisional Branch Secretary or the Divisional Branch President and such other official of the Divisional Branch as the Divisional Branch Management Committee may from time to time authorise. Provided however that all expenditure so incurred shall be placed before the Divisional Branch Management Committee for consideration and ratification, and further provided that the Divisional Branch Management Committee may withdraw such authorisation at any time or for any period it sees fit. Expenditure for other purposes authorised by the rules may be disbursed by decision of the Divisional Branch Management Committee.

24. The COM has the powers of the Divisional Branch Council.[15] Those powers relevantly include the power to take such steps necessary to carry out the objects of the Union, and to spend such funds as are necessary to carry out the objects of the Branch.[16] The COM also has power to defend "*legal proceedings in matters affecting the affairs of the Divisional Branch*".[17]

25. The Divisional Branch is also required to comply with the expenditure policy adopted by the National Executive under r 24A of the National Rules.[18] The expenditure policy relevantly provides:

> Assets and Expenses Policy

[13] The Divisional Branch Council is the "*supreme governing body*" of the Divisional Branch: Divisional Branch Rules, r 40(1).
[14] Divisional Branch Rules, r 42(c); the Divisional Branch Council is the highest deliberative body of the Divisional Branch: Divisional Branch Rules, r 40(4).
[15] Divisional Branch Rules, r 42(c).
[16] Divisional Branch Rules, r 40(4)(a).
[17] Divisional Branch Rules, r 40(4)(m).
[18] National Rules, r 24A.

> All Union funds shall be expended only for legitimate Union business, in accordance with the applicable rules and policies of the Union including, where relevant, rules and policies applying to a specific Branch, Division or Divisional/District Branch of the Union.
>
> The Union may reimburse officers and/or employees of the Union for reasonable expenses incurred by an officer or employee in performing union business. Any reimbursement of expenses shall be appropriately authorised and substantiated.
>
> Nothing in this policy removes any obligation or responsibility with respect to financial management placed upon a committee, officer, member or employee of the Union by the rules of the Union.

26. This same expenditure policy has been recently considered by Justice Logan in *FWC v Smyth*[19] where his Honour observed with respect to r 24A:

> *... Self-evidently, Rule 24A contemplates the formulation of policies that will promote the interest not just of the Union as an abstract, separate legal entity, or of a District Branch, but also of its members in financial integrity and good governance in relation to the expenditure of the Union's funds. Further, the governance dimension necessarily means that the Policy must be construed in the context of how the Rules provide for the wider organisation and governance of the Union and implications necessarily flowing from such provision. That therefore includes not just the Rules but also, materially, the Divisional Rules. Regard to the wider context of the Rules and the Divisional Rules discloses that, although there is a national executive, the Union has a structure of Divisions, on broad occupational lines with scope for most Divisions to have Branches constituted on a geographic basis. The Divisional Rules evidence an application of this with respect to the Division.*

27. The collective effect of the rules is that the funds of the Divisional Branch are to be used "*only for the carrying out of the objects of the Union*",[20] the "*necessary expenses of management*",[21] and "*only for legitimate Union business*".[22] This can only be done after authorisation by the COM.[23]

28. The objects of the Union appear in the National Rules, which relevantly provide:

> 4 – OBJECTS
>
> (a) To uphold the right of combination of labour, and to improve, protect, and foster the best interests of the Union and its members, and to assist them to obtain their rights under industrial and social legislation.
>
> …
>
> (e) To provide legal assistance to the Union and its members to protect the interests of the Union in all its Divisions and Divisional Branches, and to assist other trade unions by any legal method.
>
> …
>
> (g) To protect members from any infringement of their rights.
>
> …
>
> (p) To assist members by loan or otherwise.
>
> …

[19] [2024] FCA 304, [39].
[20] Divisional Branch Rules, r 35(c).
[21] Divisional Branch Rules, r 35(c).
[22] CFMEU Expenditure Policy.
[23] Divisional Branch Rules, r 35.

(aa) To do all other acts and things as are incidental or in any way related to the carrying out of any one or more of the above objects.

29. It is also within the COM's powers to make a loan, grant or donation. Rule 42(s) of the Divisional Branch Rules provides that where a loan, grant or donation exceeding $1,000 is to be made, the COM must have satisfied itself that the making of the loan, grant or donation would be in accordance with the rules, and the COM must approve the making of the loan, grant or donation.[24] There does not appear to be any other rules directed to when a loan, grant or donation may be made, but the power to do so is a necessary implication of a combination of the objects stated in the National Rules and r 42(s) of the Divisional Branch Rules.

30. Under the Registered Organisations Act, where a loan, grant or donation exceeding $1,000 has been made, the Divisional Branch is required to lodge with the Fair Work Commission[25] a statement showing the relevant particulars of the loan, grant or donation within 90 days of the end of the relevant financial year.[26]

31. The regulation of grants and donations is unique in this regard. Grants and donations involve unusual and extraordinary expenditure. They involve the union's funds being given to a third party without any commercial exchange. Otherwise, union funds could be being given away for nothing in return. This is why grants and donations must be reported to members. As opposed to most ordinary expenditure in return for goods and services, there is a public document that allows members to specifically find out about who is receiving grants and donations. When a donation is kept secret then members are not told the identity of the beneficiary of such extraordinary expenditure.

E. FIDUCIARY AND STATUTORY OBLIGATIONS

32. Each of the members of the Executive and the COM owe fiduciary duties to the members of the Divisional Branch; those duties are analogous to those owed by directors to companies.[27] It is now unnecessary to go into the fiduciary obligations under general law because the same obligations have been picked up in the Registered Organisations Act.

The statutory duties

33. Under Part 2 of Chapter 9 of the Registered Organisations Act, each of the members of the Executive and the COM owe specific statutory duties.[28] These duties relate to the financial management of the union.[29] The duties mirror duties imposed under the general law and

[24] Divisional Branch Rules, r 42(s); this rule is required by s 149 of the Registered Organisations Act.
[25] Prior to 6 March 2023, the Registered Organisations Commissioner had regulatory powers and functions under the Registered Organisations Act – those powers and functions were transferred to the Fair Work Commission by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth).
[26] Registered Organisations Act, s 237.
[27] *Allen v Townsend* (1977) 16 ALR 301, 348-349.
[28] See definition of "*office*", "officer", and "*collective body*" in ss 6 and 9 of the Registered Organisations Act.
[29] Registered Organisations Act, s 283.

imposed on directors under corporations law.[30] A breach of duty carries a civil penalty and can also constitute a criminal offence.[31]

34. The relevant statutory duties are of particular significance and are worth setting out in full:

> Section 285 Care and diligence—civil obligation only
>
> (1) An officer of an organisation or a branch must exercise his or her powers and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if he or she:
>
> (a) were an officer of an organisation or a branch in the organisation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the organisation or a branch as, the officer.
>
> …
>
> (2) An officer of an organisation or a branch who makes a judgment to take or not take action in respect of a matter relevant to the operations of the organisation or branch is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if he or she:
>
> (a) makes the judgment in good faith for a proper purpose; and
>
> (b) does not have a material personal interest in the subject matter of the judgment; and
>
> (c) informs himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and
>
> (d) rationally believes that the judgment is in the best interests of the organisation.
>
> The officer's belief that the judgment is in the best interests of the organisation is a rational one unless the belief is one that no reasonable person in his or her position would hold.
>
> …
>
> Section 286 Good faith – civil obligations
>
> (1) An officer of an organisation or a branch must exercise his or her powers and discharge his or her duties:
>
> (a) in good faith in what he or she believes to be the best interests of the organisation; and
>
> (b) for a proper purpose.
>
> …
>
> (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.
>
> …
>
> Section 287 Use of position—civil obligations
>
> (1) An officer or employee of an organisation or a branch must not improperly use his or her position to:
>
> (a) gain an advantage for himself or herself or someone else; or
>
> …

[30] Registered Organisations Act, ss 285 to 287.
[31] Registered Organisations Act, s 290A.

> (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.
>
> …

35. The civil penalties available for contravention are the same for each statutory duty: 100 penalty units for a contravention; 1,200 penalty units for a "*serious contravention*".[32] Under s 6 of the Registered Organisations Act a "*serious contravention*" is one which "*materially prejudices*" the branch or its membership, or just fits the description of "*serious*". Under s 301(1A), the Administrator has standing to apply for an order from the Federal Court imposing pecuniary penalties for contraventions of ss 285, 286 and 287 by a person who was an officer or employee of the CFMEU working in the Construction and General Division or any of its branches.[33]

36. If there is a breach of these statutory duties and the person has acted dishonestly or recklessly in doing so, criminal sanctions arise under s 290A with a penalty of 2,000 penalty units or 5 years imprisonment.

37. As noted above, the duties imposed by the Registered Organisations Act are similar to those imposed on directors under the *Corporations Act 2001* (Cth). Generally, whether or not there has been a contravention will be guided by principles applicable in the corporations law context.[34] Nonetheless, it is important to take into account that a union has "*different objects than the carrying on of business with a view to profit".*[35] Moreover, how the union operates, and the other duties an officer of a union may have, may render any analogy with a board of directors inapt.[36]

38. The importance of these provisions is because, as will be seen, I have come to the view that each of the members of the Executive did contravene their statutory duties and ought to be subject to civil penalty proceedings. In the instance of Darren Greenfield I go further – in my view Darren Greenfield acted dishonestly or recklessly in contravening those duties, exposing him to a criminal sanction.

39. In those circumstances it is necessary to examine the content of each of the statutory duties in closer detail.

Care and diligence

40. The requisite degree of care and diligence to be exercised is identified by reference to the organisation's circumstances and the office and the responsibilities within the organisation that the officer in question occupied.[37] Whether an officer has exercised care and diligence is

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[32] During the times relevant to this investigation the amount of a penalty unit varied. From 1 July 2020 until 31 December 2022 it was $220; from 1 January 2023 until 30 June 2023 it was $275; from 1 July 2023 until 6 November 2024 it was $313.

[33] In any proceedings for a contravention of a civil penalty proceeding, if the Court is satisfied that a person has or may have contravened a civil penalty provision but the person acted honestly and in all of the circumstances ought fairly be excused for the contravention, the Court may relieve the person wholly or partly from liability: s 315. Where a person thinks that such proceedings will or may be brought against them, they may apply to the Federal Court for relief from liability before any such proceedings have been brought: s 315(3),(4).

[34] *General Manager of the Fair Work Commission v McGiveron* [2017] FCA 405, [16]; *General Manager of the Fair Work Commission v Smyth* [2024] FCA 304, [138].

[35] *General Manager of the Fair Work Commission v Smyth* [2024] FCA 304, [134].

[36] *General Manager of the Fair Work Commission v Smyth* [2024] FCA 304, [153].

[37] *General Manager of the Fair Work Commission v McGiveron* [2017] FCA 405, [16], quoting *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465, [18].

assessed by an objective standard.[38] There is no need to show an officer acted dishonestly or with any particular mental state to establish a civil contravention. In *FWC v Smyth*,[39] in identifying the relevant standard, Justice Logan took into account that:

> *The office of President of the Branch is not one required under the Rules to be held by a person with particular experience, let alone with qualifications in law or commerce. It must be held by a member of the Union. Further, given the coverage of the Division within which the Branch is found, it is inherently likely that the member concerned will have a background of experience as a miner or in a mining industry related calling.*

41. Those observations by Justice Logan are relevant to the present circumstances. The members of the Executive and the members of the COM were foremostly trade unionists, not business people. Although Rita Mallia was a qualified lawyer, her principal focus was on industrial affairs which are a long way from ordinary commercial considerations. This needs to be taken into account when assessing whether there was a breach of any of the statutory duties.

42. In assessing the standard of care and diligence required here, it is relevant that, in addition to the statutory duties set out above, the President and the Secretary were under obligations set by the Divisional Branch Rules.

43. The President – Rita Mallia – was employed in a full-time capacity in that office,[40] and had responsibility to conduct business in accordance with the Rules[41]; enter into the minutes of COM meetings a record of all payments[42]; and sign all cheques necessary, provided they had been placed before the COM for consideration and ratification.[43]

44. The Secretary – Darren Greenfield – who was also employed in a full-time capacity in that office, was specifically under the control of the Divisional Branch Council and the COM.[44] He had responsibility to carry out the decisions made by the Divisional Branch Council or the COM[45]; and to sign all cheques necessary, provided they had been placed before the COM for consideration.[46]

45. The reference to "*cheques*" may now appear dated, but the spirit of the rule remains in place: any payments of the NSW Divisional Branch, including the payment of the Greenfields' legal expenses, were ultimately the President's and the Secretary's responsibility and they had to be ratified by the COM.

46. The degree of care and diligence required will also be assessed by reference to the financial position of the NSW Divisional Branch at the relevant time.[47]

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[38] *General Manager of the Fair Work Commission v McGiveron* [2017] FCA 405, [16]; *General Manager of the Fair Work Commission v Smyth* [2024] FCA 304, [136].
[39] [2024] FCA 304, [142].
[40] Divisional Branch Rules, r 43(b)(ii).
[41] Divisional Branch Rules, r 43(d).
[42] Divisional Branch Rules, r 43(g).
[43] Divisional Branch Rules, r 45(a).
[44] Divisional Branch Rules, r 46(a).
[45] Divisional Branch Rules, r 46(b).
[46] Divisional Branch Rules, r 45(a).
[47] See, *General Manager of the Fair Work Commission v Smyth* [2024] FCA 304, [150].

Good faith and proper purpose

47. There are two distinct obligations here – one is to act in good faith and the other is to discharge duties for a proper purpose.[48] To discharge duties in good faith, by analogy with the requirements imposed on a director, requires the officer to exercise their powers in the interests of the union, and not to misuse or abuse their power; to avoid conflict between their personal interests and those of the union; to not take advantage of their position to make secret profits; and to not misappropriate union assets for themselves.[49]

48. Whether powers and duties have been exercised in good faith or for a proper purpose is determined by a two-step analysis.[50] First, it is necessary to ascertain as a matter of law the purposes for which the relevant power may lawfully be exercised. The starting point will usually be the rules of an organisation. Secondly, it is necessary to determine as a matter of fact the purpose for which the power was exercised, and then to assess whether that purpose falls within the category of permissible purposes identified at step one.

An improper use of position to gain an advantage

49. Impropriety in this sense "*consist[s] in a breach of the standards of conduct that would be expected of a person in [the particular] position by reasonable persons with knowledge of the duties, powers and authority of [that] position … and the circumstances of the case*."[51] Because it is an objective standard, in the context of a contravention of the civil obligation an officer may act improperly even if that officer has no intention of acting dishonestly or otherwise than in the best interests of the organisation, and even if the officer is not conscious of the impropriety.[52]

50. A breach of this duty, relevantly, has two elements: there must be a connexion between the impropriety and the officer's position; and that impropriety was to gain a relevant advantage.[53] The focus is on the purpose of the conduct, such that there may be a breach of this duty even if the person does not accrue the advantage.

Persons "involved" in contraventions

51. As stated above, in my view, each of the four members of the Executive contravened statutory duties. But the contraventions do not stop there: other persons "*involved*" in those contraventions have also committed contraventions.[54] The significance of this for present purposes is that, in my opinion, it is necessary to consider whether certain lawyers were "*involved*".

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[48] *General Manager of the Fair Work Commission v McGiveron* [2017] FCA 405, [18].
[49] *General Manager of the Fair Work Commission v McGiveron* [2017] FCA 405, [19].
[50] *General Manager of the Fair Work Commission v McGiveron* [2017] FCA 405, [20].
[51] *Health Services Union v Jackson (No 4)* [2015] FCA 865, [113], citing *Doyle v Australian Securities and Investments Commission* (2005) 227 CLR 18, [35].
[52] *General Manager of the Fair Work Commission v Smyth* [2024] FCA 304, [192]; *Health Services Union v Jackson (No 4)* [2015] FCA 865, [115]; *General Manager of the Fair Work Commission v McGiveron* [2017] FCA 405, [22]; *General Manager of Fair Work Commission v Thomson (No 3)* [2015] FCA 1001, [75]-[76].
[53] *General Manager of the Fair Work Commission v McGiveron* [2017] FCA 405, [22]-[23].
[54] Registered Organisations Act, s 286(2), s 287(2).

52. In respect of the duties under s 286 (good faith) and s 287 (improper use of position to gain an advantage), a person who is "*involved*" in a contravention of those duties has contravened those duties.[55] That contravention carries with it civil penalties.

53. A person, relevantly, will be "*involved*" in a contravention if they have aided, abetted, counselled or procured the contravention.[56]

54. The definition of involvement in a contravention is the same as accessorial liability provisions in other legislation, including the *Fair Work Act 2009* (Cth) (**FWA**), the *Corporations Act,* and the *Competition and Consumer Act 2010* (Cth). To "*aid, abet, counsel or procure*" a contravention "*the person must intentionally participate in the contravention with the requisite intention*". That requires the person to have actual knowledge of "*the 'essential matters' which go to make up the events, whether or not the person knows that those matters amount to a contravention*".[57]

Were the lawyers "involved"?

55. I mentioned that this matter was relevant to determine whether certain lawyers were "*involved*" in contraventions. As will be seen, in my view, Paul McGirr of McGirr & Associates *was* involved. I have also considered whether Peter Hodges of Mills Oakley and Tim McCauley and Ivan Simic were involved in a contravention. I have come to the view that the information is insufficient to arrive at that finding.

56. In the case of Mr Hodges I was concerned whether the legal expenses charged by him and his firm were reasonable. As will be explained, this issue needs further investigation through the services of an expert costs assessor. I am also concerned about Mr Hodges' role in providing a fees estimate – a matter which is discussed in more detail in the postscript to this report. As matters presently stand, I cannot conclude that Mr Hodges was "*involved"* – but that might change depending on the advice received from the costs assessor.

57. As for Mr McCauley and Mr Simic, while I do not agree with some of the legal advice they provided to the NSW Divisional Branch, I am unable to see the relevant intention to participate in the contravention. As I will explain below, it seems that the advice may have been a misguided attempt to assist a long-standing client achieve a result it wanted.

F. THE GREENFIELDS AND THEIR CRIMINAL CHARGES

58. Darren Greenfield was born on 8 September 1965 and elected State Secretary of the NSW Divisional Branch and Secretary of the NSW Union on 2 February 2018.[58]

[55] Registered Organisations Act, s 286(2), s 287(2).
[56] Registered Organisations Act, s 284.
[57] *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365, [176]-[177], citing *Yorke v Lucas* (1984) 158 CLR 661, 667; approved by the Full Court in *Fair Work Ombudsman v Hu* [2019] FCAFC 133, [15].
[58] COM meeting minutes of 2 February 2018.

59. Michael Greenfield, his son, was born on 13 September 1985 and elected Assistant State Secretary of the NSW Divisional Branch and Assistant Secretary of the NSW Union on 2 February 2018.[59]

The background to the criminal charges

60. An independent investigative body, the Trade Union Task Force (**TUTF**), was created following the Royal Commission into Trade Union Governance and Corruption. In NSW, TUTF was a joint operation between the Australian Federal Police and the NSW Police Force.

61. TUTF opened Operation BrownSmith investigating corrupting benefits made by Xiang Feng Lin to officers and employees of the CFMEU, including Darren Greenfield and Michael Greenfield.

Darren Greenfield's criminal charges

62. On 17 September 2021 Darren Greenfield was charged with four counts of receiving a corrupting benefit contrary to s 536D(2) of the FWA. Although there are four separate charges, there are strong similarities between them.[60]

63. Each of the four charges concern Darren Greenfield's receipt of a $5,000 corrupting benefit from Xiang Feng Lin – $20,000 in total. The money was paid directly by Mr Lin to Darren Greenfield in cash on four occasions – 3 November 2018, 6 December 2018, 15 May 2019 and 19 June 2020.

64. Mr Lin owned Lin Betty Building Group – a business which installs plasterboard. His business could be advantaged by entering enterprise bargaining agreements endorsed by the CFMEU; through introductions to builders; or through industrial action on particular sites. Darren Greenfield could provide these kinds of advantages to Mr Lin.

65. The evidence to support the charges comes partly from informants, partly from captured text messages, partly through audio surveillance, and partly through video surveillance. Some of the video surveillance came from cameras installed in Darren Greenfield's union office. The video surveillance shows what appears to be Mr Lin passing cash to Darren Greenfield. There is confirmation of some of the payments through indiscreet text messages sent by Mr Lin before and after the payments were made.

Michael Greenfield's criminal charges

66. On 17 September 2024 Michael Greenfield was charged with two counts of receiving a corrupting benefit contrary to s 536D(2) of the FWA, and one count of making a false declaration contrary to s 25 of the *Oaths Act 1900* (NSW).

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[59] COM meeting minutes of 2 February 2018.

[60] This account of the criminal charges is drawn purely from a statement of facts presented by TUTF. That is only one side of the story, but, given that both Greenfields have reserved their defences, it is the only version available. I respect the Greenfields' right to reserve their defence and draw no adverse inference from their doing so.

67. The two counts of receiving a corrupting benefit are similar to those alleged against Darren Greenfield: the payer of the corrupting benefit was Mr Lin; the sums were paid on 26 January 2019 and 15 May 2019; each payment was $5,000 in cash.

68. The false declaration charge relates to a statutory declaration made by Michael Greenfield on 29 October 2018 that Hung Yu Wu was driving a vehicle on 7 August 2018 when it went through a red light. TUTF alleges the statutory declaration was false, and that Michael Greenfield was the actual driver. It is further alleged that Mr Wu's involvement was arranged between Michael Greenfield and Mr Lin.

69. The evidence against Michael Greenfield was acquired in a similar fashion to the evidence against Darren Greenfield.

An observation on the strength, complexity and seriousness of the charges

70. The strength, complexity and seriousness of the charges are relevant in assessing the decision to indemnify the Greenfields, and the amount of money expended in doing so.

71. The cases are strong, simple, and the offences are comparatively minor.

72. The cases against the Greenfields are pending. Mr Lin has pleaded guilty to his role in the offences. Assuming the covert evidence is admissible, the offences may be established. But I acknowledge that this assessment is made without knowledge of the defences to be advanced.

73. The cases against the Greenfields are simple. They cannot be compared with commercial fraud prosecutions. There are seven discrete events, each confined in scope. There are a handful of possible witnesses. It is not a "*document*" case. There is no need for financial analysis. There is no need for expert evidence. Assuming the admissibility of the covertly acquired evidence is dealt with before trial, the trial should be short.

74. The offences are not serious. There were six small bribes. The false swearing offence is commonplace. While the charges are important to the Greenfields, objectively, they are reasonably minor criminal matters.

G. THE DECISIONS TO INDEMNIFY

75. There were three decisions by the NSW Divisional Branch to indemnify the Greenfields. The decisions were made at meetings of the COM on 17 September 2021, 20 May 2022, and 19 July 2024 and recorded in meeting minutes of those meetings.

H. THE FIRST RESOLUTION – 17 SEPTEMBER 2021

76. At 7am on 17 September 2021 a meeting of the NSW Divisional Branch COM opened.[61] Rita Mallia took the Chair; Rob Kera was present; both Greenfields are recorded as apologies.

[61] It seems that when COM meetings occurred they are concurrently meetings of the NSW Divisional Branch and the NSW Union. There are minutes kept of each meeting, but the terms of those minutes are always – probably inappropriately – identical.

77. The Greenfields were not present because, that same morning, they were at Surry Hills police station being charged with the offences.[62] The non-executive attendees at the COM meeting were aware that the charges were about to be laid, but based upon my conversations with some of them, they were unaware of the details of the offences alleged.

78. The key item on the agenda was titled "*Report in relation to Darren Greenfield and Michael Greenfield".* The minutes record Ms Mallia and Mr Kera as speaking on the subject of "*the foreshadowed charges*". According to the minutes Ms Mallia and Mr Kera told the COM that *"the charges appear to relate to the search warrant executed on the Union's Pyrmont office in November 2020. As such the charges would appear to relate to allegations involving the conduct of the State Secretary and the Assistant State Secretary in the performance of their offices".*[63]

79. If they were the only facts known, drawing an inference of a relationship between the charges and the execution of the Greenfields' duties might be reasonable. It certainly could properly form a basis for the COM to make an initial decision to support the Greenfields. It would, however, be necessary to monitor that decision when further facts became known.

The background to the first resolution

80. Darren Greenfield was closely involved in the formulation of the passage of the first resolution which resulted in him and his son receiving an indemnity from the NSW Divisional Branch.

81. In the invoice issued by Mills Oakley dated 25 November 2021, there is the first recorded contact between Darren Greenfield and Peter Hodges of Mills Oakley on 15 September 2021. Mr Hodges then spoke to the police – presumably, this was making arrangements relating to the charges which were to be laid on 17 September 2021.

82. According to the invoice, after that, Mr Hodges spoke to Ivan Simic, a partner at Taylor & Scott. Then on 16 September 2021, the invoice records "*Telephone conversation with (multiple) Messrs Darren and Michael Greenfield and Mr Simic*".

83. This suggests that Mr Hodges was contacting Taylor & Scott – who were the union's solicitors – on the instructions of Darren Greenfield. The next thing that happened was that, at 4:56pm on 16 September 2021, Tim McCauley, another partner at Taylor & Scott, sent a "*proposed resolution*" to Rita Mallia. Mr Simic was included in this email. Other than the references identified in the invoice from Mills Oakley, I have not located any written instructions to prepare this resolution; it seems reasonable to conclude that someone from the Executive gave those instructions by telephone. It may also be inferred that this was an instruction given at the request or direction of Darren Greenfield or given from Darren Greenfield himself.[64]

84. The terms of that resolution are reproduced in the minutes of the COM meeting. It is clear that Ms Mallia (probably with the backing of the rest of the Executive) had already made up her mind

[62] Michael Greenfield Statement of Facts, [74], [77]-[78]; Darren Greenfield Statement of Facts, [80], [83]-[84].
[63] Given the Greenfields have remained silent on the subject of the charges, it is not clear how Ms Mallia and Mr Kera got this impression.
[64] This is something that I would have been assisted by speaking with Darren Greenfield and Rita Mallia, but I was denied that opportunity.

that the Greenfields would be indemnified. Given the observations made earlier as to the relationship between the Executive and the non-executive members of the COM, it was likely there was no informed debate and little opportunity for dissent.

85. As for the crucial part, the minutes record this:

> *The Committee of Management resolves that the reasonable legal expenses of State Secretary Darren Greenfield and Assistant State Secretary Michael Greenfield will be met by the Branch, including retaining private legal representation and counsel to defend any charges that are laid.*

86. A resolution in those terms is flawed. Although the extent of the indemnity is limited to "*reasonable legal expenses*", there is no mechanism for determining reasonableness. And although, on the information provided to the COM, it *may* have been reasonable to grant the indemnity, there should have been an internal mechanism to allow it to be reconsidered in the event further information was acquired. A carefully drawn resolution of this kind would have inserted a qualification that appropriate information would need to be proffered to the COM by the Greenfields.

87. The resolution is followed by this:

> *In so resolving, the Committee of Management has satisfied itself that: the making of the grant or donation in respect of the legal expenses would be in accordance with the rules of the Union.*

88. The keywords of that notation to the resolution are contained in the reference to "*the grant or donation*". These words were going to come under scrutiny by the auditor.

Payments for legal expenses made under the first resolution

89. It seems the Greenfields retained two law firms to act for them – Mills Oakley and McGirr & Associates.

90. McGirr & Associates appears to have been the original firm involved. The prosecutor's statement of facts records that, at the time they were charged, the Greenfields were accompanied by Paul McGirr of McGirr & Associates.

91. But it appears from the invoicing that Mills Oakley also had carriage of the matter. The first invoice raised by Mills Oakley records discussions between Peter Hodges and the Greenfields on 15 September 2021 – two days before the Greenfields were charged.[65] There were emails and teleconferences between Mills Oakley and Mr McGirr on 15 September 2021.

92. Ordinarily, there would be a formal fees agreement between the Greenfields and their lawyers. It is not clear whether agreements were made here. There is no copy of a fees agreement between the Greenfields and Mills Oakley or between the Greenfields and McGirr & Associates

[65] McGirr & Associates continued to have some role. The invoices from Mills Oakley include, as disbursements, two invoices from McGirr & Associates: 24 November 2021 for $4,840 and 16 April 2024 for $4,880.

kept amongst the union papers.[66] Even if there were no formal fees agreements, there was an obligation cast upon the lawyers to disclose the basis on which their costs were to be calculated.[67] If the Greenfields entered into some kind of agreement, they do not seem to have shared the agreements with the other members of the Executive and the COM. If Rita Mallia or Rob Kera were serious about restricting the indemnity to "*reasonable expenses*", then they should have enquired into the arrangements made by the Greenfields with their lawyers. There is no record of any enquiries being made.

93. Payments totalling $101,798.38 were made by the NSW Divisional Branch to Mills Oakley in the first eight months after the first COM resolution. That was an unusually large amount to incur as legal costs, in such a small case, in such a short time.

94. The way in which these payments were approved and paid was kept within the Executive. Invoices were sent by Mills Oakley to Darren Greenfield. Occasionally, Darren Greenfield sent the invoices directly to the finance manager, Patricia Hamson, for payment. In those instances, he seems to have included the other members of the Executive as recipients. Some of the payments were authorised by the Greenfields themselves.

95. Not one bill was questioned; not one bill was challenged. They appear to have been mostly paid on the same day they were submitted. Any question of reasonableness was abandoned – there is no sign that anyone on the Executive even turned their mind to the question of reasonableness.

96. There is also no record that Ms Mallia or Mr Kera made any enquiries into the detail of the charges which had been laid. If they had made no enquiries, they should have; this was a necessary component of determining whether the NSW Divisional Branch should continue the indemnity. If Ms Mallia or Mr Kera did make the enquiries and were told something by the Greenfields, then they kept that to themselves and did not share it with the non-executive members of the COM.

97. Returning to the Divisional Branch Rules, the indemnification was not expenditure for ordinary purposes, as is provided for under rule 35(e). As such, it required COM approval. Crucially, however, $101,798 in expenditure incurred was not placed before the COM for consideration and ratification. This was a breach of the Divisional Branch Rules. Those involved in the payment of those amounts without COM consideration and ratification probably contravened the duty of care and diligence[68] and to not improperly use their position to gain an advantage[69]. Further, there were no donations or grants reported to the Fair Work Commission during the relevant time period which would have enabled members to be informed of the payments. This kept the payments secret from the members, a matter which came to be of some concern to the Executive in coming months.

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[66] On 13 September 2024 the Administrator asked Mr McGirr of McGirr & Associates to provide "*copies of any third-party payer costs disclosure agreements with the union in relation to your services to Darren and Michael Greenfield*". There was no response to that request. This was one of the matters about which I wanted to ask Mr McGirr about, but he declined to attend or respond.

[67] *Legal Profession Uniform Law (NSW)*, s 174(1)(a).

[68] *Fair Work (Registered Organisations Act 2009* (Cth), s 285.

[69] *Fair Work (Registered Organisations Act 2009* (Cth), s 287.

I. THE SECOND RESOLUTION – 20 MAY 2022

98. Payments under the first COM resolution would have continued indefinitely except for some queries raised by the NSW Divisional Branch's auditor, Michael Mundt from a firm of chartered accountants, Daley Audit.[70]

The auditor's queries

99. On or around 7 April 2022, Mr Mundt raised questions about the resolution to indemnify the Greenfields. Amongst other things, he asked that the law firm acting for the Greenfields "*attempt to identify the potential exposure of the Union in defending these actions – which may have relevance for grants/donations/KMP reporting disclosures"*.[71] Mr Mundt went on to ask "*has there been a limitation placed upon the legal costs that the Union will meet?"* and "*how this is to be disclosed in the financial report(s)?".*

100. Obtaining that kind of information was not only important for the audit, it was (or should have been) important for the NSW Divisional Branch, which needed to know the likely cost so it could make provision for it.

101. The response from the Executive is disconcerting. Rather than just collect the information, Ms Mallia consulted Darren Greenfield. It appears that Darren Greenfield was unhappy with the information being disclosed and Ms Mallia, acting at his direction, raised some pointed questions in effect challenging why the matter should be reported.

102. As Ms Mallia and Darren Greenfield would have known, treating the payment as a grant or donation would mean it would be revealed to the members. Treating it as 'legal expenses' would result in it being rolled into a larger figure in the accounts with members left unaware that the Greenfields were receiving the donation.

103. Ms Mallia did not leave the matter there. Just two hours later, she expressed her own views about the reporting guidelines and that no disclosure was required, and stated "*We may need to have further meeting with Darren and Michael about this and seek further legal advice*". Darren Greenfield was copied into this correspondence.

104. Mr Mundt responded with a detailed email at 11.33am on 8 April 2022, noting that *"based upon our discussions to date, the legal expenses are private in nature"* and Mr Mundt then provided detailed advice as to why the payments and an estimate of the expected cost was required to be disclosed to the Registered Organisations Commission – commonly known as ROC.[72] Mr Mundt advised that this arose from the description of the indemnity as a *"grant or donation"* in the original resolution.

[70] All available information shows Mr Mundt did his job honestly, ethically, and competently.
[71] KMP is an abbreviation of Key Management Personnel. The Greenfields were Key Management Personnel.
[72] The Registered Organisations Commission was a statutory authority responsible for the regulation of trade unions, including the CFMEU. It was set up in 2017 and in 2023 its functions were transferred to the Fair Work Commission. It would be fair to regard most of the trade union movement as sceptical and hostile of ROC.

105. Mr Mundt's advice continued that it was his *"interim"* conclusion that the legal expenses paid for the Greenfields were *"NOT legal expenses of the Union"* and, thus, required separate disclosure. The email ended with Mr Mundt reiterating his request that the Greenfields' lawyers provide *"their formal estimate of future costs… to bring the matter to conclusion"* which he identified as *"the extent of the Union's commitment"*. He also asked for confirmation that the payments *"are NOT a loan, grant or donation"* or otherwise the payments had to be disclosed to ROC.

The Taylor & Scott advices

106. At 12.23pm on 8 April 2022 Ms Mallia referred the matter to the NSW Divisional Branch's solicitors, Taylor & Scott, for legal advice. Ivan Simic and Tim McCauley looked after the matter.

107. Taylor & Scott provided two letters of advice.[73]

108. Before Taylor & Scott provided their letters of advice they sought counsel's advice.

The Crawshaw advices

109. Taylor & Scott briefed a barrister, Steven Crawshaw SC, to advise. Mr Crawshaw provided two opinions, dated 11 April and 26 April 2022. They were mainly directed at the issue of how the indemnity should be characterised, and if the payments need to be disclosed to ROC.

110. In his first advice Mr Crawshaw concluded that it was open to the NSW Divisional Branch to pass a further motion which "*expressly addresses whether* [the payments] *are to be treated as expenses or a grant/donation".* He went on to observe that "*whatever course is chosen"* the detail of the legal costs would still need to be disclosed. This advice was provided upon the incorrect assumption that no payments had yet been made.

111. There was then an exchange between Mr McCauley and Mr Crawshaw. This led to the second advice by Mr Crawshaw.

112. The second advice of Mr Crawshaw corrected some of the assumptions upon which he had relied, but did not advance the legal issues. On the vexing question of whether or not the payment of the Greenfields' legal expenses could be treated as "*management expenses*", Mr Crawshaw said this:

> *I would need more information about the nature of the criminal charges brought against the Greenfields and their connection with union activities to be in a position to advise more definitively as a general proposition whether, if payment of the legal expenses were treated as expenses, such expenses have been or would be "reasonably incurred by the officer in performing the officer's duties as an officer".*

Taylor & Scott's exchanges with Mr Mundt

[73] Both letters are dated 18 May 2022, so it is difficult to distinguish between them. It is possible, however, to discern the order in which they were sent to Ms Mallia and I will call them the first advice and the second advice respectively.

113. Around 12 May 2022 Mr Simic and Mr McCauley met with Mr Mundt.[74] There seems to be confusion regarding the nature and effect of that conversation. According to Mr McCauley, during that conversation there was a discussion regarding whether or not the Greenfields' legal expenses could be treated as management expenses and that Mr Mundt had said that they could provided there was a "*nexus*" between the Greenfields' charges and their work duties. According to Mr Mundt, the word "*nexus*" was raised in the context of assessing whether the payments could be subject to the fringe benefits tax. In the end, the difference probably does not matter because, whatever the origin of the word "*nexus*" it had to be clear it was accounting advice, not legal advice. The responsibility for the legal advice fell to Taylor & Scott.

Taylor & Scott's first advice

114. Taylor & Scott's first advice to the NSW Divisional Branch is mainly directed at reporting and disclosure requirements.

115. The opening portion of the letter sets out contestable assumptions of fact which were put to Mr Mundt. For example, Mr Mundt was asked to assume the charges "*are about the conduct of the two officials arising from performing their duties as officials of the union"* and *"[t]here appears to be a nexus between the legal expenses and the performance of the officials of their duties as officials".*

116. The first advice then goes on to provide guidance on what disclosure is necessary and the language which could be used in making disclosure. If the advice was accepted, ROC would only be told that the Greenfields' charges were "*arising from their employment and the offices they held in the Branch"* and *"arise in the course of their duties as a union officer"*. The Greenfields, significantly, would not be identified by name.

117. Taylor & Scott went on to say that, until they saw the "*Fact Sheets for the Charges",* they were unable to advise whether there was a "*relevant nexus"* between the charges and the Greenfields' duties as officials. That was inconsistent with the assumptions they had provided to Mr Mundt.

118. The first advice also formulated words which meant that the NSW Divisional Branch did not need to disclose the estimate of the potential cost of defending the Greenfields. If the Executive was doing its duty, it should have been interested in that issue, but there is no information to suggest that the Executive ever asked this simple question of either of the law firms representing the Greenfields, or the Greenfields themselves.

Taylor & Scott's second advice

119. Taylor & Scott's second advice is directed at whether there was a justifiable basis for the NSW Divisional Branch to indemnify the Greenfields.

[74] In an email to Mr Simic and Mr McCauley dated 12 May 2022, Mr Mundt refers to "*our recent meeting"*; in Taylor & Scott's first advice there is a reference to a meeting with Mr Mundt.

120. The second advice was given on the premise that the legal test was whether there was a "*nexus between the charges brought and the performance by the Assistant Secretary and the Secretary of their duties as officials and employees of the Divisional Branch"*.

121. Taylor & Scott answered that question in the affirmative, the effect of which seems to be that the Greenfields' legal expenses could be treated as litigation expenses of the NSW Divisional Branch.

Were the Taylor & Scott advices correct?

122. In my view the advice given to the NSW Divisional Branch was wrong.

123. The question was not whether what the Greenfields were doing had some connexion with their duties, the question was whether the COM had the *power* to give the Greenfields the indemnity. That power had to derive from the union rules.

124. If there was power, then the COM had to ask itself whether giving an unlimited indemnity to the Greenfields was in the best interests of the union and in the best interests of the members of the union. It seems that no-one – neither the lawyers nor the Executive – turned their minds to this.[75]

The passing of the resolution

125. There are minutes of a COM meeting on 20 May 2022. The meeting opened at 7am. Rita Mallia took the Chair. Rob Kera and both Greenfields are recorded as attending, but the Greenfields appear to have left the room when the relevant matter was discussed.

126. A part of the meeting was devoted to *"Legal Matters"*. Ms Mallia is recorded as telling the COM that there was a need to *"seek clarity … to ensure proper compliance with Registered Organisation Commission reporting requirements"*. Ms Mallia then referred to the advice from Taylor & Scott and told the COM:

> *The advice clarified that as long as there is a nexus between legal costs in defending the charges and their duties as Union Officers that it is a necessary expense of the union in defending its Officials. The advice further supported the conclusion that such a nexus exists.*

127. It is not clear if non-executive members of the COM were given access to the actual advices by Taylor & Scott, but if they were, it would only have been on the morning of the meeting or during the meeting.[76]

128. A second resolution then passed:

> *The Committee of Management further resolves that it is necessary to meet this expenditure on reasonable costs to defend and protect employees and democratically elected officials performing their duties for the Union … and as such, the payment has not constituted and is not a grant or donation to either individual Official.*

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[75] The question regarding a "*nexus*" with the duties of the Greenfields was not irrelevant; it was a subsidiary issue to be considered only after the correct questions had been asked and answered. The factual determination as to whether soliciting or receiving corrupting benefits could *ever* be within the duties of an official is a controversial one. I asked Mr Mundt whether he would have formed the view that such could provide a basis for a "*nexus*" with official duties, and he responded, *"No way!".*

[76] The advices were dated 18 May 2022 and the meeting opened at 7am on 20 May 2022.

129. The resolution extracted above had been drafted by Tim McCauley. At 9:19am on 19 May 2022, Mr McCauley had sent an email to Ms Mallia recommending a form of proposed resolution to be placed before the COM. The actual resolution passed was very nearly identical, with only irrelevant differences, and picking up and repeating some of the typographical and grammatical errors contained in Mr McCauley's draft.

Payments for legal expenses made under the second resolution

130. Payment of the Greenfields' legal expenses continued under the second resolution in a manner similar to the way they were paid under the first resolution – every few months Mills Oakley would raise an invoice; it would then be passed on to some member of the Executive and rubber stamped for payment.

131. There is no sign that the legal fees were ever referred for an assessment as to whether they were reasonable or necessary. There is no sign that the accumulating legal fees were tallied. There is no sign the COM was told or warned of the size of the payments. I spoke to several non-executive members of the COM and *none* of them were told about the spending or the rate of spending. There is no sign that the general members of the NSW Divisional Branch were told the payments were even being made.

132. This is problematic because the fees were extraordinary.

J. LEGAL FEES PAID TO MILLS OAKLEY

133. Large sums were paid to Mills Oakley for the Greenfields' legal expenses under the first and second resolutions – in total, around $895,000.

134. That is an astonishing sum of money to be spent on a defence of charges of this kind.

135. Mills Oakley's first invoice was delivered on 25 November 2021; its final on 16 August 2024. All were paid, in full, without question, within days:

Date	Amount
25.11.21	$13,555.30
16.03.22	$44,289.71
17.05.22	$43,953.37
29.06.22	$56,790.66
19.08.22	$23,900.97
09.11.22	$48,166.50
07.02.23	$61,859.94
27.04.23	$218,917.54
06.06.23	$49,856.24
04.08.23	$4,135.89
27.09.23	$32,531.14
27.09.23	$28,233.33
06.10.23	$10,972.50
16.11.23	$18,686.13
28.11.23	$123,436.27
18.03.24	$18,836.14
09.05.24	$18,097.98

11.06.24	$11,019.76
02.07.24	$33,158.81
16.08.24	$35,111.55

136. When I informed non-executive members of the COM that nearly $900,000 of union money had been spent on the Greenfields' legal fees the reaction was striking. There was a mixture of shock and anger. Some colourful language was deployed.

Mill Oakley's services

137. I have examined the invoices raised by Mills Oakley. My experience as a barrister enables me to comment upon overcharging or overservicing. I was troubled by what I saw in the Mills Oakley invoices. There does seem to be an unusually intense amount of servicing on matters which are at the very edge of the substance of the Greenfields' defence. I was troubled by the fact that three barristers were retained. The matter had not progressed far at all. The size of the fees makes me concerned about overcharging. At the very least, this issue needs to be examined.

138. As pointed out earlier, the records of the NSW Divisional Branch do not appear to include any copy of a fees agreement and cost disclosure between the Greenfields and any of their lawyers. Fees agreements and cost disclosures are heavily regulated and there are consequences if a fees agreement or a cost disclosure does not comply with statutory requirements, including the lawyers not being entitled to all of its costs.[77] This issue, too, needs to be examined.

139. No one amongst the Executive showed any interest in this matter, so Mills Oakley's fees have never been reviewed. These were union funds. The money belonged to the members, not to the Executive or to the Greenfields. I recommend that these fees be placed under review by obtaining an assessment from an appropriately qualified person skilled in these matters. In a sense, I am asking the Administrator to undertake a task of determining whether the legal expenses were reasonable – a task which should have been undertaken, at a much earlier time, by the Executive.

RECOMMENDATION ONE:
The invoices raised by Mills Oakley in Re: Advice in respect of Operation BrownSmith Prosecution be referred to a costs assessor for advice as to whether the legal expenses were reasonable and whether they remain enforceable.

K. THE THIRD RESOLUTION - THE $3 MILLION PAYMENT TO McGIRR & ASSOCIATES

The threat of administration

140. On 13 July 2024 an article was published making serious allegations of crime and corruption in the CFMEU. The articles and the allegations grew, and became known as, "*the Building Bad*"

[77] *Legal Professional Uniform Law (NSW)*, Part 4.3.

series. The NSW Divisional Branch, and Darren Greenfield in particular, were caught up in the swirl of these allegations.

141. The fallout from the Building Bad series included calls for political solutions, even going so far as to call for the deregistration of the CFMEU.

142. On 17 July 2024 the General Manager of the Fair Work Commission, Murray Furlong, issued a statement expressing his "*concern about the alleged conduct and commentary that organised crime has infiltrated several state branches of the [Construction and General] Division*." Mr Furlong went on to say he was "*seeking advice on making an application to the Federal Court under s. 323 of the [Registered Organisations] Act*."

143. The provision to which Mr Furlong referred permits the Federal Court to make an order reconstituting a union or a branch of a union.

144. At this point the Executive of the NSW Divisional Branch was aware that it was likely that the Branch would be reconstituted. One method available would be for the removal of the Executive and its replacement with an administrator.

The Executive steps in

145. Immediately after it was announced that the Fair Work Commission was considering reconstituting the CFMEU, the Executive moved to take two protective measures. The *first* was to secure over $3,000,000 of NSW Divisional Branch money to cover all future legal expenses which might be incurred by the Greenfields in their defence. The *second* was to secure $500,000 to be in a position to defend any proceedings brought by the Fair Work Commission.[78]

146. In each instance the money was to be paid into the trust account of a law firm. The idea was, at least ostensibly, to attempt to place the money beyond the control of an incoming administrator, protecting it so that it could be used for its designated purpose. There may have been some other purpose – I base this upon the extraordinary amount of money put aside for the Greenfields' defence: it seems as though it was intended there would be money left over.

147. It is remarkable that, at this time of apparent crisis, the Greenfields were receiving this kind of specifically preferential treatment. In the order in which the decisions were made, the Greenfields' interests came before the interests of saving the CFMEU. The sums involved are telling as well: $500,000 set aside to save the CFMEU; six times that much was set aside to defend the Greenfields.

148. It gets worse: there is no doubt that each of the Greenfields were involved in making the decisions which would confer a massive benefit upon themselves. Rita Mallia and Rob Kera were complicit in that. It is clear that the Greenfields' interests were being protected and placed ahead of and before the interests of the ordinary membership.

[78] The money was paid based upon a brief estimate drawn up by Taylor & Scott and the $500,000 was returned upon commencement of the administration.

Preparation for the third resolution – the fees estimate

149. It appears that from the moment the reconstitution was foreshadowed, the Executive – principally through Rita Mallia – sought an estimate of the future fees of the Greenfields' defence. There is an irony in this sudden burst of interest of the Executive in the future cost of the defence: Mr Mundt had been asking for that since April 2022 and the Executive had been resisting providing the information for more than two years. But now it had become urgent for a different reason.

150. Two law firms became involved – Mills Oakley and McGirr & Associates. It is necessary to examine their roles separately.

Mills Oakley's involvement

151. It is clear from the Mills Oakley invoices that Mr Hodges had been requested by Ms Mallia to provide an estimate of fees for the defence.

152. On 17 July 2024 an associate at Mills Oakley emailed counsel seeking information regarding their fees and prepared a "*summary of anticipated fees to provide to the CFMEU"*. The same associate then conferred with Mr Hodges regarding "*defence fees"*.

153. On 18 July 2024 the same associate billed for "*Further revise costs estimate to accompany resolution".* Shortly after that Mr Hodges conferred with Ms Mallia.[79]

154. The fact that Mr Hodges was providing an estimate was made known to Taylor & Scott. At 5.01pm on 18 July 2024 Tim McCauley sent an email to Ms Mallia attaching *"a resolution re the legal fees put together by Peter"* and suggesting to her that she should provide the COM with a *"copy of the estimate of legal costs provided by Peter"*.[80]

155. Something then occurred so that Mr Hodges' fees estimate was no longer to be relied upon by Ms Mallia.[81] Instead, a fees estimate was received from Paul McGirr of McGirr & Associates.

156. I am very troubled by this episode because, as will be seen, I make findings seriously adverse to Mr McGirr on the basis that it was he who prepared the fees estimate. In fact, I have some doubts whether that is so. There were surrounding facts – which I will explain in a postscript to this report – which suggest that the fees estimate prepared by Mr Hodges was provided to Mr McGirr and he then used it, or at least adapted it, and supplied it to Rita Mallia.

Paul McGirr's estimate

[79] There is a calendar entry in Ms Mallia's diary for a meeting on 17 July 2024 with Peter Hodges at the office at Mills Oakley between 11.30am and 12pm.
[80] Mr McCauley's email was copied to Peter Hodges and Ivan Simic.
[81] I would have liked to ask the members of the Executive about this change, but they did not co-operate.

157. What follows proceeds on the basis that the fees estimate on the letterhead of McGirr & Associates was actually prepared by Mr McGirr. As I have already said, I have some doubts that is so, but I will proceed on that basis.

158. It seems that as late as the afternoon of 18 July 2024 Ms Mallia still intended to use the estimate provided by Peter Hodges at Mills Oakley.[82] Something then changed and, instead, another estimate was sought from Paul McGirr. It is not clear why or exactly when this happened.[83]

159. At 5.04pm on 18 July 2024 Mr McGirr emailed a letter to Ms Mallia described as a "*Costs Estimate"*. The retainer to provide this fees estimate was between Ms Mallia on behalf of the NSW Divisional Branch and McGirr & Associates. This is confirmed from the manner in which Mr McGirr addressed his letter to Ms Mallia – it was to "*Rita Mallia President CFMEU*".

160. The speed with which Mr McGirr was able to respond to the request casts doubt over the whole process. Mr McGirr had only peripheral contact with the Greenfields' defence. It is hard to understand how, given the complexity Mr McGirr foresaw in the matter, Mr McGirr could possibly have mastered the relevant facts to make such an important assessment on such short notice.

161. I have examined Mr McGirr's estimate. I have forty years' experience in litigation. I have prepared countless costs agreements of my own and seen many prepared by other lawyers. As counsel I have done a dozen or so cases on the subject of overcharging by solicitors, including two or three in the NSW Court of Appeal. When I read Mr McGirr's estimate I thought it was grossly exaggerated. I will explain why.

162. Mr McGirr estimated that the total expenses would be $3,150,969.50.[84] That alone is extraordinary: the amount is extremely high for the defence of some simple and minor criminal charges. It needs to be kept in mind that nearly $900,000 had already been spent by the NSW Divisional Branch – if Mr McGirr was correct, the members of the NSW Divisional Branch were spending over $4,000,000 on defending the Greenfields from these minor offences. This was obviously an important matter for the Executive, the COM and the general membership, yet the estimate is less than three pages. There is little detail. It mainly consists of purely speculative estimates. These are some of its features:

    (a) Mr McGirr says that court time would involve two to four days for mentions; five days for a s 82 hearing; eight days of pre-trial legal arguments; 20 days for the trial; and two to four days for sentencing. That is a total of around forty days in court. Each step in that seems exaggerated to me.

    (b) It is said that out of court time would involve eight to 10 days of preparation for the s 82 hearing; another 20 days for the trial; and one to three days for the sentencing. That is around another 32 days of out of court time – again, grossly overstated.

[82] This can be inferred from Mr McCauley's email to Ms Mallia at 5.01pm on 18 July 2018 – see above.
[83] I asked Ms Mallia a specific question on this, but she declined to answer.
[84] The precision of that figure is striking. Usually a lawyer would estimate fees in a range, and always round figures off.

(c) But even assuming that to be a fair guess, there are problems: it suggests that all of the legal work can be carried out in 72 days – but that part of the estimate does not match up with other parts; for example, the estimate then allows for some of the barristers and solicitors to be engaged for far more than 72 days.

(d) Mr McGirr suggests three counsel be retained. It is not reasonable to retain three barristers. A senior junior alone would be sufficient – this is not a complex or serious case. Mr McGirr says that he spoke to counsel and they told him how much time they would need. According to Mr McGirr, the senior counsel said he should be allowed 90 days; the senior junior wanted another 90 days; and the junior wanted 100 days for the case. Remarkably, each is seeking substantially more than the 72 days calculated by Mr McGirr. And the overall allowance is ridiculous – collectively the barristers would be engaged for 280 days.

(e) And then there are the solicitors. Mr McGirr said he would be working on the matter for 50 days. Special counsel would be on the case for 70 days.[85] An associate would be engaged for 85 days. A paralegal would be working on the matter for 90 days. It is hard to reconcile this with Mr McGirr's estimate of 72 days to deal with the matter. And if his estimate is correct, Mr McGirr and his staff would be fully engaged for 295 days between them.

(f) The estimate means that, on nearly all of the days spent working on the matter, there would be seven lawyers engaged, all working at once. That, based upon my experience, is quite ridiculous.

163. I did not think it appropriate to rely only upon my opinion, so I consulted an expert litigator with over 30 years' experience in criminal law. The expert has a speciality in corruption and white-collar crime.

164. The expert described Mr McGirr's estimate as *"grossly excessive"* and said virtually every aspect of the estimate was *"over the top"*. The expert made these points:

(a) The criminal charges were neither complicated nor serious. It was not like a fraud case or a white-collar crime case. There are very few documents involved.

(b) The four week estimate for a trial was too long; five days for the committal was too long; eight days for pre-trial arguments was much longer than typical.

(c) Briefing three counsel was excessive; the time allowed for the counsel was excessive. The time allowed for the solicitors' work was similarly overstated. The hourly rates for the solicitors and paralegal were all at or above the highest end of the range.

(d) Taking these matters into account, the $3,000,000 estimate was between five and ten times the appropriate estimate.

[85] This is despite there being no person identified on the letter head as special counsel.

165. The expert was also troubled that the whole $3,000,000 would be paid at once – a matter which the expert described as *"extraordinary*" and that he had *"never seen it in his entire career"*. He explained that, while it is the usual practice to obtain funds in advance of criminal defence work, the payments come in tranches, never all at once.

166. I find Mr McGirr's estimate troubling. It is so exaggerated that it could not be a genuine attempt to provide the NSW Divisional Branch with guidance. Mr McGirr knew why he was being asked for the estimate – he concluded his letter this way:

> *Please pay us the sum of $3,150,969.50 which we will hold in trust on account of our costs and disbursements as disclosed above.*

167. Securing a retainer of this kind was a benefit to Mr McGirr's firm. There would have been substantial profit margins in the estimated fees. If this fee estimate truly came from Mr McGirr, then the larger the estimate, the larger the benefit to McGirr & Associates.

168. In my opinion, Mr McGirr was motivated partly for his own benefit, and partly because an inflated estimate is probably what the Greenfields and Rita Mallia wanted. I do not accept it was a proper estimate. I asked the expert for his opinion – he said that he was "*suspicious of it not being genuine"*.

169. Mr McGirr's estimate was obviously hopeless, but even if it looked impressive on its face (it did not), the amount of money involved meant that the Executive was bound, as a matter of prudence to get a second opinion. The COM was entitled to be given options. It is hard to understand why Peter Hodges' estimate was not also given to the COM. Yet the Executive did not do this. Instead, the Executive decided that Mr McGirr's estimate – and his estimate alone – should be placed before the COM.

170. The Executive had only received the estimate at 5.04pm on 18 July 2024, but in the short time they held it, the Executive decided this was a proper basis for withdrawing over $3,000,000 from members' funds.

19 July 2024 – the COM meeting and the third resolution

171. There are minutes of a meeting of the COM on 19 July 2024. The meeting opened at 9.40am and Rita Mallia took the chair. Both Greenfields and Rob Kera attended.

172. One of the items discussed was titled "*Issues relating to CFMEU Branch and Darren Greenfield and Michael Greenfield".*

173. Remarkably, both Greenfields remained in the meeting when this issue was raised and even participated in the discussion. The minutes record that Darren Greenfield "*briefly addressed the meeting in respect of the matters that have played out in the media this week"*. He told the meeting that he and Michael Greenfield maintained their innocence and intended to "*fight"* the cases.

174. Given his interest in the outcome and his position in the NSW Divisional Branch, it was grossly inappropriate for Darren Greenfield to speak to the COM. There is a record that Darren

Greenfield even lectured the COM on their obligation to discharge their fiduciary duty – ironic, given he was breaching his own fiduciary duty while speaking on the subject.[86]

175. The non-executive members of the COM then requested the Executive leave the meeting. On the face of it, this might look as though the COM was free to come to its own decision. But that is not true: I have been told by members of the COM who were at that meeting that the feeling was that there was no freedom to debate, much less a freedom to dissent.

176. Even though the minutes say "*a long and detailed discussion*" ensued, the truth is that the result of the meeting was settled before it started. Before they left the room, the Executive gave the non-executive members of the COM a piece of paper with the resolution already printed on it. The terms of that resolution had been sent to Rita Mallia by Tim McCauley in an email at 5pm on 18 July 2024 in which Mr McCauley said: "*Attached is a resolution re the legal fees put together by Peter, with my amendments to take account of some of the auditor's comments from recent years.*"[87] The resolution drawn by Mr McCauley is reproduced precisely in the minutes of the COM meeting, right down to the detail of the repetition of a typographical error.

177. The reality is that the resolution was presented to the COM by the Executive as a *fait accompli*.

The $3 million payment is made

178. At 3.13pm on 19 July 2024 Rita Mallia sent an email to the NSW Divisional Branch finance manager, Patricia Hamson, asking for the transfer to be made. A copy of the minutes of the COM meeting was attached. At 4.20pm $2,700,000 was transferred from an account titled CFMEU NSW Branch Construction and General Division into an account titled CFMEU NSW No.2 Account. At 4.29pm $3,150,969.50 was transferred from the No. 2 Account to the McGirr & Associates trust account.

179. The basis upon which the money was paid, and the legal position in respect of how the money was held, is not at all clear. It seems as though, in the haste to complete the process, this was not even considered.

180. It is not even clear who Mr McGirr thought was his client. In his letter providing the estimate, Mr McGirr addressed Rita Mallia in her capacity as the President of the CFMEU. On the face of it the CFMEU was his client – or, more probably, the NSW Divisional Branch was his client. The letter, however, was addressed regarding the Greenfields and their criminal charges. Maybe Mr McGirr thought that the Greenfields were his clients.

181. In making the payment, the NSW Divisional Branch was accepting the terms of the estimate and the letter providing the estimate described the payment as follows: "*Please pay us the sum of $3,150,969.50 which we will hold in trust on account of our costs and disbursements as disclosed above."* Earlier in the letter, Mr McGirr described the purpose of the estimate as "*the anticipated*

[86] There are handwritten minutes of the meeting taken by Denis McNamara. The notes include this reference to "*Fiduciary duties of COM members distributed and read out by [Denis McNamara]".* This is a reference to another document which had been prepared by Taylor & Scott. I attempted to meet with Denis McNamara, but he said he was taking legal advice and that I would hear from the lawyers soon. I had not heard from the lawyers by the time this report was finalised.

[87] "*Peter"* is Peter Hodges from Mills Oakley.

costs that will be incurred by both Counsel and solicitors in defending Darren and Michael until finalisation of the matter".

182. On the face of those assertions, it would seem that the money was placed by the NSW Divisional Branch into a trust account to be held on trust for the purpose of paying the Greenfields' legal expenses. But that leaves open a question as to whether it was the NSW Divisional Branch or the Greenfields who controlled the allocation of the funds in the trust account. It might have been the NSW Divisional Branch; it might have been the Greenfields. There are two invoices which were paid after the trust fund had been created – one was to McGirr & Associates and one was to Mills Oakley. In both instances, it seems to have been assumed by the lawyers involved that approval had to be obtained from Ms Mallia, presumably in her capacity as President of the NSW Divisional Branch.[88]

183. This kind of careless legal work could lead to complications, and could have led to an assertion by the Greenfields that the money was, in law, their money.

184. As it turns out, most of the funds were returned shortly after the Administrator was appointed.

Further concerns regarding the lawyers

185. Earlier it was observed that the Greenfields appeared to have two law firms acting for them. The billing which occurred after the $3.1 million was deposited in McGirr & Associates' trust account seems to confirm that this was the case.

186. In his invoice dated 16 August 2024, Mr McGirr charges for "*all work since 17 April 2024*", and this includes work in relation to the "*committal proceedings at the Downing Centre*", conferences with Peter Hodges, and some role in relation to a "*public interest immunity argument*". Mills Oakley were also charging for that same work.

187. Ordinarily it would be thought when McGirr & Associates gave the estimate (which included the charge out rates for its own staff) that McGirr & Associates had taken over carriage of the matter. This does not appear to be so. The invoice of Mills Oakley dated 16 August 2024 records substantial work being done by Mills Oakley in a manner similar to the way it was carried out before Mr McGirr received $3.1 million in trust. It seems as though Mills Oakley continued to have principal carriage of the matter for the Greenfields.

L. THE RECOVERY OF (MOST OF) THE $3 MILLION

188. The Administration was introduced by statute and commenced on 23 August 2024.

189. On 27 August 2024 Paul McGirr wrote to the National Secretary of the CFMEU, Zach Smith asking for confirmation *"that the funds previously provided by the CFMEU to our firm's trust account remain allocated for the use of the Greenfields' reasonable defence costs and*

[88] Arrangements of this kind may be permitted under the *Legal Profession Uniform Law*, but there is no evidence of arrangements of this kind were made or even considered, and if so, whether the relevant professional obligations for such an arrangement were complied with by the lawyers.

expenses." It is not clear why Mr McGirr, who was acting for the Greenfields, now thought that Mr Smith was his client or controlled the funds.

190. On 9 September 2024 the Administrator, Mark Irving KC, wrote to Mr McGirr stopping further payments from the trust account and asking for an account of the use of the money.

191. On 11 September 2024 Mr McGirr advised that two payments, totalling $43,911.55, had been made from the trust account. One was for $33,111.55 paid to Mills Oakley on 19 August 2024 "*on account of disbursements incurred in the Court Proceedings"*. The other, for $8,800, was transferred to the general account of McGirr & Associates on 20 August 2024 "*on account of the professional fees of McGirr & Associates in the Court Proceedings"*.

192. On 13 September 2024 Mr Irving requested the return of the whole sum transferred, including the $43,911.55. On 19 September 2024, $3,107,057.95 was transferred by McGirr & Associates to one of the NSW Divisional Branch's accounts.

193. The $43,911.55 remains outstanding.

M. CONTRAVENTIONS OF STATUTORY DUTIES

194. In my opinion there have been multiple contraventions of statutory duties by each of the members of the Executive – Rita Mallia, Darren Greenfield, Rob Kera and Michael Greenfield.

195. In arriving at this conclusion, I have kept steadily in mind the observations made by Justice Logan in *FWC v Smyth*[89] that the actions of the Executive and the COM, the considerations which they took into account, and the decisions at which they arrived, are not to be judged by some external standard unrelated to the industrial and political environment in which they were operating. Instead, the actions of the Executive and the COM are to be tested by reference to appropriate union-minded intentions and objectives.

196. Even taking account of the observations of Justice Logan, there were steps taken by the Executive which were indefensible, and clearly in contravention of their statutory duties.

The original decision to indemnify

197. In the way in which it was cast, the first resolution was probably within power and justifiable (as it was originally expressed), as a "*gift or donation*". That power derived from a combination of the union objects which appear in the National Rules and rules 35(c), 40(4)(a), 42(c) and 42(s) of the Divisional Branch Rules.

198. But just because there was power to make the decision does not mean that it was in the best interests of the NSW Divisional Branch to do so.

199. The NSW Divisional Branch could have passed a resolution supporting the Greenfields without a promise to pay the reasonable legal expenses of the Greenfields. There was no urgency to the payment of the Greenfields' legal expenses. As far as the materials disclose, there is no

[89] [2024] FCA 304.

apparent reason why a decision indemnifying legal costs had to be made on the same day the Greenfields were charged. Had there been a desire to indemnify the reasonable legal expenses of the Greenfields, a reasonable person in the position of the Executive exercising care and diligence would have made some proper inquiries into the precise nature of the charges, the anticipated legal fees, the anticipated time for the resolution of the criminal proceedings, the NSW Divisional Branch's financial position, and what financial liability it could accept.

200. However, taking into account the industrial and political environment, and excusing what might have been an overreaction made in the heat of the moment, I do not make findings that the original decision to indemnify constituted a contravention of the Registered Organisations Act. That is not to say the original decision was wise or warranted.

The second resolution

201. Similarly, I am not inclined to make a finding of a contravention in respect of the circumstances leading to the passage of the second resolution. In this respect I am relying heavily on the observations of Justice Logan.

202. The purpose behind the second resolution is transparent: it was designed to protect the fact of the payment of the legal expenses from disclosure to ROC and from disclosure in the NSW Divisional Branch's accounts.[90] The first aspect of this purpose is one which is explained from the deep-seated hostility of the union movement generally, and the CFMEU specifically, to the ROC. It seemed to be mainstream union thinking that if compliance with ROC requirements could be avoided, then they should be avoided.

203. The other aspect of this is more troubling, because it also seems plain that by taking the measures which it did, the form of the resolution proposed by the Executive to the COM also had an effect of concealing the payments from the ordinary membership.

204. I have taken into account that the Executive took legal advice on this matter. And while I have disagreed with the substance of that advice, that does not mean that it was unreasonable for the Executive to rely upon it. There is a real question as to whether there was a power available to pass the resolution, but that depends upon whether the payments are regarded as the expenses of management. Taylor & Scott emphatically told the Executive that it was because of their view regarding the significance of the "*nexus*". The actual form of the resolution which was passed was one drawn up for the Executive by the lawyers.

205. Once all these factors are taken into account, and even though the matter is borderline, I am not willing to make a finding of a contravention based upon the terms of the second resolution or the fact that the resolution was carried.

206. That does not mean that all of the payments made under either of the resolutions did not independently constitute contraventions.

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[90] In fact, the purpose was the opposite of Rita Mallia's representation to the COM: she told the COM that it was necessary "*to ensure proper compliance with Registered Organisation Commission reporting requirements*"; the reality is the resolution was proposed to defeat ROC reporting requirements.

The payments made under the first and second resolutions

207. Even if the first and second resolutions were justifiable exercises of power, the way in which the Executive dealt with the matter clearly involved contraventions of their statutory duties. The matter upon which I am focussed is the payment of nearly $900,000 for legal expenses in under three years. This was members' money and it should have been kept under careful control.

208. Neither resolution under which the payments were made was expressed in the terms of an absolute indemnity; the indemnity was always limited by reference to "*reasonable legal expenses*". As discussed earlier, there was no effort made to determine whether the legal expenses incurred were reasonable or not.[91]

209. Under r 24A of the National Rules, there was a continuing obligation that union funds only "*be expended for legitimate union business*". That meant that each payment made under the indemnity had to be judged by reference to whether it was in the best interests of the union, and the best interests of the membership.

210. This was not just a breach of the rules. The conduct of the Executive was such that it concealed from the COM the true position in respect of the spending. That is especially serious when two of the members of the Executive were benefiting from the concealment. The reaction of non-executive members of the COM when I revealed to them that $900,000 had been spent suggests that, had they known, they would have reviewed and probably terminated the payments.

211. It is not even clear now whether the members of the Executive themselves were aware exactly how much was being spent. It seems different members of the Executive approved different invoices. No cumulative tally seems to have been kept. There was no rigour, no checking, no care.

The statutory contraventions

212. There were two aspects to the contraventions by the Executive in relation to the payments made under the first and second resolutions. The first was the failure to control the payments by testing the reasonableness of the invoices. The second was the failure to keep the COM informed as to the rate of spending, and the accumulated costs, and the anticipated future costs.

213. These matters, both independently and in combination, constituted contraventions of s 285, s 286, and s 287 of the Registered Organisations Act.

214. As to s 285 the conduct of the Executive demonstrated a complete absence of care or diligence. The invoices rendered were paid almost immediately and there was no checking or challenge. The invoices themselves carried advice as to how that could have been done. Instead, the legal

[91] The mere fact that there were two law firms engaged to do the same work suggests that the legal expenses incurred were not reasonable.

costs were allowed to mount to $900,000 in the absence of review by the COM. It is not even clear that the members of the Executive turned their mind to the accumulated costs.[92]

215. As to s 286 and the duty of good faith, there was undoubtedly a contravention because good faith requires that the powers be exercised in what was believed to be the best interests of the organisation. It is inconceivable that failing to evaluate the legal expenses by reference to their reasonableness could discharge that duty. It is equally inconceivable that keeping the accumulated costs a secret from the COM, and failing to inquire as to the total costs to be expended, was in the best interests of the organisation. Good faith also requires avoiding conflict between the decision-making and personal interests – which was obviously breached by both Greenfields.

216. As to s 287, the duty not to misuse a position was plainly contravened by each of Darren Greenfield and Michael Greenfield. They were using their place on the Executive improperly to gain an advantage for themselves. They even personally approved some of Mills Oakley's invoices charged to them to be paid by the NSW Divisional Branch.

217. I am also of the view that each of the above contraventions should be characterised as "*serious*" for the purposes of the civil penalty which can be imposed. In each instance the contravention was one which involved a great deal of members' funds. It also had the impact of neutering the role of the Committee of Management – which should have been regarded as the apex body protecting the interests of the membership. In the case of the Greenfields it was additionally serious because it involved personal gain.

The third resolution

218. There were further statutory contraventions by each of Rita Mallia, Darren Greenfield, Rob Kera, and Michael Greenfield in respect of their role in proposing and securing the passage of the third resolution.

219. Even if the payment of a union member's legal expenses could, in certain circumstances, be supported by the rules, it could *never* be justified to pay those fees in the way in which they were paid here. By recommending or making the payment on the basis of the single estimate obtained from Mr McGirr was reckless – there was no checking to see whether the estimate was reasonable or not. Had it been checked, it would have been identified as unreasonable. Even the fact that it was an estimate made by Mr McGirr – who from the Executive's perspective had little previous involvement in the Greenfields' defences – was reckless. By making the payment, any chance of having the fees restricted to "*reasonable legal expenses*" was foregone.[93] A large

[92] I have considered whether s 285(2) could excuse a member of the Executive from a contravention, but I am satisfied it is not available to them. In the case of Rita Mallia and Rob Kera I do not accept that in failing to monitor the legal expenses they could have rationally believed their actions were in the best interests of the organisation: s 285(2)(d). That could also be said in respect of the Greenfields, and in addition they would be denied the excuse under s 285(2) because each had a "*material personal interest*" in the matter: s 285(2)(b).

[93] Who would have the standing to challenge the reasonableness of the bills? This raises the same legal problem addressed earlier.

proportion of the cash available to the NSW Divisional Branch was tied up, indefinitely, in circumstances over which the COM would have no control.[94]

220. There were specific breaches by the Greenfields by participating at the meeting at which this payment was to be approved. As mentioned earlier, Darren Greenfield should not have attended the meeting, much less addressed the non-executive members of the COM as to their fiduciary duties. Michael Greenfield was present in the room while that was occurring. It is true that the Executive left the room before the vote was taken, but by that time the breach had occurred. Making the Greenfields leave the room just after Darren Greenfield had claimed his innocence, was merely window dressing.

The statutory contraventions

221. As to s 285 and the duty of care and diligence, the actions of each of the members of the Executive were woefully short of what would be expected of a reasonable person in their position. As far as the materials disclose, the Executive did not consider the reasonableness of the estimate, or the financial impact on the NSW Divisional Branch in making such a significant upfront payment. The way in which the trust was formalised was not thought through or adequately documented. Tying up an important part of the funds available to the NSW Divisional Branch for an indeterminate period was financially foolish – the money could have remained invested and earning interest.[95]

222. As to s 286, the duty of good faith required the members of the Executive to focus on the "*best interests*" of the NSW Divisional Branch. If that had been done, the decision would never have been made. It does not appear that the Executive paid any attention to the best interests of the NSW Divisional Branch; they focussed only on the best interests of the Greenfields. The Greenfields' conflict in this respect is another aspect of their serious contravention of their duty of good faith.

223. As to s 287, the Greenfields obviously breached their duty not to use their office to gain an advantage when they put forward a resolution which, if passed, would provide them with a massive benefit.

224. There is no doubt in my mind that these matters were of a character such as to be "*serious*" for the purposes of imposing a civil penalty.

[94] Of course, this again raises the legal issue over who had the actual control over the money.
[95] The potential excuse available under s 285(2) is not available to the members of the Executive for the same reasons put forward earlier.

RECOMMENDATION TWO:

Rita Mallia, Darren Greenfield, Rob Kera and Michael Greenfield should be subject to civil penalty proceedings for serious contraventions of their civil obligations under s 285 and s 286 of the Registered Organisations Act upon the basis that they:

(a) *failed to consider the reasonableness of the Greenfields' legal expenses;*

(b) *failed to inform the COM as to the spending on the Greenfields' legal expenses; and*

(c) *facilitated the payment of $3,150,969.50 into the trust account of McGirr & Associates.*

RECOMMENDATION THREE:

In addition, Darren Greenfield and Michael Greenfield should be subject to civil penalty proceedings for serious contraventions of their civil obligations under s 287 of the Registered Organisations Act upon the basis that they:

(a) failed to consider the reasonableness of the Greenfields' legal expenses;

(b) failed to inform the COM as to the spending on the Greenfields' legal expenses;

(c) failed to remove themselves from the decision-making processes; and

(d) facilitated the payment of $3,150,969.50 into the trust account of McGirr & Associates.

Criminal contraventions

225. I have thought carefully as to whether the conduct of the members of the Executive crossed that line which would make their contraventions subject to a criminal penalty, rather than a civil penalty. In the end, I have concluded – with some hesitation – that the conduct of Rita Mallia, Rob Kera and Michael Greenfield did not cross that line. That conclusion in respect of Michael Greenfield is one I hold with considerable reticence.

226. It is different for Darren Greenfield. I am of the view that his conduct disclosed intentional dishonesty and certainly reached the standard of recklessness.

227. Darren Greenfield knew that important funds were being paid for his benefit, when they could have been used elsewhere for the benefit of the members. Darren Greenfield knew that the legal expenses were very large and were continuing to mount. He was active in preventing disclosure to ROC, which had the consequential effect of concealing the payments from the membership. Darren Greenfield knew that the COM was not being given sufficient information to allow it to make the appropriate decisions as to whether the payments should be continued. Darren Greenfield knew, because of the way he had tamed dissent, that whatever was proposed to the COM would be approved.

228. It is also clear that Darren Greenfield himself was involved in the processes leading to the formulation to the formulation and passing of the third resolution. This may readily be inferred from the fact that his lawyers – both Paul McGirr and Peter Hodges – were speaking directly to the NSW Divisional Branch regarding matters relevant to his criminal charges. That could only

have been because Darren Greenfield had given those lawyers instructions that they were released from any privilege for the purposes of having those discussions. This had two aspects. Peter Hodges was giving a fees estimate *and* drew the original form of the resolution the day before the resolution was passed. Mr McGirr was supplying the estimate which would be the subject of the resolution.

RECOMMENDATION FOUR:
Darren Greenfield should be prosecuted under s 290A of the Registered Organisations Act for:
(a) an offence of recklessly failing to discharge his duties as State Secretary of the NSW Divisional Branch in good faith; and
(b) an offence of using his position of State Secretary of the NSW Divisional Branch dishonestly and with the intention of directly gaining an advantage for himself and his son.

Paul McGirr

229. In my view, Paul McGirr was "*involved*" in the Executive's contraventions under s 286 and the Greenfields' contraventions of s 287.

230. Mr McGirr undoubtedly aided and abetted Rita Mallia, Darren Greenfield, Rob Kerr, and Michael Greenfield in their contraventions under s 286 and s 287 in facilitating the payment of the $3,150,969.50 into the trust account of McGirr & Associates. The way in which Mr McGirr aided and abetted was by providing the fees estimate, by providing a grossly inflated estimate, and by providing his trust account as the receptacle for the money. Without Mr McGirr's assistance, the $3,150,969.50 would never have left the NSW Divisional Branch's accounts.

231. For the same reasons as applied to the principal contraventions, Mr McGirr's contraventions were obviously "*serious*". In that respect, I also take into account that he was to be a beneficiary of the arrangement once the money had passed through the accounts.

RECOMMENDATION FIVE:
Paul McGirr should be subject to civil penalty proceedings for his involvement in a serious contravention of s 286 and s 287 in facilitating the payment of $3,150,969.50 into the trust account of McGirr & Associates.

N. RECOVERING THE MONEY

232. The question arises as to whether the NSW Divisional Branch is able to recover any of the money paid out on behalf of the Greenfields. There is a subsidiary question: if so, from whom can it be recovered?

The statutory provisions relating to the recovery

233. Under s 307(1) of the Registered Organisations Act, the Federal Court may order a person to compensate an organisation for damage suffered by the organisation if "*the damage resulted from the contravention*". The language of s 307(1) mirrors the relief available for breaches of

directors' duties under s 1317H the *Corporations Act*.[96] Drawing from the authorities on s 1317H, it follows that the words "*resulted from*" in s 307(1) should be given their natural meaning – ie. an order for compensation will be in respect of damage that "*as a matter of fact was caused by the contravention*",[97] requiring a causal connection between the damage and the contravening conduct.

234. The Administrator of the CFMEU may apply for a compensation order from the Federal Court for contraventions of, inter alia, ss 285, 286 or 287 by a person who was an officer or employee of the CFMEU working in the Construction and General Division or any of its branches.[98]

The $900,000 paid to Mills Oakley

235. Some control should have been put in place soon after the payments commenced to be made to Mills Oakley. Based upon my conversations with non-executive members of the COM, if they had been informed that the invoices were charging for legal expenses at a rate of nearly $30,000 a month, the COM would have required a review of the original indemnity decision and, at some point, terminated the payments.

236. From the moment that that decision would have been made, any further payments to Mills Oakley would constitute damage inflicted on the NSW Divisional Branch by the contravention of a statutory duty by the members of the Executive. That amount would be recoverable from the individual members of the Executive.

237. It is impossible to be precise as to when a decision to terminate the payments would have been made. But that kind of uncertainty is a common feature whenever damages are assessed; precision is impossible, but a court makes a best estimate. In my view it is likely that a substantial proportion of the $900,000 paid to Mills Oakley could be recoverable. An assessment of the reasonableness of Mills Oakley's fees would assist in this respect.

The $44,000 paid out by McGirr & Associates

238. Similar considerations apply to the $44,000 which has not yet been accounted for by McGirr & Associates.

239. In this instance it would be recoverable from each of the members of the Executive and from Paul McGirr.

[96] See, *Health Services Union v Jackson (No 4)* [2015] FCA 865**,** [123].
[97] *Adler v ASIC* [2003] NSWCA 131, [709].
[98] Registered Organisations Act, s 301(1A).

RECOMMENDATION SIX:

The Administrator should consider taking action against Rita Mallia, Darren Greenfield, Rob Kera, Michael Greenfield, and (only in respect of (b)) Paul McGirr under s 307 of the Registered Organisations Act to recover:

(a) *some or all of the $900,000 paid to Mills Oakley; and*

(b) *some or all of the $44,000 which remains unaccounted from the McGirr & Associates trust account.*

O. POSTSCRIPT

240. As foreshadowed, there is a particular matter about which I remain uncertain and troubled.

241. It seems to me that it is at least a possibility that the fees estimate prepared by Peter Hodges was provided to Paul McGirr, and then put by Mr McGirr onto his letterhead, with or without adaptation.

242. I tried to get to the bottom of this matter. A statutory notice was issued by the Administrator on 13 December 2024 seeking production of "*a specific document*" being "*the document described in the email sent at 5.01pm on 18 July 2024 by Tim McCauley to Rita Mallia and copied to Ivan Simic and Peter Hodges as 'A copy of the estimate of legal costs provided by Peter'*".

243. The recipients of the notice were Rita Mallia, Tim McCauley, Ivan Simic and Peter Hodges. *None* of them supplied me with a copy of the document.

244. Ms Mallia claimed no longer to have access to the relevant records. Mr McCauley claimed never to have received a copy of Mr Hodges' fee estimate – even though he referred to it in his email of 18 July 2024. Mr Simic did not respond at all. Mr Hodges, through his lawyers, gave reasons why he regarded the notice as invalid, and then declined to respond voluntarily.

245. I find that response by Mr Hodges to be particularly disconcerting. He did not deny retaining a copy of the document; he simply refused to supply it. This is despite the fact that, plainly enough, at the moment of preparing the fees estimate the NSW Divisional Branch was his client. What is more, Mr Hodges billed for creating the fees estimate and the NSW Divisional Branch paid his invoice.

246. The reasons why I regard it as, at least, a possibility that Mr McGirr's fee estimate was one created by Mr Hodges are because:

(a) Mr Hodges *did* create a fee estimate. The document exists, but he will not assist me by letting me see it.

(b) At some point, that fees estimate was in the hands of Rita Mallia and, based on Mr McCauley's email, it was intended to be used as the basis for the third resolution.

(c) If Mr Hodges' fees estimate was different to Mr McGirr's estimate, there is no obvious reason it would not have been provided during the COM meeting. One reason could be because there was no difference between the two fees estimates.

(d) It is hard to understand how Mr McGirr, if he was discharging his professional duty, could have arrived at an estimate as swiftly as he did.

(e) There are some tell-tale features in Mr McGirr's estimate which suggest a connexion with Mr Hodges' estimate. For example, the charge out rates for the lawyers and paralegal approximate those which were charged by Mills Oakley in its invoice dated 16 August 2024. In Mr McGirr's estimate he refers to an hourly rate for "*Special Counsel*", even though there was no one in his firm with that status – but Mills Oakley regularly had a person described as "*Special Counsel"* working on the Greenfields' matter.

(f) Even after the monies were paid into the McGirr & Associates' trust account, Mills Oakley still provided the primary legal services to the Greenfields. This is evident from Mills Oakley's invoice dated 16 August 2024. That is, the work covered by McGirr's fees estimate was being performed by Mills Oakley.

(g) There is no record of, and no separate charge for, as there usually would be, a handover of the file from Mills Oakley to McGirr & Associates, who were ostensibly taking over the Greenfields' defence to completion.

247. Some of these matters may have an innocent explanation, but their collected effect seems to point to the tentative conclusion I referred to.

248. As soon as these matters became apparent to me, on 19 December 2024, I sent an email to the lawyers representing Mr McGirr and Mr Hodges, drawing attention to this possible inference and asking for their submissions. Mr McGirr did not respond; Mr Hodges obfuscated.

249. In this report I have been strongly critical of Mr McGirr in relation to his fees estimate. He would not be relieved of that criticism if all he has done is adopt Mr Hodges' fees estimate, but at least the blame could be shared.

Geoffrey Watson