FEDERAL COURT OF AUSTRALIA

General Manager of the Fair Work Commission v Thomson (No 3)
[2015] FCA 1001

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| Citation: | General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001 |
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| Parties: | **GENERAL MANAGER OF THE FAIR WORK COMMISSION v CRAIG THOMSON** |
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| File number: | VID 798 of 2012 |
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| Judge: | **JESSUP J** |
|  |  |
| Date of judgment: | 11 September 2015 |
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| Catchwords: | **INDUSTRIAL LAW** – Trade union registered as organisation – Officer of – National Secretary – Duties of – Use by officer of his position to cause union to pay for goods and services acquired for personal purposes – Use of position to cause union to incur liabilities for his benefit – Use of position in circumstances including conflict of interest – Whether such actions improper – Whether officer acted in good faith in interests of union – Whether officer acted with degree of care and diligence that a reasonable person would have exercised  |
|  |  |
| Legislation: | *Associations Incorporation Act 1984* (NSW)*Workplace Relations Act 1996* (Cth)  |
|  |  |
| Cases cited: | *Allen v Townsend* (1977) 31 FLR 431*Chan v Zacharia* (1984) 154 CLR 178*R v Byrnes* (1995) 183 CLR 501  |
|  |  |
| Date of hearing: | 30, 31 March, 1, 10 April, 4 May 2015 |
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| Place: |  |
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| Division: | FAIR WORK DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 140 |
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| Counsel for the Applicant: | S Donaghue QC with J McKenna and J Kirkwood |
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| Solicitor for the Applicant: | Corrs Chambers Westgarth |
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| Counsel for the Respondent: | The respondent did not appear |
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| Counsel for the Health Services Union (Intervener): | The intervener did not appear |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | VID 798 of 2012 |

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| BETWEEN: | GENERAL MANAGER OF THE FAIR WORK COMMISSIONApplicant |
| AND: | CRAIG THOMSONRespondent |
|  | HEALTH SERVICES UNIONIntervener |

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| JUDGE: | JESSUP J |
| DATE OF ORDER: | 11 september 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The proceeding be listed at 10:15 am on 9 November 2015 for the purpose of hearing the parties and the intervener on the relief, if any, proper to be granted to the applicant in consequence of the reasons of the court published this day.
2. The parties file and serve minutes of the orders for which they will contend at the said hearing, and any, or any further, affidavits upon which they will rely in that regard, according to the following timetable:
	1. the applicant, no less than six weeks before the said hearing;
	2. the intervener, no less than four weeks before the said hearing;
	3. the respondent, no less than two weeks before the said hearing.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
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| BETWEEN: | GENERAL MANAGER OF THE FAIR WORK COMMISSIONApplicant |
| AND: | CRAIG THOMSONRespondent |
|  | HEALTH SERVICES UNIONIntervener |

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| JUDGE: | JESSUP J |
| DATE: | 11 SEPTEMBER 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

1. In this proceeding, the applicant, the General Manager of the Fair Work Commission, alleges that the respondent, Craig Thomson, contravened certain provisions of the “Registration and Accountability of Organisations” schedule (“the schedule”) to the *Workplace Relations Act 1996* (Cth) (“the WR Act”), while he was an officer of the Health Services Union (“the HSU”), a trade union registered as an organisation under the schedule. Until 26 March 2006, the schedule was Sch 1B to the WR Act, and thereafter it was Sch 1. The presently relevant provisions, however, remained unchanged over the whole of the period with which this proceeding is concerned, 12 May 2003 to 14 December 2007. The applicant seeks declarations, the imposition of penalties, and orders for compensation to be paid to the HSU.
2. The applicant’s allegations were originally set out in her Statement of Claim filed with the Originating Application on 15 October 2012. The respondent filed his Defence on 4 December 2012, in which all of the applicant’s factual allegations of any substance were denied or not admitted. The applicant filed a Reply on 19 December 2012, but nothing further needs to be said about that now. The applicant filed an Amended Statement of Claim on 13 October 2014, a Further Amended Statement of Claim on 17 February 2015, and a Second Further Amended Statement of Claim on 23 February 2015. The respondent’s Defence was never amended. The respondent led no evidence, and made no submissions, on the merits of the case. In the circumstances, the reasons which follow deal only with the sufficiency of the applicant’s evidence to sustain the allegations which she made against the respondent. In approaching that task, there are several respects in which I have been able to draw inferences of fact, fairly open on the evidence, more confidently because of the respondent’s absence from the witness box.

# LEGISLATION

1. The provisions of the schedule under which the applicant sues are the following:

**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.

…

**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.

…

**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

(b) cause detriment to the organisation or to another person.

1. These provisions commenced on 12 May 2003. Amongst the instances of conduct on the part of the respondent on which the applicant relies under these provisions were two transactions which occurred before that date, in February and March 2003. I was favoured with no explanation as to why a very detailed factual case was advanced in relation to these transactions, but clearly they cannot add to the applicant’s case under the only provisions upon which she relies. In the circumstances, nothing further should be said about them.

# RELEVANT RULES OF THE HSU

1. I shall refer to the presently relevant provisions of the Rules of the HSU (“the Rules”) next, but I should mention at the outset that the applicant has no cause of action against the respondent for breach of the Rules as such. Rather, as was made clear by senior counsel for the applicant, such breaches of the Rules as are disclosed on the evidence are relied on in support of her case on reasonableness under s 285(1), on lack of good faith under s 286(1) and on impropriety under s 287(1).
2. By r 19 of the Rules, the officers of the HSU were the National President, the National Vice-President, two National Trustees, the National Secretary (the respondent’s position), the Senior National Assistant Secretary and the National Assistant Secretary. By r 20(a), the National Council consisted of the officers together with delegates from the branches. By r 46(a), there were five branches in Victoria, two in Tasmania, two in Western Australia, and one in each of New South Wales, South Australia and Queensland. By r 21, the National Council was the “supreme governing body” of the HSU, having the management and control of its affairs. Without limitation, that rule gave the National Council many specific powers, including the appointment and removal of industrial and research officers and the determination of their remuneration and terms and conditions of employment, and the delegation of its authority “on all routine or other matters” to the National Executive.
3. By r 26(a) of the Rules, the National Executive consisted of the officers together with the secretaries of the various branches. By r 27(a), subject to the National Council, the National Executive had the power to “to conduct and manage the affairs” of the HSU and, with certain limited (and presently irrelevant) exceptions, to “exercise all the powers of National Council” between meetings of the National Council.
4. Rule 32 related to the position of the National Secretary, and was as follows:

The National Secretary shall –

(a) be the registered officer of the Union to sue and be sued on its behalf;

(b) summon by notice in writing to each member thereof and attend, unless excused, all meetings of the National Council and National Executive and keep or cause to be kept correct minutes of the same;

(c) have the right to speak at any general or special meeting of any branch or Branch Committee, but not to vote unless he/she is a member of such branch or Branch Committee;

(d) answer and file all correspondence;

(e) keep or cause to be kept the records required to be kept by an organisation pursuant to the provisions of the Industrial Relations Act 1988 [sic] or as amended from time to time;

(f) lodge and file with and furnish to the Industrial Registrar all such documents as are required to be lodged, filed or furnished under the said Act at the prescribed times and in the prescribed manner;

(g) receive all monies on behalf of the Union and pay the same within seven days of receipt into the Commonwealth Bank to the credit of the Union and enter into a book kept for that purpose particulars of all amounts received and paid to such bank;

(h) draw up a report and balance sheet to be submitted to the National Council at its Biennial Meeting and forward a copy of the same to each branch;

(i) submit his/her books, accounts and receipts annually or as often as may be required by the National Council or National Executive to the auditors and to give them such assistance as they may require in the audit;

(j) be responsible for the books, records, property and moneys of the Union and, within 48 hours of receiving a request from the National Council to do so, deliver to the National Council such books, records, property and moneys;

(k) take all reasonable steps to increase the membership of the Union and foster a branch of the Union in each state or Territory where members are employed;

(l) supply branches with information as to the proceedings of the National Council, National Executive and branches;

(m) confer with Branch Secretaries as often as is necessary in the interests of the Union and assist as best he/she is able all Branch Secretaries and Committees;

(n) between meetings of the National Executive, control and conduct the business of the Union;

(o) between meetings of the National Council and National Executive, have power to call any meeting in the Union which the National Council has power to call;

(p) be ex-officio a member of all Committees of the National Council;

(q) be indemnified and guaranteed for the sum of $5,000, the premiums to be paid from the funds of the Union;

(r) provide the Returning Officer with such assistance as is necessary to enable him/her to conduct any election;

(s) have the power to submit any industrial dispute in which members of the Union are involved to Conciliation and Arbitration; and,

(t) carry out such other duties as the National Council or National Executive may from time to time assign to him/her.

1. Rule 36 was concerned with the “national funds and property” of the HSU, and included paras (b) and (f) as follows:

(b) The funds and property of the Union shall be controlled by the National Council and the National Executive both of which shall have power to expend the funds of the Union for the purposes of carrying out the objects of the Union and all cheques drawn on the funds of the Union shall be signed by two officers of the Union and at least one Trustee. For the expenditure of the funds of the Union on the general administration of the Union and for purposes reasonably incidental to the general administration of the Union, the prior authority of the National Council or the National Executive shall not be necessary before cheques are signed or accounts paid.

….

(f) Subject always to paragraph (g) in this rule, but notwithstanding anything elsewhere contained in these rules, the Union shall not make any loan, grant or donation of any amount exceeding $1,000 unless the National Council of the National Executive of the Union –

(i) has satisfied itself –

(a) that the making of the loan, grant or donation would be in accordance with the other rules of the Union, and,

(b) in relation to a loan, that, in the circumstances, the security proposed to be given for the repayment of the loan is adequate and the proposed arrangements for the repayment of the loan are satisfactory and,

(ii) has approved the making of the loan, grant or donation.

Paragraph (f) did not apply to payments by way of provision for, or reimbursement of, “out of pocket expenses incurred by persons for the benefit” of the HSU.

1. By r 22, save where special meetings were necessary, the National Council met biennially. There was no provision for regular meetings of the National Executive. By r 28(a), the National Executive met when it decided to do so itself, when the National Council so decided, when requested in writing by any four members of the National Executive, upon petition from a branch or branch committee, and where considered necessary by the National Secretary in conjunction with the National President.

# THE RESPONDENT’S CIRCUMSTANCES IN OUTLINE

1. From 16 August 2002 until 14 December 2007, the respondent was the National Secretary of the HSU. His position was a paid, full-time, one. The National Secretary was the senior full-time officer of the HSU: the respondent was, in effect, its chief executive.
2. The branches of the HSU had considerable autonomy and, for the most part, operated independently of the National Office. Indeed, it is clear that the centre of gravity of the operations of the HSU as a trade union was in the various branches rather than in the National Office. For example, over the period when the respondent was National Secretary, the NSW branch had about 35,000 members and employed about 35 staff, while the Tasmanian branch, with about 8,000 members, employed about 26 staff. Over that period, the number of staff employed in the National Office (including the respondent) varied from a low of about five to a high of about eight.
3. Chris Brown, who was for the whole of the period with which I am concerned, the Secretary of the Tasmanian Branch, and the National Vice-President, of the HSU, said that he had “very, very little” awareness of what was going on on a day to day basis within the National Office. Months would go by when he would have no contact at all with anyone from the National Office, including the the National Secretary. He described the financial reporting made to the National Executive by the respondent as “very little and spasmodic”. His evidence continued:

[T]he reporting for the vast majority of the time that I was on the [N]ational [E]xecutive during Mr Thomson’s term was very general, so even when you did get financial reports you really couldn’t deduce from those reports any real pattern of expenditure, if you like, or detail of expenditure or, except for the bottom line, how the union was actually going. So there was lots of questions asked at the time, but, generally speaking, we didn’t receive the answers that we felt we needed.

Mr Brown had “very little understanding of what controls may have been in place in the National Office.”

1. In written submissions made on behalf of the applicant, her counsel said:

The combination of the autonomous nature of the Branches, the small size of the National Office compared to the Branches, the limited contact between the National Office and the Branches, and the limited reporting to the National Executive all combined to mean that, in practice, the National Executive had very little awareness of Thomson’s activities during his tenure as National Secretary.

From what appears in the evidence in this proceeding, that seems a fair summary of the environment in which the respondent operated within the HSU.

1. When the respondent became National Secretary and for some time thereafter, the National Office of the HSU was located in Melbourne. After he was elected as National Secretary, the respondent and his wife Christa relocated from their then address in North Sydney to Melbourne, where he would thereafter be working. At a time which is not clearly disclosed in the evidence, but which was probably towards the end of 2005, the respondent caused a second National Office to be established in Pitt Street, Sydney. From the evidence, it is unclear whether anyone other than the respondent himself ever worked from this office. It was established in the period following the respondent’s own change of residence from Melbourne to an address at Forresters Beach on the Central Coast in New South Wales.
2. The circumstance which led to that change of address was explained by Christa Thomson in her evidence: “Craig had political aspirations and intended to seek pre-selection with the Australian Labor Party for the Federal seat of Dobell”. That that intention was a reality by at least mid-September 2005 is apparent from a visit which the Thomsons made to Sydney, and to the Central Coast, at that time to which I refer in more detail below. At some point, the respondent told the Secretary of the Victorian No 4 Branch of the HSU, Rosemary Kelly, that he was moving the National Office to Sydney because he wanted it to be located closer to the HSU’s largest branch, but I find on the probabilities that the real reason for the move was that the respondent himself intended to reside on the Central Coast to further his political aspirations.
3. Throughout 2006 and into 2007, the respondent involved himself heavily in political and community campaigns and activities in areas that were relevant to the electorate of Dobell. He caused two additional employees, who were members of the Australian Labor Party (“the ALP”), to be taken on to the payroll of the HSU. I shall return to them later in these reasons. On 13 April 2007, the respondent was endorsed as the ALP candidate for Dobell, and established a campaign office at 3/332 The Entrance Road, Long Jetty, where he had an office and thereafter spent a considerable amount of his working time.
4. After the declaration of his election as the member for Dobell, on 14 December 2007 the respondent resigned from his position in the HSU. That date represents the end-point of the period with respect to which the applicant makes her allegations in this proceeding.

# PERSONAL EXPENDITURE

1. Before turning to the specific instances of the respondent having used the HSU’s funds for his own benefit cited by the applicant, I should draw attention to a distinction which is important to an understanding of much of what follows. As revealed in the evidence, there were two categories of situation in which the applicant made allegations against the respondent. First, there was the situation where the respondent himself (or another organisation with which he was associated) was the party involved in making a particular purchase or in incurring a particular liability, but where, by the use of his position as National Secretary, he caused the HSU to pay for that purchase or to discharge that liability. The transactions referred to in this section of these reasons are some which fell into this category. Here, there is no criticism of the respondent having made the purchase or incurred the liability as such: the criticism which the applicant validly makes is that the respondent arranged for the HSU to pay for it. In the case of credit card transactions, the use of the card as such gave rise to a liability in the HSU as against the card issuer to settle the amount owing on the card at the end of every relevant period. By using the card, the respondent passed that liability on to the HSU. Had the HSU had a policy which permitted its staff to use credit cards for personal purchases, and/or had the respondent been scrupulous in reimbursing to the HSU the amounts which it was obliged to pay on credit cards but which related to his own personal purchases, there again might have been no criticism of the way he conducted himself. Neither, however, was the case.
2. Secondly, there was the situation where the respondent used his position as National Secretary to cause the HSU to make the purchase or to incur the liability. As between the HSU and the other party to the transaction, it was the former which was contractually obliged to pay for the purchase or to discharge the liability. Here, the respondent’s conduct in causing the HSU to be a party to the original transaction does attract valid criticism, within the confines, of course, of the statutory provisions on which the applicant relies. As will appear in due course, there was one substantial contract into which the respondent caused the HSU to enter, and which involved a large payment falling due some time after the respondent had resigned as National Secretary. The then National Executive made good on that obligation, attaching to the HSU itself as it did.
3. At times relevant to this proceeding, one of the staff employed in the National Office of the HSU was its bookkeeper, Belinda Ord. She recorded the expenses of the National Office and its staff on its MYOB computerised accounting system. That system had the expense categories that would be conventional for a trade union, including meetings and travel, for example. Usually, the official or staff member responsible for incurring an expense would provide her with something to vouch it as proper to be paid by the HSU, such as an invoice, receipt or similar docket. For expenses paid by credit card, the card holder would usually have provided Ms Ord with the voucher provided to him or her at the time of each transaction. In some cases, even in the absence of a voucher or similar document, a payment recorded on the statement provided by the issuer of a credit card would self-evidently relate to something which Ms Ord could record on MYOB because of her familiarity with the operations of the National Office. Otherwise, she would refer to the official or staff member by whom the expense was incurred. In the areas dealt with in these reasons, the official was always the respondent, or one of the two staff members, referred to below, whom he had directly engaged without the knowledge of the National Executive. As bookkeeper, it was Ms Ord who settled the accounts of the National Office, once she was satisfied that the expenses in question had been incurred in the business of the HSU. She reported directly to the respondent.
4. As National Secretary of the HSU, the respondent held two credit cards, a Diners Club card (“the Diners Club card”) and a Commonwealth Bank MasterCard (“the CBA card”). In each case, the respondent was the card holder and the HSU was the account holder.
5. The respondent, resident in Melbourne at the time, had cause to be in Sydney over the period 6-8 April 2005. He stayed at the Swissotel. On the evening of 7 April 2005, he made two telephone calls to Keywed Pty Ltd (“Keywed”), a company which operated as an agency for escorts who provided sexual services to clients at private addresses or hotels. Later that night, using the Diners Club card, the respondent made three payments to Keywed in the sums of $570.00, $550.00 and $550.00, a total of $1,670.00. On the card issuer’s statement, the first of these payments was dated 7 April, and the other two were dated 8 April. On the latter date, all three payments were reversed. However, there is also in evidence a sales voucher in favour of Keywed on the CBA card in the sum of $2,475.00. This voucher was signed by the respondent on 8 April 2005. It corresponded with an entry on the card issuer’s statement which was later received by the HSU. Kati Traunwieser, the director and manager of Keywed, gave evidence in the case. She said that, in 2005, $2,475.00 “would have obtained the services of a [sic] multiple escorts for one or more hours, including transportation costs and a credit card fee”.
6. In the drawing of the inferences made necessary by the evidence referred to, some confusion is introduced by the reversed payments on the Diners Club card. However, counsel for the applicant invited me to infer that, for some reason, the respondent, having made these payments, decided that he would prefer to use the CBA card for the relevant transactions instead. Absent the respondent from the witness box, I consider that such an inference is proper to be drawn in the circumstances, and I do so. What is clear is that the respondent did make a payment to Keywed, using the CBA card, in the sum of $2,475.00. Given the nature of Keywed’s business, the date of the payments, and the absence of any benign explanation from the respondent, it is also to be inferred that he used this payment to purchase services from Keywed that were personal to himself, either alone or in company with others.
7. When the card issuer’s statement for the CBA card was received by the HSU in the normal course, the respondent caused his staff to describe the expenditure of $2,475.00, in the HSU’s MYOB accounting system, as a “meetings” expense. He caused the total sum due on that statement, including the $2,475.00, to be paid by the HSU. The transaction to which the expenditure related had not been, and never was, authorised (save by the respondent himself), and was not disclosed to the National Executive.
8. It was submitted on behalf of the applicant that the respondent’s use of the funds of the HSU to pay for the personal services which were provided to him on the night of 7/8 April 2005 amounted to an improper use of his position to gain an advantage for himself, and to cause detriment to the HSU, within the meaning of s 287(1) of the schedule. The correctness of that submission is self-evident, and I accept it. As an incident of his position, the respondent was provided with the CBA card, of which the HSU itself was the account-holder. It was the HSU which carried the contractual obligation to settle purchases made on that card by the respondent. The description of this expense as “meetings”, in the knowledge (which must surely be inferred) that proceeding in this way would serve to conceal the true nature of the transaction and lead to the funds of the HSU being used to settle the card issuer’s statement in the normal course, was the clearest of improprieties, and was conspicuously calculated to deliver an advantage to the respondent himself and to cause detriment to the HSU.
9. It was also submitted that, in this transaction, the respondent contravened s 286(1) of the schedule. I am not persuaded that, in making his transaction or transactions with the escort on 7/8 April 2005, the respondent was exercising his powers or discharging his duties as National Secretary of the HSU at all. Indeed, it seems to me that he was acting entirely outside the powers which he had and the duties which were required of him as National Secretary. I say that notwithstanding that he improperly used the CBA card for those purposes. But it was squarely within his duties to record the true nature of the payments that he had made using that card, and to attend to the payment by the HSU of the card issuer’s statement upon which the relevant payments were set out. In these respects, the respondent acted neither in good faith nor for a proper purpose. That he did not, in fact, believe that this payment, or any payment with a like purpose, was in the best interests of the HSU – a proposition which I would, in any event, find to be established on the probabilities in the absence of any evidence from him – is left in no doubt by an answer which he gave in the course of the applicant’s investigation of matters which included those presently under consideration. The question posed to the respondent related to expenditure for escort or other adult services:

[Q]: Can you think of any circumstance in which such expenditure, if it did occur, could be legitimate expenditure of the HSU?

[A]: No.

1. I therefore find that, in the respects indicated in the two previous paragraphs, the respondent acted in contravention of ss 286(1) and 287(1) of the schedule.
2. The respondent was again in Sydney over the period 6-8 May 2005. This time he stayed at the Westin Hotel. At 1:26 am on 7 May 2005, he made a call from his hotel telephone to an escort agency which advertised itself as “Boardroom Escorts”. This agency was operated by International Immobiliare Pty Ltd (“International Immobiliare”). A further call from that telephone to International Immobiliare was made at 1:52 am. There is no evidence of any sales voucher signed by the respondent on this occasion, but the card issuer’s statement for the CBA card, which was received by the HSU in the normal course, contained an entry for a sale in the amount of $770.00 on 7 May 2005, the merchant being International Immobiliare.
3. Graeme Edwards, the director of International Immobiliare, gave evidence in the case. He said that the only business operated by that company was that of an escort service. He described what was its *modus operandi* at the relevant time. When a prospective client rang to inquire about booking an escort, the receptionist would take the client’s name and the name of the hotel at which he was staying; and would find out whether he intended to pay by cash or by credit card. The receptionist would then contact the escort and pass on the client’s details and location. The receptionist would then call the client back and, in a situation in which the client had chosen to pay by credit card, would take the details of the card from the client over the telephone. These details were written on to the spine of a manual credit card voucher, which the escort took with her when she visited the client. Having arrived at the client’s hotel room, the escort would use the client’s credit card to make an imprint on the voucher, and have the client sign it. The escort would then telephone the receptionist at International Immobiliare to confirm that payment had been received, either in cash or by credit card in the way described. This call could be made either from the telephone in the client’s premises or hotel room or from the escort’s own mobile phone. At the end of the period for which the escort had been contracted, either she would call the receptionist or the receptionist would call her to confirm that all was well.
4. In May 2005, Mr Edwards was overseas. He arranged with the receptionist at International Immobiliare to send him, by email, summary particulars of the business that had been transacted each night. By reference to the receptionist’s email sent on the morning of 7 May 2005, Mr Edwards said that, in the course of the previous night, there were services provided to two different clients at the Westin Hotel, each by an escort whose working name was “Alina”, and each for one hour at a price of $700.00 plus 10% card fee, a total of $770.00.
5. It is to be inferred from the evidence referred to above, and I find, that, early in the morning of 7 May 2005, the respondent engaged International Immobiliare to provide an escort for him in his room at the Westin Hotel and paid the sum of $770.00 for that engagement using the CBA card. The call at 1:26 am was the respondent’s initial inquiry. There is no evidence of any call from International Immobiliare to the respondent to confirm that an escort had been contacted and to take his credit card details. However, the call from the respondent’s hotel room to International Immobiliare at 1:52 am was, on the probabilities, that of the escort herself confirming that she had arrived and that payment had been made. It is to be inferred, of course, that the escort provided, and that the respondent used the CBA card to pay for, services that were personal to himself.
6. As mentioned above, the payment of $770.00 was recorded on the card issuer’s statement for the CBA card received by the HSU. The respondent caused his staff to describe this expenditure, in the HSU’s MYOB accounting system, as a “meetings” expense. He caused the total sum due on that statement, including the $770.00, to be paid by the HSU. The transaction to which the expenditure related had not been, and never was, authorised (save by the respondent himself), and was not disclosed to the National Executive.
7. With respect to the findings proper to be made under ss 286(1) and 287(1) of the schedule, the events of 7 May 2005, and the respondent’s subsequent treatment of the relevant expenditure in the administration of the National Office of the HSU, are indistinguishable from those of 7/8 April 2005 dealt with at paras 26-28 above. I find that, in relation to the events of 7 May 2005, the respondent acted in contravention of those provisions.
8. The respondent was again in Sydney, staying at the Westin Hotel, over the period 11-12 June 2005. At what I would infer was about 2:00 am on 12 June 2005, the respondent travelled by taxi from a location which was identified in the Cabcharge system as “CITY” to a destination so identified as “TAYLOR SQUARE”, arriving at 2:13 am. The next piece of evidence relevant to the respondent’s doings on that night is a sales voucher on the CBA card in the sum of $418.00 dated 11 June 2005. The merchant was Nolta Pty Ltd (“Nolta”). To understand the significance of that voucher requires a consideration of the evidence of Nelson Da Silva, who was at the time the director and secretary of Nolta.
9. Mr Da Silva said that the only business of Nolta was the operation of a brothel at 89-101 Albion Street, Surry Hills, which traded as “Tiffany’s Girls”. He said that this address was about 500 m from Taylor Square. The brothel was run in two shifts, the day shift from 11:30 am to 7:30 pm and the night shift from 7:30 pm to 5:00 am. All business conducted on the night shift would be recorded on Nolta’s job sheet for, and any relevant credit card voucher would be given the date of, the day on which the shift commenced. Job sheets were maintained for credit card transactions. They recorded the time and the GST-inclusive room rent, and identified the room used, in relation to each engagement of a prostitute in the brothel. The job sheet for 11 June 2005 contained an entry for a 1½-hour engagement in the “Red Turbo Spa Room” at a rental of $190.00. Mr Da Silva said that, in addition to this rental, there would have been a cost for the prostitute herself which, for that period of engagement, would have been an additional $190.00, making a total of $380.00. To that sum was added 10% for the use of a credit card, making a total of $418.00.
10. Counsel for the applicant asked me to infer that the respondent used services provided by Nolta at its brothel in the early hours of the morning of 12 June 2005. While that is one available interpretation of the evidence to which I have referred, the applicant’s case as to the timing of the respondent’s visit to the brothel depends on the Cabcharge records of his trip in the taxi from the city to Taylor Square. While I allow for the possibility that the identification of this destination – as given, I presume, by the driver concerned – may be an inexact one, there is nothing from which I could find on the probabilities that the respondent travelled directly to the address in Albion Street. But the evidence is such as to justify the inference, which I draw, that the respondent was in the vicinity in the early hours of the morning on 12 June 2005. I also find that the respondent used the CBA card to make a payment to Nolta at some time which, according to that company’s administrative protocols, was between 11:30 pm on 11 June and 5:00 am on 12 June 2005. Given the nature of Nolta’s only business and the explanation of how the sum of $418.00 would conventionally be accounted for by room rental and services known to have been provided by it during the period referred to, the natural inference is that, at some point over that period, the respondent obtained services, personal to himself, from Nolta at the brothel in Albion Street.
11. When the card issuer’s statement for the CBA card was received by the HSU in the normal course, the respondent caused the total sum due on that statement, including the $418.00 which related to the transaction with Nolta, to be paid by the HSU. On this occasion, it was not possible to identify the category of expense against which this expenditure was entered in the HSU’s MYOB accounting system, because the outlay was part of a large expense identified only as a bill from the Commonwealth Bank. On any view, however, the sum of $418.00 was paid to that bank by the HSU, and was so paid in the normal course of payments for which the respondent was responsible. The transaction to which the expenditure related had not been, and never was, authorised (save by the respondent himself), and was not disclosed to the National Executive.
12. With respect to the findings proper to be made under ss 286(1) and 287(1) of the schedule, the events of 11 or 12 June 2005, and the respondent’s subsequent treatment of the relevant expenditure in the administration of the National Office of the HSU, are distinguishable from those of 7/8 April 2005 dealt with at paras 26-28 above in one respect only: there is no evidence of the terms in which the respondent vouched the June expenditure in the records of the HSU. In my view, that is a distinction without a difference. The respondent knew that the payment to Nolta would become payable by the HSU to the card issuer in the normal course, and would be so paid by staff under his control. Absent some intervention by him, the HSU would pay for a transaction which was his own personal affair; which was, of course, exactly what happened. To allow that to happen involved, in my view, a failure on the part of the respondent to discharge his duties in good faith in what he believed were the best interests of the HSU, a failure to discharge those duties for a proper purpose and the improper use of his position to gain an advantage for himself and to cause detriment to the HSU. I find, therefore, that, in relation to the events of 11 or 12 June 2005, the respondent acted in contravention of ss 286(1) and 287(1).
13. Chronologically, the next instance of the respondent using the funds of the HSU for his own purposes related not to personal services of the kind provided by escorts but to the prospective relocation of his residence from Melbourne to the Central Coast in the second half of 2005. In her evidence, Ms Thomson said that, in about October 2005, she and the respondent moved their residence from Melbourne to Forresters Beach. The applicant alleged, and the respondent admitted, that, from about November 2005 until 14 December 2007, he resided on the Central Coast. Allowing for some inexactness in these dates, this admission is not inconsistent with Ms Thomson’s evidence.
14. The respondent took a day’s leave from his work at the HSU on Friday 16 September 2005. He and his wife flew to Sydney on that day. They hired a car at Sydney airport. They stayed at the Westin Hotel on the nights of 16, 17 and 18 September. They returned to Melbourne on 19 September 2005. The time of their return flight to Melbourne is not disclosed in the evidence, and is not readily to be inferred. There is no suggestion that the respondent’s leave extended to 19 September, but, in his electronic diary the whole of that day, from 7:30 am to 5:00 pm, was shown as “Central Coast”.
15. While she could not recall the dates, Ms Thomson did recall at least two occasions when she and her husband travelled to Sydney, hired a car and looked at prospective residential properties for them in the event that they moved to the Central Coast. Mobile telephone records disclose that the respondent telephoned a real estate agent called Ray White at Bateau Bay at 11:42 am and at 12:04 pm on 17 September 2005. Six further calls, in total, were made by the respondent to four other real estate agents operating in the Central Coast region between 8:50 am and 12:21 pm on 19 September 2005. It is, of course, quite possible that the respondent was back in Melbourne at the time that he made some or all of the calls in this latter group, but nothing turns on that.
16. From the evidence to which I have referred, including the fact that the respondent took leave for the purpose on 16 September 2005, it is to be inferred that his travel to, and activities in, Sydney and the Central Coast over the period 16-19 September 2005 were unrelated to the functions of his office as National Secretary of the HSU.
17. The following expenses incurred by the respondent during this visit to Sydney and the Central Coast, were paid for by him using the Diners Club card:
* Qantas $1,086.16
* Thrifty Rent A Car $ 430.39
* Pyrmont’s Restaurant $ 105.00
* Miro Tapas Bar $ 80.00
* Quix Food Store $ 50.82
* The Westin $1,622.40
* Coles Express $ 57.91
* Valet parking, Tullamarine $ 143.00

A total of $3,575.68.

1. The card issuer’s statement for the Diners Club card was received by the HSU in the normal course. The whole of the sum claimed on that statement, including the $3,575.68 referred to above, was paid by the HSU in the normal course of payments for which the respondent was responsible. The transactions to which the expenditure related had not been, and never were, authorised (save by the respondent himself), and were not disclosed to the National Executive.
2. It was submitted on behalf of the applicant that the respondent’s use of the funds of the HSU to pay for the expenses referred to above amounted to an improper use of his position to gain an advantage for himself, and to cause detriment to the HSU, within the meaning of s 287(1) of the schedule. I accept that submission. Relevantly, the respondent used his position to cause the HSU to pay for this excursion to the Central Coast, and the expenses which were incidental thereto, when they were his own affair, and no business of the HSU. The advantage was his own, the detriment the HSU’s. His procurement of the HSU to pay the sums concerned gave rise, in my view, to a contravention of s 287(1).
3. With respect to s 286(1) of the schedule, by causing the HSU to pay for these personal expenses, the respondent failed to discharge his duties in good faith in what he believed to be the best interests of the HSU. Here there is no direct admission by the respondent on the subject of his own belief, but, in the absence of evidence from him, I have no hesitation in inferring that he did not believe that it was in the best interests of the HSU for it to pay for this excursion and the incidentals which it involved. Had there been any such belief, I can think of no reason why the respondent would not have informed the National Executive, even before the event, and had it give the necessary authorisation. Likewise, I have no hesitation in concluding that, in passing on the responsibility for this expenditure to the HSU, the respondent was not acting for a proper purpose: his purpose was to avoid having to pay for the excursion himself. This affair gave rise, in my view, to a contravention of s 286(1).
4. For the sake of the narrative, I mention next the adoption by the National Office of the HSU of a policy governing the use of credit cards. As I shall mention below, in September 2005 the respondent caused the HSU to employ, originally in a training role, Criselee Stevens. In early December 2005, she was provided with a Diners Club card on the HSU account, which she could use for work expenses. At some point, Ms Ord noticed that Ms Stevens had paid for “some kind of subscription for horoscopes or astrology” on her Diners Club card. She drew this to the attention of the respondent, who responded by approving and promulgating (Ms Ord could not recall the extent to which the wording was actually drafted by the respondent or herself) a written policy with respect to the use of credit cards. It contained the following injunction:

Any credit cards issued by The Health Services Union cannot be used for personal expenses. All expenses must be for business related purposes – a written notation next to the transaction is required for any items that are not self explanatory.

Ms Stevens was required to sign a copy of that policy and to return it to Ms Ord. So far as the respondent himself was concerned, of course, this policy went no further than to state an obvious dimension of his own obligations to the HSU. But the promulgation of the policy under his authority leaves no doubt as to his actual appreciation of those obligations. As the matters discussed so far in these reasons demonstrate, the respondent had regularly acted in contravention of what became his own policy. As the matters discussed below demonstrate, he continued to do so not withstanding that he had cause to turn his mind specifically to the limitations which the HSU should impose on the use of credit cards in its name.

1. The respondent was in Sydney over the period 25-26 August 2006. It is not established whether he stayed the night of 25 August 2006 in Sydney, made a separate trip to Sydney on each of those days (Friday/Saturday), or something else. But it is established on the pleadings that he was in Sydney “on or about 25 and 26 August 2006”.
2. The card issuer’s statement in respect of the CBA card for the period ending on 26 September 2006 contains an entry dated 26 August 2006 as follows: “STAFF CALL SURRY HILLS AUS $660.00”. In evidence is a business names extract for the name “Staff Call”. The name was registered on 3 December 1986 and removed on 3 March 2008. It was, therefore, extant in August 2006. The nature of the business is described as “Escort Agency”. The principal place of business, as noted on the extract, was 377 Riley Street, Surry Hills, NSW, 2010.
3. The applicant submitted that I should infer that this business was one and the same as that registered as “A Touch of Class”, in relation to which a Yellow Pages entry, under the category “Escort Services - Social”, gave the address of 377 Riley Street, Surry Hills. This name was, in August 2006, owned by Ke-Su Investments Pty Ltd (“Ke-Su”). At the time, the secretary, and one of the directors, of Ke-Su was one Peter Lazaris (who also had a tiny shareholding in Ke-Su). Mr Lazaris was also, at the time, one of the three individual proprietors of the business name “Staff Call”. It was submitted that these linkages justified the inference that Ke-Su traded as “A Touch of Class” and that Mr Lazaris used “Staff Call” as the merchant name for credit card sales made by Ke-Su.
4. I do regard it as established on the probabilities that, in August 2006, 377 Riley Street was the principal place of business of “Staff Call” and of “A Touch of Class”; and that, at that time, Mr Lazaris was a proprietor of the former and a director and the secretary of the latter. But to conclude that these ostensibly separate businesses were one and the same would be a matter of conjecture rather than inference. If it is to be inferred that the “Staff Call” business was that of an escort agency providing personal services, it must be for a reason other than the Yellow Pages entry in respect of the business “A Touch of Class”.
5. There is such a reason: the business names extract for the “Staff Call” business itself. As noted above, the nature of that business was that of an escort agency operating from 377 Riley Street, Surry Hills. It seems clear from the card issuer’s statement for the CBA card that, at some point when he was in Sydney over the period 25-26 August 2006, the respondent obtained services from this business and paid $660.00 for them. It is to be inferred that those services were personal to the respondent himself.
6. When the card issuer’s statement for the CBA card was received by the HSU, the respondent caused the sum owing on that statement, including the expenditure of $660.00, to be paid. He caused his staff to enter the relevant transaction into the HSU’s MYOB accounting system as a “teleconferencing” expense. The transaction to which the expenditure related had not been, and never was, authorised (save by the respondent himself), and was not disclosed to the National Executive.
7. With respect to the findings proper to be made under ss 286(1) and 287(1) of the schedule, the events of 25 or 26 August 2006, and the respondent’s subsequent treatment of the relevant expenditure in the administration of the National Office of the HSU, are indistinguishable from those of 7/8 April 2005 dealt with at paras 26-28 above. Needless to say, the description of the relevant payment as “teleconferencing” was no less culpable than the description of the earlier payment as “meetings”. I find that, in relation to the events of 25 or 26 August 2006, the respondent acted in contravention of those provisions.
8. The respondent was again in Sydney over the period 15-16 August 2007, this time staying at the Fraser Suites Hotel. At 12:55 am on 16 August 2007, a call was made from his mobile phone in the Sydney CBD to one of the numbers used by Keywed in its escort agency business. The identification of that number as relevant to that business was the subject of evidence from Ms Traunwieser. The number also corresponded with the number provided in an advertisement in the Sydney Yellow Pages in the category “Escort Services - Social”, under the name “Escort Connections”. At 1:12 am, Keywed telephoned the respondent’s hotel. In evidence is a sales voucher on the CBA card in the sum of $385.00, dated 15 August 2007. The merchant was Keywed. On the card issuer’s statement for the CBA card which was received by the HSU in the normal course, there were two entries, each in the amount of $385.00, each dated 16 August 2007 and each identifying the merchant as Keywed.
9. Ms Traunwieser said that, in the relevant period, she or someone else working for Keywed would receive telephone calls from clients seeking the services of escorts. In the case of a client who was at a hotel, she would obtain the name and address of the hotel, and the number of the client’s room. If the client proposed to pay by credit card, she would obtain the card details at this point. She would sometimes call the hotel back, and ask to be put through to the client to confirm that the call was not a hoax. Ms Traunwieser said that some credit cards would attract a 10% surcharge, and that, in 2007, a payment of $385.00 would have secured the services of an escort for one hour, including the surcharge, but probably excluding transportation costs.
10. On the basis of this evidence, it is to be inferred that, in the early morning of 16 August 2007, the respondent telephoned the “Escort Connections” number of Keywed and requested the services of an escort. The return telephone call from Keywed to the respondent’s hotel is consistent with what Ms Traunwieser said was sometimes her practice. Using the CBA card, the respondent paid Keywed, and it is to be inferred that he did so as consideration for personal services provided to himself. With respect to the sum of $385.00, additionally to the evidence of Ms Traunwieser referred to, I note that, in the Yellow Pages advertisement relevant to the number which the respondent called, the price of a service was given as $350.00: with the 10% credit card surcharge, the price payable by the respondent would have been $385.00.
11. The double entry on the card issuer’s statement is unexplained in the evidence. The second entry might have related to a second person who engaged Keywed at that time, for which engagement the respondent used the CBA card to pay; it might have related to a second (ie subsequent) engagement by the respondent himself; it might have arisen from some error in the systems of Keywed or the card issuer; or it might be the result of something else altogether. Whatever the explanation may be for this double entry, it does not diminish the force of the applicant’s factual case that the respondent used the CBA card to pay the sum of $385.00 (at least) for personal services which he obtained from Keywed on this occasion. I accept that case.
12. When the card issuer’s statement for the CBA card was received by the HSU in the normal course, the respondent caused his staff to describe both $385.00 expenditures, in the HSU’s MYOB accounting system, as “meetings” expenses. He caused the total sum due on that statement, including the sum of $770.00, to be paid by the HSU. The transaction or transactions to which the expenditure related had not been, and never was or were, authorised (save by the respondent himself), and was, or were, not disclosed to the National Executive.
13. With respect to the findings proper to be made under ss 286(1) and 287(1) of the schedule, the events of 16 August 2007, and the respondent’s subsequent treatment of the relevant expenditure in the administration of the National Office of the HSU, are indistinguishable from those of 7/8 April 2005 dealt with at paras 26-28 above. I find that, in relation to the events of 16 August 2007, the respondent acted in contravention of those provisions.

# UTILISATION OF THE SERVICES OF MS STEVENS

1. Ms Stevens had grown up in the Central Coast, she had joined the Toukley branch of the ALP at about the age of 13, and she had campaigned extensively for ALP candidates (as she said in her affidavit) “all over the country in all three tiers of government”. In the 2004 Federal Election, she campaigned for the ALP candidate for Dobell. At some point in what would have been 2005, she applied for, and was accepted into, a traineeship program run by the Australian Council of Trade Unions (“the ACTU”) called the “Organising Works Program”, intended for those desiring to have careers as union organisers. In addition to the completion of training modules in the strict sense, this program involved each trainee being placed with a host employer, that is to say, a trade union in which the trainee would be given practical experience in the work of organising. After making inquiries of many unions in New South Wales, Ms Stevens was referred to the respondent. He and the then National President of the HSU interviewed her in August 2005, and the respondent subsequently offered her a traineeship position. She commenced her employment with the National Office of the HSU on 26 September 2005.
2. Ms Stevens’ commencing wage was $743.59 per week (gross). This was increased to $45,000.00 pa in March 2006, and to $46,800.00 pa in September 2006, by which time she had successfully completed the organising traineeship program. The HSU also made superannuation contributions into her nominated fund.
3. Ms Stevens worked from her home in Woongarrah on the Central Coast, her communications with her mentor in the National Office of the HSU, Karene Walton (who was based in Melbourne), then being chiefly by telephone and email. Her essay-writing, study and research for the purposes of the traineeship program were carried out during working hours. The classroom aspects of the program were conducted in Sydney, usually in blocks of a week and, on such occasions, Mr Stevens would stay in Sydney, where her accommodation would be paid for by the HSU. There does not appear to be anything in the evidence that suggested that Ms Stevens was ever based, in the sense of having her own office, in the National Office in Pitt Street.
4. Until about November 2005, while the respondent was still resident in Melbourne, Ms Stevens communicated with him either by telephone or by email on most days. He would give her, as she put it in her affidavit, “small tasks, such as draft[ing] simple letters, data entry and Excel spreadsheet work, or … work on historic information relating to the HSU, up and coming campaigns, or organising sharing calendars”. She was not a workplace industrial organiser in the conventional sense, but was what she described as the “national campaign organiser”. Although part of her work was, as she put it, was “to increase the profile of the HSU on the Central Coast”, she spent her time on “tasks that were really general campaigning work, campaigning to get rid of Work Choices and to get the ALP elected”.
5. The respondent caused Ms Stevens to be involved in work for, including as secretary of, a community group established in the Central Coast region in April 2006 on the respondent’s initiative. It was called “Coastal Voice”. I deal with this organisation specifically below, but I note at this stage Ms Stevens’ estimate that, from its establishment until probably, on her evidence, about the end of 2006, she was occupied working for the organisation, on average, about one day a week.
6. Once the respondent had opened his campaign office in April 2007, Ms Stevens worked from it and confined herself to the respondent’s campaign in the election. She remained employed, and paid, by the HSU until after the respondent became the local member.
7. In her evidence, Ms Stevens said that her primary activity whilst employed by the HSU related to the “Your Rights at Work” campaign in the seat of Dobell. While I have no doubt but that, factually, this perception on Ms Stevens’ part reflected the nature of the activities in which she was involved, what she was doing was not part of that campaign at all. It was a campaign conducted under the auspices of the ACTU to overturn the Work Choices legislation. It commenced in early 2005 and ran until the Federal Election in late 2007.
8. The architect of the “Your Rights at Work” campaign was Chris Walton, the Assistant Secretary of the ACTU at the time. He gave evidence on the subject. He said that the campaign had a number of components, one of which was the placement of what were called “community campaign co-ordinators” in 25 marginal seats. Each national union was asked to nominate a person as one of these co-ordinators, who would be seconded to the campaign under the direction of Mr Walton, but would continue to be paid by the union concerned (or, in some cases in New South Wales, by Unions New South Wales). The co-ordinators were in place by about June 2006. Mr Walton had regular contact with them: they were brought in for training, they participated in regular hook-ups and meetings during the campaign, and they provided regular reports to him. The co-ordinator from the HSU was Katie Hall, with whom Mr Walton had regular contact. She was placed in the Victorian marginal seat of La Trobe. The co-ordinator for Dobell was Mary Yaager, employed by Unions New South Wales. Mr Walton was not aware of any contribution to the campaign made by the HSU in relation to Dobell. He had never heard of Ms Stevens.
9. Mr Brown (to whom I have referred at para 13 above) and the respondent were members of the HSU’s campaign committee for the “Your Rights at Work” campaign. Mr Brown gave evidence that La Trobe was the HSU’s allocated seat and, other than a suggestion that the HSU might also have a shared involvement in the Tasmanian seat of Bass, he was not aware of any other participation that his union had. Dobell was never mentioned: at the time, Mr Brown was not even aware that Dobell was one of the marginal seats identified by the ACTU.
10. Ms Yaager, whose campaign office was in The Entrance Road opposite the respondent’s campaign office, knew that Ms Stevens worked in the latter, but said that there was very little overlap between the work that she did and her own work. Ms Yaager’s evidence was consistent with that of Mr Walton and Mr Brown that Ms Stevens was not part of the HSU’s contribution to the “Your Rights at Work” campaign.
11. The respondent did not report the employment of Ms Stevens to the National Council or the National Executive of the HSU. The minutes of the meetings of those bodies make no reference to that employment. The members of those bodies who gave evidence in the case were not aware of the employment of Ms Stevens until after the respondent had left the HSU, albeit that, as mentioned above, the National President was present when Ms Stevens was interviewed for the position. At a meeting of the National Executive on 28/29 March 2007, the respondent circulated a paper which he had prepared which included a proposed structure for the National Office of the HSU. The structure purported to show the then existing staff of the National Office, but it made no reference to Ms Stevens. In an email of 2 July 2007 to members of the National Executive, the respondent foreshadowed a discussion, at the next meeting, as to the functions of the National Office, in which context he attached the duty statements of four then current staff employed in that office, including one seconded from a branch of the HSU. There was no duty statement for, or reference to, Ms Stevens.
12. The conclusion is inescapable that, if Ms Stevens performed any valuable work at all for the HSU while she was employed by it, that work must have occupied a minor fraction of her total time during working hours. For the most part, she was occupied doing the respondent’s bidding in building his profile as a community/political campaigner on the Central Coast and, after the respondent’s endorsement as the ALP candidate for Dobell, in prosecuting his campaign for election. However worthy those activities may have appeared to the respondent, he had no entitlement to use a member of the employed staff of the HSU in this way without disclosing the fact to, and receiving the approval of, the National Executive or the National Council.
13. It was submitted on behalf of the applicant that, by employing Ms Stevens on work which related either to the elevation of his own profile in the Central Coast in the period leading up to the ALP pre-selection process or to election campaigning as such in the subsequent period, the respondent contravened s 287(1) of the schedule. As stated in those terms, the submission must be accepted. As it seems to me, the only issue of any real uncertainty relates not to the principle but to the extent to which Ms Stevens’ work was in fact directed to these purposes, as distinct from legitimate HSU purposes. Putting the matter as the respondent might have done had he been represented, there may be a case for saying that, in taking Ms Stevens on under the Organising Works Program, the HSU would not have expected a full return on the wages which it paid her. There may also be a case for assigning some value to what I would find to be the minority of Ms Stevens’ time that was, both before and after her completion of that program, occupied on HSU-related matters. For reasons which follow, however, I take the view that considerations of these kinds cannot stand as legitimate qualifications to the broad terms in which the applicant puts her submission.
14. In *R v Byrnes* (1995) 183 CLR 501, the High Court was concerned with an appeal from a conviction for breaches of s 229(4) of the *Companies (South Australia) Code*, a provision which was in terms relevantly indistinguishable from those of s 287(1) of the schedule. Brennan, Deane, Toohey and Gaudron JJ held that, for the conduct in question to be improper, it was not necessary that the offender be conscious of the impropriety. Their Honours continued (183 CLR at 514-515):

Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case. When impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important [*Hindle v John Cotton Ltd* (1919) 56 SLR 625 at 630–631]: the alleged offender’s knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power are important factors in determining the question whether the power has been abused. But impropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do.

1. Without the authorisation of the National Council or the National Executive, the respondent did not have authority to use the services of staff of the HSU on work or activities not related to the functions or legitimate interests of the HSU (indeed, the National Council and the National Executive themselves may not have had that authority, an issue which it is unnecessary to investigate in the present case). And, if he did not in fact know, at least he ought to have known, of that limitation on his authority. Under the Rules, the respondent was responsible for the property and moneys of the HSU, and, between meetings of the National Executive, he had control and conduct of the business of the HSU. His position was a fiduciary one: *Allen v Townsend* (1977) 31 FLR 431, 483-485. The avoidance of conflicts of interest is a fundamental element (or “theme”) of the fiduciary obligation: *Chan v Zacharia* (1984) 154 CLR 178, 198-199. If the respondent intended, as he clearly did, to deploy Ms Stevens on work which was of benefit to himself and of little or no benefit to the HSU, it was his duty to secure the HSU’s fully-informed consent to such an arrangement.
2. To use the services of Ms Stevens for his own purposes was the clearest of improprieties on the respondent’s part. It was no different from the manager of a construction company, for example, using the services of a carpenter employed by the company to carry out renovations on his or her domestic premises without the authorisation of the board of directors (or possibly, depending on the company’s constitution, the shareholders).
3. In these circumstances, it would not lie upon the HSU to prove how much of Ms Stevens’ time was occupied on what I would call illegitimate activities. As the fiduciary, the respondent would have to account. And, in a case brought by a regulator such as the present one, it does not lie upon the applicant to prove how much of Ms Stevens’ time was so occupied. *De minimus* situations aside, the applicant has, in my view, established her case under s 287(1) once she has proved, as she has, that the respondent, without authority, deployed the services of Ms Stevens, to some extent, on activities which were to his own, rather than to his organisation’s, advantage. The HSU’s detriment, of course, lay in the necessity to discharge the obligations which, as employer, it owed to Ms Stevens.
4. I find, therefore, that, in relation to the work done by Ms Stevens, the respondent improperly used his position as National Secretary to gain an advantage for himself and to cause detriment to the HSU. Relevantly, his conduct amounted to a contravention of s 287(1).
5. Likewise, for the purposes of s 286(1) of the schedule, in the absence of evidence from the respondent himself, the applicant’s submission that it should be inferred that he did not believe that the deployment of the services of Ms Stevens wholly or substantially on non-HSU work was in the best interests of the HSU is unanswerable. Indeed, on the evidence, it is nigh impossible to perceive how the respondent could have believed, had he fairly turned his mind to it, that the deployment of those services in the way that he did was in the best interests of the HSU. Relevantly to those services, the respondent did not exercise his powers or discharge his duties in good faith in what he believed were those best interests. Neither did he do so for a proper purpose, in which respect what I have written above on the question of impropriety sufficiently conveys the view I take on that aspect of the matter. There was, in my view, a very clear contravention of s 286(1).
6. It was also submitted on behalf of the applicant that, in relation to the employment of Ms Stevens, the respondent contravened s 285(1) of the schedule because –

… the National Secretary of an organization in the circumstances of the National Office’s could not reasonably have exercised his or her powers to hire staff, to deploy those staff to work full time in campaigning in one small part of the country, and/or to incur substantial credit card expenditure, without first seeking the authorization of the National Council or the National Executive of the union.

The difficulty with this submission is that s 285(1) is not concerned with whether the way in which an officer exercised his or her powers, or discharged his or her duties, was reasonable. The question, rather, is whether he or she exercised those powers and discharged those duties with the degree of care and diligence that a reasonable person would exercise in the circumstances postulated in paras (a) and (b). The focus, in other words, is on care and diligence rather than with the reasonableness of the things done or omitted to be done at the substantive level.

1. In a case such as the present where contraventions of ss 286(1) and 287(1) of the schedule have been established, the re-characterisation of those very facts as demonstrating absence of care and diligence for the purposes of s 285(1) is, in my view, problematic. Had this been a case in which, for example, the respondent had given Ms Stevens a job and left her to her own devices, the result of which was that she spent much of her paid time on activities which were unrelated to her employment by the HSU, it may be that a case under ss 286(1) and 287(1) would have failed. But the respondent might then have been held not to have exercised the degree of care and diligence required by s 285(1). That is not the present case, however. Although the applicant drew my attention to a number of high-level judicial pronouncements about ss 180, 181 and 182 of the *Corporations Act 2001* (Cth), I was not referred to any previous treatment of a problem of the kind to which I have referred in this paragraph.
2. In the circumstances, I am not prepared to treat s 285(1) as a kind of catch-all provision which, dealing with conduct which might be perceived as lying at the less serious end of the spectrum of contraventions, may always be resorted to additionally to successful proceedings under ss 286(1) and/or 287(1). It may, of course, be pleaded in the alternative, lest it be found in a particular case that the latter sections were not contravened. I also allow for the possibility that the facts of a case may justify findings under all three sections. I say only that a contravention of s 285(1) is not *necessarily* established upon the establishment of a contravention of one of the other sections.
3. There is, however, one respect in which the respondent’s relevant conduct did bespeak a want of the degree of care and diligence referred to in s 285(1). A reasonable person in the respondent’s position would, in my view, at the very least have caused to be maintained an accurate, running, account of the time that Ms Stevens spent (during normal working hours) on each category of work – HSU and non-HSU – and a financial account of the outlays which she made on her Diners Club card, or otherwise using HSU funds, for non-HSU purposes. In this respect, the conduct of the respondent gave rise to a contravention of s 285(1), notwithstanding that his conduct, viewed at a higher level, also gave rise to contraventions of ss 286(1) and 287(1).

# UTILISATION OF THE SERVICES OF MR BURKE

1. Matthew Burke, a delegate to the Federal Electoral Council (“the FEC”) for the electorate of Dobell from the Wamberal Day Branch of the ALP, was enlisted by the respondent to help establish Coastal Voice. He did the work that the respondent required of him from his home in Wamberal, in addition to which he made trips around the Central Coast and/or to the Pitt Street office several times a month. At the outset, Mr Burke was not on the payroll of the HSU, but he received a payment of $3,000.00 from the HSU on 4 April 2006. He was put on the payroll at about the beginning of July 2006. He understood that his role was that of “media/executive assistant” to the respondent. In his evidence, he said that he worked on “a lot of issues” including Coastal Voice and the ALP. He was also responsible for the HSU website.
2. On 13 March 2007, Mr Burke resigned from the HSU to work full time as an electoral officer for Senator Hutchins. For the financial year ended 30 June 2007, the HSU paid for Mr Burke a total of $26,551.23 in wages. At the time of the cessation of his employment with the HSU, the respondent asked Mr Burke to keep working for him on a voluntary basis, and arranged for him to be issued with a corporate Diners Club card on the HSU account, which, the respondent said, Mr Burke could use “to pay for petrol and other ancillary expenses”. The respondent instructed Ms Ord to accept, and to process in the normal course, charges incurred by Mr Burke on this card which appeared on the card issuer’s statements. Between March and December 2007, Mr Burke used this card to pay for goods and services to the value of $10,120.37. It is to be inferred that those goods and services were not acquired for the HSU’s own legitimate purposes.
3. Mr Burke was not part of the “Your Rights at Work” campaign. What I have said above in respect of Ms Stevens – see paras 68-70 – applies equally to his circumstances. He was not part of the “Your Rights at Work” campaign. From what appears on the evidence, the only work he did for the HSU (presumably until 13 March 2007) was the maintenance of the website of the National Office. The fact of his employment by the HSU was not reported to or authorised by the National Council or the National Executive. The utilisation of his services by the respondent for non‑HSU purposes gave rise to contraventions of ss 285(1), 286(1) and 287(1) of the schedule in the same way as I have found above in relation to Ms Stevens.
4. Whereas Ms Stevens remained in the employ of the HSU until the respondent became the member for Dobell, Mr Burke resigned from that employment on 13 March 2007. For the respondent to have caused him to be issued with a HSU Diners Club card, and to have directed him to use it for expenses outside the purposes of the HSU in the period following his resignation, was, in my view, a very clear contravention of ss 285(1), 286(1) and 287(1).

# COASTAL VOICE

1. As mentioned above, this community group was established on the initiative of the respondent. There was an initial meeting of what was, in effect, a steering committee on 9 April 2006. Although many others had been invited, all those who attended were ALP members. They included Ms Stevens and Mr Burke. The respondent explained to those present that it was intended that the group would campaign on local issues of concern to the people of the Central Coast, and, while it would generally do so from a progressive perspective, it would not be aligned with any political party. The respondent was the interim president, and Ms Stevens the interim secretary, pending the holding of elections for office-bearers. Although the respondent procured the incorporation of Coastal Voice under the *Associations Incorporation Act 1984* (NSW)on 1 May 2006, such elections were never held.
2. An idea of how this group represented itself to the Central Coast community may be seen from the following extract from its website which, although downloaded in June 2010, appears, from the context, to have been written (presumably by Mr Burke) in the period following its incorporation:

**About Coastal Voice**

**How did we start?**

Coastal Voice was started by a group of residents who had concerns about the treatment of the aged on the Central Coast of NSW.

Due to the large number of elderly residents on the coast, the group decided to put together a hotline that is staffed by volunteers, that assist older Australians with their aged care concerns and problems.

The response has been overwhelming, with the generosity of Coasters showing through with dozens of residents, coming from all different walks of life, volunteering to help with the hotline.

Volunteers and organisers of the hotline soon got around to talking about other issues on the central coast and what could be done to help make the coast an even better place to live. Many of the volunteers mentioned issues such as Health Care, Policing, Education, transport and petrol prices as issues which affected their lives and the lives of the majority of other coasters. After talking about what could be done to highlight these issues and making a difference, Coastal Voice was born.

To ensure political independence, whilst we encourage all Central Coast residents to join, we have determined that if you are a sitting Federal or state MP or a local councillor or indeed a preselected candidate for any such position, you are not eligible to be on the Coastal Voice Executive.

**What do we do?**

Coastal Voice became formalised on Sunday 19 March, 2006. Coastal Voice is an incorporated Community Association, our aims are:

* To ensure that the residents of the Central Coast of New South Wales, especially senior citizens and the young, do not suffer through ignorance of their rights, or threats to their rights.
* To promote policies and practices which support the provision of quality Aged Care services on the central coast of New South Wales.
* To promote policies and practices which support the provision of quality Law enforcement and healthcare on the Central Coast of New South Wales.
* To ensure accountability from the elected representatives of the Central Coast of New South Wales.
* To provide a democratic forum of which residents of the the [sic] NSW Central Coast Region are free to join, with an aim to improving the quality of life for residents on the central coast of NSW.
* To exercise a responsible influence on the development of social policies and services that have the potential to impact in any way, on residents of the Central Coast of NSW.

**Who are we?**

Coastal voice is made up of Central Coast residents who are active in voicing their ideas about how to improve life on the coast for all members of the community. Anyone who lives on the Central Coast is able to join and participate in the forum.

1. The version of the Coastal Voice website in evidence referred to the respondent as follows:
* For all media enquiries please contact Craig Thomson on ...;
* Please send all enquiries via email to ... or call the President Craig Thomson on ...;
* In order to get involved in the activities of coastal voice send us an email on ... or call Craig Thomson on ....
1. One of the first things that the respondent asked Ms Stevens to do for Coastal Voice was to place some advertisements in a local paper, the Sun Weekly. She designed an advertisement, which originally included the HSU logo. The respondent asked her to remove the logo, saying that it would not be necessary. Ms Stevens forwarded the amended advertisement to the paper, the cost of the publication of which was $616.00. She subsequently designed four further advertisements, which were published at a cost of $2,286.70. The respondent instructed Ms Stevens to pay for all of the advertisements using her Diners Club card, which she did.
2. The official launch of Coastal Voice occurred on 27 May 2006. In anticipation of that event, Mr Burke prepared letters to be sent to various local, state and federal politicians inviting them to attend. Ms Stevens booked the venue, arranged entertainments for the children and generally co-ordinated the work of a range of ALP members, union members and other volunteers who would assist with the event. She purchased some T-shirts (at a cost of $29.88), some paint and a silk screen (at a cost of $82.05) for the purpose of decorating the shirts, and some other sundries (at a cost of $23.94). Conformably with the respondent’s instructions, Ms Stevens used her Diners Club card to pay for these items. In connection with the launch of Coastal Voice, a number of expenses were incurred. There was a cost for the hire of the public reserve, including security deposit ($320.00); and there were costs amounting to $389.28 in total in respect of “party hire” items. These expenses and costs were paid for by the respondent using the CBA card. The payments referred to in this paragraph were not disclosed to, or authorised by, the National Council or the National Executive.
3. As the Secretary of Coastal Voice, Ms Stevens was responsible for taking and maintaining the minutes of the meetings (informal though they were) which it held. Annexed to her affidavit were minutes for meetings held on 8 May, 17 July and 25 September 2006. At a meeting of Coastal Voice on 5 June 2006, a list of various outstanding tasks was drawn up, and beside each task on the list were the initials of the person or persons delegated to attend to it. The list was updated as tasks were completed, and new tasks were added, at subsequent meetings. The version of the list tendered in evidence, which Ms Stevens thought was current as at about 20 July 2006, was seven pages long. Many items on it were allocated to Ms Stevens or Mr Burke.
4. At some point, Coastal Voice became non-operational. Ms Stevens and Mr Burke gave different evidence about that circumstance. Ms Stevens said that Coastal Voice “started attracting criticism as being a front for the ALP”, as a result of which she and Mr Burke came to do less of their campaigning work under the banner of that group, and the group itself “just died off by the end of 2006”. Mr Burke said that Coastal Voice “dispersed” once the respondent was pre-selected as the ALP candidate for Dobell (ie in April 2007). Because of the obvious informality of the demise of Coastal Voice, nothing turns on this difference of recollection.
5. On one view, the thing which may set the respondent’s activities in relation to Coastal Voice apart from his party-political and electoral activities discussed elsewhere in these reasons is the circumstance that the former were community activities and thus not, at least universally, referable to the respondent’s self-interest or personal advancement. This has a bearing on the court’s assessment of the matters of propriety under s 286(1)(b) and impropriety under s 287(1) of the schedule. Ultimately, however, I have reached the same conclusion in this area of the case as I have in others.
6. It may well have been legitimate for the HSU to invest its funds and staff resources in ways that assisted community groups and promoted their aims. However, not being “the business of the [u]nion” within the meaning of rule 32(n), and not being “the general administration of the [u]nion” or “reasonably incidental” thereto under r 36(b), of the Rules, no such investment could have been undertaken by the National Secretary on his own initiative. The authorisation of the National Council or the National Executive would have been necessary. As things happened, in circumstances where such authorisation had not been sought or granted, the respondent took it upon himself to select, of all the places in Australia where valid claims for assistance of this kind might have been advanced, the specific location where assistance would be provided. When it is realised that the respondent himself had only recently moved into the relevant area with the general project of increasing his own profile in the community to further his own political career, the potential for a conflict of interest to have arisen is all too obvious. Indeed, I would go further. In the absence of evidence from the respondent justifying how he proceeded in relevant respects, I would infer that his decision to commit the funds and staff resources of the HSU to Coastal Voice, a group which he himself established, was substantially influenced, if not wholly driven, by the advancement of that general project. In short, the respondent used his fiduciary position to benefit himself, at the expense of the organisation which he served. That was a conspicuous impropriety.
7. With respect to Ms Stevens’ and Mr Burke’s own time, I have dealt with that aspect above. Their Coastal Voice work and activities are sufficiently comprehended by the findings which I have already made.
8. With respect to the respondent’s use of the HSU’s funds to meet the expenses of Coastal Voice as laid out above, I find that the respondent exercised his power as National Secretary of the HSU other than in good faith in what he believed were the best interests of the HSU, and for an improper purpose, in contravention of s 286(1) of the schedule. I also find that the respondent thereby improperly used his position as National Secretary to gain an advantage for himself and to cause detriment to the HSU, in contravention of s 287(1) of the schedule. I also find that, by failing to maintain a scrupulous separation between the matters and transactions for which he might properly use the funds and resources of the HSU and the matters and transactions which he ought to have funded otherwise, he exercised his powers and discharged his duties without the degree of diligence that a reasonable person would have exercised in like circumstances, in contravention of s 285(1) of the schedule.

# THE RESPONDENT’S ELECTION CAMPAIGN

1. In submissions made on her behalf, the applicant grouped what were described as the Dobell election campaign expenses, with which I deal in paras 101-123 below, together for the purpose of considering the application of the relevant provisions of the schedule on which she relied. For my own part, I doubt that that was a very useful approach. It cannot be assumed that the incurring and, where relevant, the payment of all of the outgoings referred to below necessarily attract the same analysis or justify the same conclusions. Although, in what follows, I shall express myself in very similar terms for each of them, I make it clear that each has been considered as a separate entity in relation to which findings must be made.
2. On 1 July 2006, the respondent caused the HSU to purchase a table at an ALP function organised by the Dobell FEC. The cost was $2,000.00. On 6 December 2006, the respondent caused the HSU to purchase a table at a similar function organised by the Dobell FEC, this time at a cost of $1,500.00. Neither purchase was disclosed to, or authorised by, the National Council or the National Executive of the HSU.
3. The applicant’s case was that these outgoings could only have been for the benefit of the respondent rather than for that of the HSU. All I know of the respondent’s position from his Defence, such as it is, is that he denies having authorised the making of the payments concerned by the HSU. I reject that Defence. I am then left with the fact that the payments were made by the HSU on the authority of the respondent, and with the absence of any explanation for it by him. This was, it will be recalled, a period during which the respondent was working to enhance his prospects of pre-selection for Dobell. The inference which I draw is that the expenditure was related to that project, rather than to any benefit legitimately sought for the HSU.
4. I find that, in relation to these expenditures, the respondent exercised his power as National Secretary of the HSU other than in good faith in what he believed were the best interests of the HSU, and for an improper purpose, in contravention of s 286(1) of the schedule. I also find that the respondent thereby improperly used his position as National Secretary to gain an advantage for himself and to cause detriment to the HSU, in contravention of s 287(1) of the schedule. I also find that, by failing to maintain a scrupulous separation between the matters and transactions for which he might properly use the funds and resources of the HSU and the matters and transactions which he ought to have funded otherwise, he exercised his powers and discharged his duties without the degree of diligence that a reasonable person would have exercised in like circumstances, in contravention of s 285(1) of the schedule.
5. In para 17 above, I referred to the establishment of the respondent’s election campaign office at 3/332 The Entrance Road, Long Jetty. The respondent and Ms Stevens, and possibly other staff, moved into this office on 11 April 2007. On that day, Ms Stevens, acting on the respondent’s behalf, purchased three workstations and three chairs for the office, at a cost of $1,587.93. She used her Diners Club card for these purchases. The furniture to which they related was used in the respondent’s campaign office. On 17 April 2007, the respondent used the CBA card to purchase a portable air conditioner for use in that office, at a cost of $1,053.00. The service, equipment and call charges associated with the telephone and facsimile services used in the campaign office were billed to, and paid by, the National Office of the HSU, at a total cost over the period concerned of $860.57. One charge of $301.75 and five charges of $59.95 each in respect of internet access provided by Central Coast Internet between July and December 2007, which I infer related to the campaign office, were paid by the respondent using the CBA card. The payment made by Ms Stevens using her Diners Club card and the payments made by the respondent using the CBA card appeared on the respective statements sent by the card issuers to the HSU in the normal course, and those statements were paid. Neither those payments, nor the direct payment in respect of telephone and facsimile, were disclosed to or authorised by the National Council or the National Executive of the HSU.
6. These payments were all unarguably attributable to the respondent’s campaign office, and were nothing to do with the HSU. The funds of the HSU should never have been used to make them.
7. I find that, in relation to these payments, the respondent exercised his power as National Secretary of the HSU other than in good faith in what he believed were the best interests of the HSU, and for an improper purpose, in contravention of s 286(1) of the schedule. I also find that the respondent thereby improperly used his position as National Secretary to gain an advantage for himself and to cause detriment to the HSU, in contravention of s 287(1) of the schedule. I also find that, by failing to maintain a scrupulous separation between the matters and transactions for which he might properly use the funds and resources of the HSU and the matters and transactions which he ought to have funded otherwise, he exercised his powers and discharged his duties without the degree of diligence that a reasonable person would have exercised in like circumstances, in contravention of s 285(1) of the schedule.
8. In early July 2007, a member of the ALP in the Central Coast offered Ms Stevens the use of his bus for the purposes of the respondent’s campaign, so long as he was paid for the registration and the compulsory third party insurance. Ms Stevens communicated this offer to the respondent, who accepted it. He told Ms Stevens to send the bills to Ms Ord for payment. The bus was duly acquired and decorated with electioneering advertising. Conformably with the respondent’s instruction, Ms Ord caused various payments to be made by the HSU to the bus owner, namely, $671.88 on 12 July, $79.28 on 12 August and $526.80 on 9 October 2009. These payments were not disclosed to or authorised by the National Council or the National Executive of the HSU.
9. These payments were all unarguably attributable to the respondent’s campaign office, and were nothing to do with the HSU. The funds of the HSU should never have been used to make them.
10. I find that, in relation to these payments, the respondent exercised his power as National Secretary of the HSU other than in good faith in what he believed were the best interests of the HSU, and for an improper purpose, in contravention of s 286(1) of the schedule. I also find that the respondent thereby improperly used his position as National Secretary to gain an advantage for himself and to cause detriment to the HSU, in contravention of s 287(1) of the schedule. I also find that, by failing to maintain a scrupulous separation between the matters and transactions for which he might properly use the funds and resources of the HSU and the matters and transactions which he ought to have funded otherwise, he exercised his powers and discharged his duties without the degree of diligence that a reasonable person would have exercised in like circumstances, in contravention of s 285(1) of the schedule.
11. During the course of the respondent’s election campaign, his campaign office distributed a deal of material by mail. On 6 June 2007, Australia Post invoiced the respondent, “ALP Candidate, Federal Seat of Dobell”, in respect of “Total supply this period ending 31/05/2007”. The amount of the invoice was $7,253.17. The invoice was paid, electronically, by the National Office of the HSU on 12 July 2007. Neither the incurring of this liability nor the payment of the invoice was reported to or authorised by the National Council or the National Executive. Ms Ord could not specifically recall paying the invoice, but she identified a copy printout of the electronic receipt of the National Office’s bank. In the HSU’s MYOB system, this expense was coded as “Postage – National Office”.
12. It is clear that the respondent either caused or authorised the incurring of this liability, but he did so in his capacity as ALP candidate for Dobell. He was himself, in that capacity, the debtor of Australia Post. The invoice was addressed to him at his electoral office post office box and would have been received there in the normal course. Someone caused the invoice to be placed before the office staff of the HSU, most probably Ms Ord, for payment out of the funds of the National Office. In the absence of evidence from the respondent, the inference that it was he who did so, either directly or through a member of his electoral office staff, is a very obvious one. I have no hesitation in drawing that inference.
13. This payment was unarguably attributable to the respondent’s campaign office, and was nothing to do with the HSU. The funds of the HSU should never have been used to make it.
14. I find that, in relation to this payment, the respondent exercised his power as National Secretary of the HSU other than in good faith in what he believed were the best interests of the HSU, and for an improper purpose, in contravention of s 286(1) of the schedule. I also find that the respondent thereby improperly used his position as National Secretary to gain an advantage for himself and to cause detriment to the HSU, in contravention of s 287(1) of the schedule. I also find that, by failing to maintain a scrupulous separation between the matters and transactions for which he might properly use the funds and resources of the HSU and the matters and transactions which he ought to have funded otherwise, he exercised his powers and discharged his duties without the degree of diligence that a reasonable person would have exercised in like circumstances, in contravention of s 285(1) of the schedule.
15. On 14 May 2007, the New South Wales branch of the ALP invoiced the HSU in respect of “Advertising paid by ALP NSW Head Office relating to Dobell FEC”. The respondent’s name appeared as the “customer reference”. The amount claimed in the invoice was $12,511.40. In the absence of evidence from the respondent, I infer from the fact that the invoice was addressed to the HSU that it was that organisation that was, as between itself and the ALP, the party liable on the invoice; and I likewise infer from the appearance of the respondent’s name as the “customer reference” that it was he who incurred the liability on behalf of the HSU. The incurring of this expense was approved neither by the National Council nor by the National Executive.
16. Notwithstanding that circumstance, the invoice was in fact paid, by electronic transfer, in two payments on 14 and 18 February 2008. The hard copy of the invoice in evidence is endorsed with the notation “Approved by: …” followed by someone’s initials. Ms Ord did not recognise the initials. Neither did she recognise the handwritten date “18/2/08” beneath those initials. She was vague when asked when she herself had left the employ of the HSU: she thought maybe between two and four months after the respondent had resigned. With respect to the applicant, this detail ought not to have been left to the unaided recollection of the witness. As the evidence stands, the court has no way of knowing whether Ms Ord was still in her position with the HSU in mid-February 2008. Neither is there any evidence as to the identity of the person who purported to approve this invoice for payment. It was approved neither by the National Council nor by the National Executive.
17. One thing is clear: it could not have been the respondent who approved payment on this invoice in February 2008. However, in the absence of evidence from the respondent, I infer that the HSU was contractually liable to pay the invoice. The HSU was caused to incur that liability in, or before, May 2007 as a result of the doings of the respondent. He had no authority to proceed in that way. From the invoice itself, it seems clear that the services for which the HSU was required to pay were in the nature of advertising by the FEC. It is a very short step to draw the inference, which I do, that that advertising related to the respondent’s election campaign (remembering that he became the endorsed ALP candidate on 13 April 2007) rather than to anything required by, or for the benefit of, the HSU.
18. This liability ought not to have been incurred in the name of the HSU.
19. I find that, in relation to this liability, the respondent exercised his power as National Secretary of the HSU other than in good faith in what he believed were the best interests of the HSU, and for an improper purpose, in contravention of s 286(1) of the schedule. I also find that the respondent thereby improperly used his position as National Secretary to gain an advantage for himself and to cause detriment to the HSU, in contravention of s 287(1) of the schedule. I also find that, by failing to maintain a scrupulous separation between the matters and transactions for which he might properly use the funds and resources of the HSU and the matters and transactions which he ought to have funded otherwise, he exercised his powers and discharged his duties without the degree of diligence that a reasonable person would have exercised in like circumstances, in contravention of s 285(1) of the schedule.
20. The respondent’s campaign office caused a number of radio advertisements relating to the election campaign to be broadcast in the Central Coast region. Invoices totalling $18,733.00 were rendered by Central Coast Radio Centre and by Nova 106.9 Pty Ltd in October and November 2007. The Central Coast Radio Centre invoices were addressed to the respondent at his campaign office. The Nova 106.9 Pty Ltd invoice was addressed to the respondent at an ALP New South Wales post office box. Of the Central Coast Radio Centre invoices, all but one were paid by the National Office of the HSU on 12 November 2007, and that one (in the sum of $1,346.40) was so paid on 13 February 2008. The invoice from Nova 106.9 Pty Ltd was paid by the respondent using the CBA card on 12 October 2007. Although these outgoings were incurred by the respondent in his election campaign, he caused them to be paid – at least to the extent that they were so paid while he was National Secretary – by the HSU. The payments were neither disclosed to nor authorised by the National Council or the National Executive.
21. These payments were all unarguably attributable to the respondent’s campaign office, and were nothing to do with the HSU. The funds of the HSU should never have been used to make them.
22. I find that, in relation to these liabilities and payments, the respondent exercised his power as National Secretary of the HSU other than in good faith in what he believed were the best interests of the HSU, and for an improper purpose, in contravention of s 286(1) of the schedule. I also find that the respondent thereby improperly used his position as National Secretary to gain an advantage for himself and to cause detriment to the HSU, in contravention of s 287(1) of the schedule. I also find that, by failing to maintain a scrupulous separation between the matters and transactions for which he might properly use the funds and resources of the HSU and the matters and transactions which he ought to have funded otherwise, he exercised his powers and discharged his duties without the degree of diligence that a reasonable person would have exercised in like circumstances, in contravention of s 285(1) of the schedule.
23. A printing business called The Entrance Print was used by the respondent to produce stationery and printed material for use in his election campaign between April and November 2007. It invoiced the respondent a total amount which, according to the arithmetic of the applicant, exceeded $75,000.00. However, from what appears in the evidence, only the sum of $10,763.00 was paid by the HSU. That amount was paid by the respondent using the CBA card on various dates between May and November 2007. These payments were not disclosed to or authorised by the National Council or the National Executive. They were all unarguably attributable to the respondent’s campaign office, and were nothing to do with the HSU. The funds of the HSU should never have been used to make them.
24. I find that, in relation to these liabilities and payments, the respondent exercised his power as National Secretary of the HSU other than in good faith in what he believed were the best interests of the HSU, and for an improper purpose, in contravention of s 286(1) of the schedule. I also find that the respondent thereby improperly used his position as National Secretary to gain an advantage for himself and to cause detriment to the HSU, in contravention of s 287(1) of the schedule. I also find that, by failing to maintain a scrupulous separation between the matters and transactions for which he might properly use the funds and resources of the HSU and the matters and transactions which he ought to have funded otherwise, he exercised his powers and discharged his duties without the degree of diligence that a reasonable person would have exercised in like circumstances, in contravention of s 285(1) of the schedule.

# CENTRAL COAST RUGBY LEAGUE

1. The respondent caused the HSU to enter into a major sponsorship agreement with the “Central Coast Division of Rugby League Inc”. There is no direct evidence of the date of this contract (the version in evidence being an unexecuted one reproduced, I presume, from the Division’s electronic records), but Ms Stevens, on whose initiative this sponsorship was pursued, said that she first became aware that the Division needed a major sponsor in early 2006. The agreement covered three rugby league seasons, those of 2006, 2007 and 2008. The invoice for the first payment, in the amount of $30,000.00, was due on 19 April 2006, that for the second payment, in the amount of $31,200.00, was due on 16 February 2007 and that for the third payment, in the amount of $35,521.12, was due on 7 March 2008. These amounts were net of GST, and the increases from year to year are explicable by reference to a term of the contract that provided for adjustments according to movements in the consumer price index.
2. The invoices in respect of 2006 and 2007 were paid on the authority of the respondent, while he was National Secretary of the HSU. The invoice in respect of 2008 was paid on the authority of the National Executive, reluctantly and only because they considered that the HSU was under a contractual obligation in that regard. The respondent’s execution of the contract on behalf of the HSU was not disclosed to the National Council or the National Executive. Authority to make the contract was neither sought nor given. It was not until after the respondent had resigned from his position as National Secretary that members of the National Executive became aware of this affair. Neither they nor the members of the National Council were aware of, or authorised, the 2006 and 2007 sponsorship payments.
3. Amongst the benefits which the HSU obtained under this contract were 10 season passes, six places in the sponsors’ box for the representative game played (in the 2006 contract) on 13 May 2006, six places in that box for the grand final of the competition, and the right to present the trophy to the winning team on grand final day. In each of 2006 and 2007, the respondent made that presentation.
4. This was a substantial commercial contract made with an outside organisation. Quite apart from the position arising under the Rules – and there could really be no suggestion that the respondent was empowered to enter into this contract without authority from the National Council or the National Executive – it is, in my view, unthinkable that a responsible manager or administrator, especially one in charge of a trade union, would commit his or her organisation to a liability of this size without reference to higher authority. I shall leave to others the judgment whether the HSU derived any promotional or like benefit from this contract. The fact is that the respondent ought to have left it to the National Council or the National Executive to make that judgment. Had the matter been taken there, and had the members of either body been disposed to authorise such an investment, there is no reason to assume that the sporting body chosen by the respondent, based as it was in the region where he was seeking to establish his own personal profile, would have been the one favoured with a contract.
5. In this area of the case, the applicant relies only on s 285(1) of the schedule. It is submitted on her behalf that a reasonable person occupying the office of National Secretary and otherwise exposed to this sponsorship proposal would, conformably with the Rules, have been diligent to secure the endorsement of the National Executive for the proposal. I accept that submission. Additionally to the limitations on the power of the respondent to proceed independently under the Rules, I am influenced in this conclusion by the palpable conflict of interest which attended the respondent’s circumstances. A reasonable senior officer of a trade union with a national presence would, in my view, have been diligent to ensure that the decision to contract with a particular local competition was made or approved, at least, by the relevant committee of management. In the facts with which I am dealing here, the respondent failed to apply that degree of diligence to the matter at hand. In that respect, the respondent contravened s 285(1) of the schedule.

# DONATIONS

1. On 8 August 2006 or thereabouts, the respondent caused the National Office of the HSU to make a donation of $2,400.00 to a multiple sclerosis fund‑raising lunch with which the wife of the then National President of the HSU was associated. The donation was not disclosed to or approved by the National Executive or the National Council until it appeared amongst a list of donations notified by Ms Ord on 21 August 2007. It was later retrospectively authorised by the National Executive, but there is nothing in the evidence to suggest when this occurred.
2. It was submitted on behalf of the applicant that, because this transaction involved a donation of more than $1,000.00 made without the approval of the National Council or the National Executive, it was in breach of r 36(f) of the Rules. That appears clearly to be the case. It was next submitted that the respondent relevantly contravened s 285(1) of the schedule by failing to apply the degree of care and diligence in the exercise of his powers and the discharge of his duties that a reasonable person would have applied in the circumstances obtaining. That submission should also be accepted. Rule 36(f) is directed to what the HSU itself may do, rather than being concerned with the limits of the authority of any particular officer. Members were entitled to assume, therefore, that their union would not use its funds for donations of more than $1,000.00 unless the approval of the National Council or the National Executive had been obtained. It is true that the National Executive later gave that approval in relation to this donation of $2,400.00, but the wording of the rule – “shall not make” – makes it clear that prior approval is required. On the facts of the present case, the respondent caused the HSU to act in breach of its own rules. In the absence of evidence from the respondent, I cannot see how this did not involve, on his part, a failure to exercise care and diligence within the meaning of that section. There was, I would find, a contravention of s 285(1).
3. On 12 September 2006 or thereabouts, the respondent caused the National Office of the HSU to make a donation of $5,000.00 to an event known as “Central Coast Convoy for Kids”. This was an annual fund‑raising event run by the Transport Workers’ Union. The donation also appeared amongst Ms Ord’s list of 21 August 2007 to which I have referred but, in this instance, there is no evidence that it was authorised by the National Council or the National Executive, retrospectively or otherwise. Indeed, Mr Brown, then the National Vice-President of the HSU, said that it was not so authorised.
4. This donation was made in breach of r 36(f) of the Rules. What I have said in para 130 above applies equally here. The conduct of the respondent involved a contravention of s 285(1) of the schedule.
5. It was submitted on behalf of the applicant, on this occasion, that the making of the donation also involved a contravention of each of ss 286(1) and 287(1). It was said that the fact that there was a breach of the Rules made the respondent’s conduct improper for the purposes of s 287(1) and, I take it, s 286(1)(b). While the donation was perhaps not so egregious as other instances with which I have dealt in these reasons, at the level of principle these submissions must, it seems to me, be accepted. That this was a worthy cause may be accepted, but it was not for the respondent himself to select the causes that the HSU would support, particularly where the presence and activities of the cause selected were centred on the region where he sought to elevate his profile for political reasons. Against the standard articulated in *Byrnes*, I take the view that the making of this donation involved conduct on the part of the respondent that fell short of that which would be expected of a person in his position by reasonable persons with knowledge of the duties, powers and authority of the National Secretary and the circumstances of the case. That gave rise to an impropriety for the purpose of s 287(1). The donation was self-evidently detrimental (in a financial sense) to the HSU and, absent evidence from the respondent, it may be inferred that it was advantageous to himself.
6. In relation to s 286(1)(a), it was submitted that there was “an obvious and serious conflict of interest between the interests of the National Office, and [the respondent’s] personal interests in furthering his own political aspirations in Dobell”. How this would yield a finding under para (a) of the subsection was not made clear. While I accept that there was a conflict of interest, I could not find that the respondent acted otherwise than in good faith in what he actually believed were the best interests of the HSU. It is possible that he simply did not perceive the conflict, and that he genuinely believed that it was in the interests of the HSU to get such kudos as may be assumed to come the way of benefactors in situations such as this. On the other hand, against the *Byrnes* standard, I have reached the conclusion that the purpose of this donation, however worthy at the general level, was not a proper one within the meaning of para (b) of the subsection because it ought not to have been pursued without the authority of the National Council or the National Executive. It must be remembered that the concern of this legislation is with the good governance of registered organisations, and with the conduct of persons assumed to be fiduciaries. These are circumstances, in my view, which provide content to the concept of “proper purpose” in s 286(1)(b).
7. For the above reasons, I hold that, in making this donation of $5,000.00 to the Central Coast Convoy for Kids, the respondent contravened ss 286(1) and 287(1), additionally to s 285(1).
8. On a date which can be placed at 25 November 2006 or thereabouts, the respondent purchased three pieces of framed sporting memorabilia from a concern called “Golden Years Collectables”. He donated them for an auction at a fund‑raising lunch being held by the Dobell FEC at a function centre in Wyoming. Using the CBA card, he paid the sum of $2,050.00 for these items. That sum appeared on the card issuer’s statement received by the HSU in the normal course, and was paid accordingly. The transaction was not disclosed to, or authorised by, the National Council or the National Executive.
9. Although in form a donation, and therefore made in breach of r 36(f) of the Rules, this outlay can only have had the purpose, I would infer in the absence of evidence from the respondent, of advancing his prospects of pre-selection for Dobell. I have said enough elsewhere in these reasons to make it clear that I regard the respondent’s conduct as relevantly giving rise to contraventions of ss 286(1) and 287(1) of the schedule. Because the respondent caused this donation to be made in breach of r 36(f), there was also, I would find, a failure to apply the degree of care and diligence required by s 285(1) and, therefore, a contravention of that provision also.
10. One of the causes in which the respondent took an interest was something described as the “Dads in Education” breakfast. The organisers of that function invoiced the HSU for a donation in the amount of $5,000.00 on 25 June 2007. That was paid (in two payments of $2,500.00 each) by the National Office of the HSU on 22 and 23 August 2007. A further invoice in the amount of $5,000.00 was rendered on 8 October 2007. It was paid on 3 December 2007, while the respondent was still National Secretary of the HSU. Ms Ord, who accepted that it would have been she who processed these payments, was adamant that she would not have done so on no other authority than the receipt of the invoices, which did not obviously relate to services which a trade union would acquire. Although she could not recall it, she was firm in saying that it would have been the respondent who told her to pay the invoices. The payments were neither disclosed to nor authorised by the National Council or the National Executive.
11. I would make no distinction between this donation and that made in respect of the Central Coast Convoy for Kids. For the reasons given in paras 133-135 above, there were also here contraventions of ss 285(1), 286(1) and 287(1) on the part of the respondent.

# DISPOSITION OF THE PROCEEDING

1. In her Second Further Amended Originating Application, the applicant seeks the imposition of penalties for the contraventions of ss 285, 286 and 287 of the schedule which were alleged, and the making of orders for the payment of compensation to the HSU. I shall list the proceeding to hear the parties upon these outstanding aspects of the litigation. I shall also hear the applicant on her application for declarations, although it should not be assumed that a remedy of that kind would follow as a matter of course from the fact that I have made the various findings set out in these reasons.

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| I certify that the preceding one hundred and forty (140) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup. |

Associate:

Dated: 11 September 2015