FEDERAL COURT OF AUSTRALIA

Australian Workers’ Union v Registered Organisations Commissioner (No 9) [2019] FCA 1671

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| File number: |  |
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| Judge: | **BROMBERG J** |
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| Date of judgment: | 11 October 2019 |
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| Catchwords: | **INDUSTRIAL LAW -** *Fair Work (Registered Organisations) Act 2009* (Cth) (“**RO Act**”): s 331(2), power of Commissioner of Registered Organisations to conduct an investigation as to whether a civil penalty provision has been contravened if satisfied reasonable grounds for doing so – where Commissioner commenced investigation as to whether ss 237, 285, 286 and 287 of the RO Act contravened by reason of various donations made by a registered organisation; where reasonable grounds for investigation based on contravention of rules of the registered organisation – consideration of ss 237, 285, 286 and 287 of RO Act dealing with financial reporting and financial management of registered organisations – consideration of s 320 and 321 of RO Act dealing with validation after 4 years of acts in contravention of rules – discussion of legislative history of RO Act.  **ADMINISTRATIVE LAW** – whether Commissioner’s decision to conduct investigation affected by jurisdictional error.  Excess of Power: where s 331(2) power to investigate conferred on Commissioner following amendment to RO Act – whether s 331(2) qualified by a temporal restriction limiting Commissioner’s power to conduct investigations to conduct post-dating conferral of investigation power upon Commissioner – statutory interpretation – discussion of legislative history of RO Act: ss 331, 305 – whether a transitional provision expressly limited Commissioner’s power – whether principle of legality attracted – whether presumption against retrospectivity attracted – whether amendment to s 305 altered operation of provisions listed in s 305 so they no longer operated as civil penalty provisions prior to amendment – discussion of ss 7(2)(b) and (e) of *Acts Interpretation Act 1901* (Cth) – decision to conduct investigation not invalid on this ground.  Formation of requisite state of satisfaction: whether Commissioner validly “satisfied that there are reasonable grounds” for conducting an investigation into whether ss 237, 285, 286 and 287 of the RO Act contravened – discussion of relevant principles for assessing whether formation of a statutory state of satisfaction is affected by jurisdictional error – where reasons are given by the decision-maker which explain the basis for the decision‑maker reaching the requisite state of satisfaction – whether Commissioner’s basis for satisfaction that “reasonable grounds” existed sufficient to induce that state of mind in a reasonable person – where (in relation to ss 285, 286 and 287 but not 237) “reasonable grounds” of Commissioner based on acts suspected to have been done in contravention of the rules of the registered organisation – whether Commissioner’s ground for suspicion can sustain the opinion that there were “reasonable grounds” to conduct an investigation in circumstances where by the operation of s 320 of RO Act the suspected acts in question, if done, must be “taken to have been done in compliance with the rules of the organisation” – whether Commissioner misunderstood law he sought to apply – decision to conduct an investigation into whether ss 285, 286 and 287 of RO Act had been contravened invalid.  Improper purpose: whether decision to conduct an investigation invalidated by improper purpose – whether Commissioner had the improper purpose of aiding in, assisting or promoting an alleged improper political purpose of Minister for Employment (“**Minister**”) to embarrass or politically harm her political opponent – discussion of applicable legal principles regarding improper purpose – holding of improper purpose not demonstrated on the evidence – decision to conduct an investigation not invalid on this ground.  Irrelevant consideration: whether irrelevant consideration taken into account in decision to conduct investigation – where irrelevant consideration alleged is Minister’s alleged political purpose – taking irrelevant consideration into account not demonstrated on the evidence – decision to conduct an investigation not invalid on basis of this ground.  Dictation: whether investigation commenced at direction of Minister – discussion of principles of dictation ground of jurisdictional error – extent to which the repository of the power to investigate conferred by s 331(2) of RO Act may be permissibly influenced or directed by the views of the Minister – whether Minister’s views were a material and operative reason for Commissioner’s decision to investigate – decision to conduct an investigation not invalid on basis of this ground.  **ADMINISTRATIVE LAW** – RO Act ss 335K and 335L: application by Commissioner in course of his investigation for issuance of search warrants – whether search warrants invalidly issued where decision to conduct an investigation invalid. |
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| Legislation: | *Acts Interpretation Act 1901* (Cth): ss 7(2)(b), 7(2)(e)  *Evidence Act 1995* (Cth) s 55, 140  *Fair Work (Registered Organisations) Act 2009* (Cth): ss 5, 140(1), 149(1), 237(1), 285(1), 286(1), 287(1), 305, 305(2), 310(1), 317, 320, 320(1), 320(1)(a)(i), 320(1)(a)(ii), 329AA, 329AB, 329DA, 329DB, 329CA(1), 329DC, 329FA, 330, 330(1), 330(2), 331, 331(1), 331(2), 335D(3), 335K, 335L 337(1)(d)(i), 337AD, 338  *Fair Work (Registered Organisations) Amendment Act 2016* (Cth), Item 130 of Sch 1 |
|  |  |
| Cases cited: | *A v Corruption and Crime Commissioner* [2013] WASCA 288  *Ashby v Slipper* (2014) 219 FCR 322  *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 213 CLR 485  *Australian Conservation Foundation v Forestry Commission* (1988) 19 FCR 127  *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117  *Bailey v Krantz* (1985) 13 IR 339  *Bread Manufacturers of NSW v Evans* (1980) 180 CLR 404  *Briginshaw v Briginshaw* (1938) 60 CLR 336  *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166  *Commissioner for Corporate Affairs v X and Y* [1987] VR 460  *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466  *Cotterill v Minister for Immigration and Border Protection* (2016) 240 FCR 29  *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514  *E and J Gallo Winery v Lion Nathan Australia Pty Ltd* (2010) 241 CLR 144  *Egan v Harradine* (1975) 25 FLR 336  *Emirates v Australian Competition and Consumer Commission* [2009] FCA 312  *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2014) 227 FCR 1  *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33  *Geneff v Peterson* (1986) 19 IR 40 at 76  *George v Rockett* (1990) 170 CLR 104  *Gill v Minister for Immigration and Border Protection* (2017) 250 FCR 309  *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1  *HK Systems Australia Pty Ltd v Debus* (2008) 169 FCR 46  *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34  *Hunter v The Minister for Planning* [2012] WASC 247  *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649  *Jones v Dunkel* (1959) 101 CLR 298  *Lodestar Anstalt v Campari America LLC* (2016) 244 FCR 557  *McKinnon v Department of Treasury* (2006) 228 CLR 423  *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 31 ALR 519  *Minister for Aboriginal Affairs v Peko‑Wallsend Ltd* (1986) 162 CLR 24  *Minister for Foreign Affairs v Lee* (2014) 227 FCR 279  *Minister for Immigration and Border Protection v Haq* [2019] FCAFC 7  *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1  *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437  *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611  *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569  *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8  *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219  *Prior v Mole* (2017) 261 CLR 265  *Prichard v Krantz* (1983) 5 IR 437  *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177  *R v Commonwealth Court of Conciliation Arbitration; Ex parte Barrett* (1945) 70 CLR 141  *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407  *R v Rogerson* (1992) 174 CLR 268  *Re Application for Inquiry into Election in Australian Workers’ Union* (1982) 2 IR 69  *Re McJannet; Ex parte Australian Workers’ Union of Employees, Queensland [No 2]* (1997) 189 CLR 654  *Robertson v City of Nunawading* [1973] VR 819  *Singapore* *Airlines Ltd v Australian Competition and Consumer Commission* [2009] FCAFC 136  *Universal Music Australia Pty Ltd v Australia Competition and Consumer Commission* (2003) 131 FCR 529  *Wong v Commissioner, Australian Federal Police* [2014] FCA 443 |
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| Date of hearing: | 11-15, 18, 25, 28 February 2019 and 1, 8 March 2019 |
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| Registry: |  |
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| National Practice Area: |  |
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ORDERS

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|  | | VID 1151 of 2017 |
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| BETWEEN: | THE AUSTRALIAN WORKERS’ UNION  Applicant | |
| AND: | REGISTERED ORGANISATIONS COMMISSIONER  First Respondent  COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE  Second Respondent | |

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| JUDGE: | BROMBERG J |
| DATE OF ORDER: | 11 october 2019 |

THE COURT ORDERS THAT:

1. The proceeding be listed for further hearing on a date to be fixed and on an estimate of half a day.
2. On or before 14 days prior to the further hearing, the applicant file and serve any further submissions addressing the matters raised by [385]-[391] of the Court’s reasons published on 11 October 2019, as well as a Minute setting out the orders that should be made to give effect to those reasons.
3. On or before 7 days prior to the further hearing, the respondents file and serve any further submissions addressing the matters raised by [385]-[391] of the Court’s reasons, as well as a Minute setting out the orders that should be made to give effect to those reasons.

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

REASONS FOR JUDGMENT

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BROMBERG J:

1. The *Fair Work (Registered Organisations) Act 2009* (Cth) (“**RO Act**”) provides for the formation of associations of employees and associations of employers and for the registration of those associations as registered organisations. In setting out Parliament’s intention in enacting the RO Act, s 5 of that Act records that registered organisations are required to meet standards set out in the Act including standards which “encourage the efficient management of organisations and high standards of accountability of organisations to their members” (s 5(3)(c)). Regulatory processes are provided for by the RO Act and facilitated by the establishment of the office of the first respondent, the Registered Organisations Commissioner (“**Commissioner**”) (s 329AA). The functions of the Commissioner are specified by s 329AB and include to promote “efficient management of organisations and high standards of accountability of organisations and their office holders to their members”; and also to promote “compliance with financial reporting and accountability requirements” of the RO Act (s  329AB(a)).
2. The RO Act also establishes the Registered Organisations Commission (“**Commission**”) (s 329DA). As s 329DB specifies, the Commission consists of the Commissioner and any staff assisting the Commissioner as mentioned in s 329CA(1). The function of the Commission is to “assist the Commissioner in the performance of the Commissioner’s functions” (s 329DC).
3. At all relevant times the Minister with oversight responsibility for the Commission was Senator the Honourable Michaelia Cash, the Minister for Employment (“**Minister Cash**” or “**Minister**”).
4. The applicant (“**AWU**”) is an association of employees registered as an organisation under the RO Act.
5. Section 331 of the RO Act empowers the Commissioner to conduct investigations. Relevantly, s 331(2) provides:

(2) If the Commissioner is satisfied that there are reasonable grounds for doing so, the Commissioner may conduct an investigation as to whether a civil penalty provision (see section 305) has been contravened.

1. On 20 October 2017, Mr Chris Enright, the Executive Director of the Commission and a delegate of the Commissioner decided (“**Decision**”) to conduct an investigation (“**Investigation**”) described by the decision record made by him (“**Decision Record**”) as “an investigation under section 331(2) of the [RO Act] in relation to the National Office and Victorian Branch of [the AWU] as to whether various civil penalty provisions within the meaning of section 305 have been contravened”. Mr Enright’s Decision Record identified the matters that the Investigation related to. Those matters included a donation of $50,000 from the National Office of the AWU to GetUp Limited (“**GetUp**”) during the financial year ending 30 June 2006; a donation of $50,000 from the Victorian Branch of the AWU to GetUp during the financial year ending 30 June 2006; and fifteen other donations made by the AWU in the financial year ending 30 June 2008 to persons or entities associated with the Australian Labour Party (“**ALP**”) (collectively “**Donations**”). The Decision Record identifies that the making of the Donations involved possible contraventions of ss 237(1), 285(1), 286(1) and 287(1) of what was Schedule 1B of the *Workplace Relations Act 1996* (Cth) (“**WR Act**”) and which later became Schedule 1 of the WR Act. Section 237 deals with a financial reporting requirement, namely an obligation imposed on registered organisations to file within a specified time a statement of particulars of any loans, grants or donations made in a particular financial year. Sections 285 to 287 deal with financial probity obligations and impose care, diligence and good faith obligations upon the officers of organisations and protect against the misuse by an officer of his or her office.
2. Those provisions were in the following terms:

**237 Organisations to notify particulars of loans, grants and donations**

(1) An organisation must, within 90 days after the end of each financial year (or such longer period as the Registrar allows), lodge in the Industrial Registry a statement showing the relevant particulars in relation to each loan, grant or donation of an amount exceeding $1,000 made by the organisation during the financial year.

Note: This subsection is a civil penalty provision (see section 305).

…

**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.

Note: This subsection is a civil penalty provision (see section 305).

...

**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.

Note: This subsection is a civil penalty provision (see section 305).

...

**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.

Note: This subsection is a civil penalty provision (see section 305).

1. On 24 October 2017, upon the application of the Commissioner under s 335K of the RO Act, a magistrate issued a warrant authorising officers of the second respondent (“**AFP**”) to search the premises of the National Office of the AWU in Sydney, and a warrant authorising officers of the AFP to search the premises of the Victorian Branch of the AWU in Melbourne (collectively “**search warrants**”). Later that day, officers of the AFP accompanied by representatives of the Commissioner executed the search warrants at each of the National and Victorian Branch offices of the AWU. In the execution of the search warrants, the AFP took possession of various documents.
2. On 25 October 2017, the AWU filed an originating application in this Court seeking relief in relation to the acts and decisions of the Commissioner and the AFP referred to above. In summary, the AWU seeks, among other things:
3. a declaration that the Decision of the Commissioner (by his delegate) to conduct the Investigation is invalid, and orders in the nature of certiorari and prohibition quashing that Decision and prohibiting the Commissioner from giving further effect to it;
4. a declaration that the search warrants are invalid, and an order in the nature of prohibition or an injunction preventing the AFP from giving further effect to either of the warrants; and
5. an injunction requiring the AFP to return to the AWU the documents seized in the execution of the search warrants.
6. The AWU challenged the Investigation on the basis of five grounds which are set out in the AWU’s Grounds of Review dated 13 February 2019, the substance of which are as follows:

**Ground 1 -** That the Commissioner’s decision to conduct the Investigation under s 331(2) of the RO Act was affected by jurisdictional error, because he purported to investigate conduct occurring before 1 May 2017 whereas the provision (s 331(2)) is limited to investigating whether a civil penalty provision has been contravened after 1 May 2017.

**Ground 2 -** That the Commissioner’s decision to conduct the Investigation under s 331(2) of the RO Act was affected by jurisdictional error, because:

(i) it was not open to the Commissioner to be satisfied that there were “reasonable grounds” to conduct an investigation for breach of the AWU’s rules, due to the operation of s 320 of the RO Act;

(ii) further or alternatively, in not adverting to s 320 of the RO Act, the Commissioner misunderstood the law he was to apply.

**Ground 3 -** That the Commissioner’s decision to conduct the Investigation under s 331(2) of the RO Act was affected by jurisdictional error, because a decision was made for an improper political purpose (“**improper purpose**”) of aiding in, assisting or promoting the political purpose of Minister Cash and or members of her office (“**Minister Cash’s political purpose**”) who wanted the AWU to be investigated by the Commissioner in order to discredit, embarrass or politically harm the Honourable Bill Shorten MP (“**Mr Shorten**”).

**Ground 4 -** That the Commissioner’s decision to conduct the Investigation under s 331(2) of the RO Act was affected by jurisdictional error, because the Decision was made taking into account a mandatory irrelevant (political) consideration, namely Minister Cash’s political purpose.

**Ground 5** **-** That the Commissioner’s decision to conduct the Investigation under s 331(2) of the RO Act was affected by jurisdictional error, because the Commissioner impermissibly acted upon the advice or direction of Minister Cash.

1. The AWU also challenged the validity of the search warrants on the basis of three grounds, only two of which were pressed:

**Ground 6 -** That the warrants are invalid because there was no valid investigation and thus no power to obtain a warrant under s 335K of the RO Act;

**Ground 7** **-** That the warrants are invalid because there was no power for the Commissioner to apply for them in connection with the conduct under investigation (which allegedly occurred before 1 May 2017)

1. The AFP did not participate in the trial having requested and obtained leave to be excused. The AWU called a number of witnesses who gave evidence in response to subpoenas. Those witnesses included Mr Enright as well as Mr Mark Lee and Mr Greg Russo each of whom were involved in assisting the Commission. Additionally, the AWU called Minister Cash and members or former members of her staff – Mr Ben Davies and Mr David De Garis. The Commissioner did not call any witnesses. A large number of documents were tendered.
2. In the main, the evidentiary case which the AWU sought to establish was relevant to grounds 3, 4 and 5. The other grounds for review challenging the Investigation (grounds 1 and 2) largely turn on questions of statutory construction and the proper characterisation of the Decision Record. The grounds which challenge the search warrants (grounds 6-7) are largely contingent on whether the AWU succeeds on its challenge to the validity of the Investigation. It is convenient that I deal with each of the grounds of review in turn and address most of the relevant facts when I deal with grounds 3-5, the resolution of which is largely fact dependent.
3. There is no issue that the Court has jurisdiction to hear and determine this application or that it has the power to make the orders and declarations sought. Section 338 of the RO Act confers on the Court jurisdiction in relation to any matter arising under that Act. It is not in contest that each of the challenges made to the validity of the Investigation and the validity of the search warrants raise a matter arising under the RO Act, including because the Commissioner’s power to investigate and the power to issue a warrant are conferred by and owe their existence to the RO Act: *R v Commonwealth Court of Conciliation Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 (Latham CJ); *Re McJannet; Ex parte Australian Workers’ Union of Employees, Queensland [No 2]* (1997) 189 CLR 654 at 656 (Brennan CJ, McHugh and Gummow JJ).

# ground 1 – Can the Commissioner investigate “historical conduct” ocurring prior to 1 May 2017?

## The Competing Contentions and Relevant Legislative Provisions

1. It is not in contest that if it occurred, the conduct the subject of the Investigation occurred during the 2006 and 2008 financial years and therefore prior to 1 May 2017.
2. The AWU contended that the Commissioner’s power to conduct investigations is qualified by a temporal limitation such that, the Commissioner’s power to conduct investigations under s 331(2) of the RO Act is only enlivened where the Commissioner (or the Commissioner’s delegate) is satisfied that there are reasonable grounds to investigate whether a civil penalty provision has been contravened by conduct occurring after 1 May 2017. In this respect, the AWU contended that the Commissioner’s investigative function was prospective in the sense that it is confined to conduct which post-dated the conferral of that function upon the Commissioner and did not extend to historical conduct, that is, conduct which pre-dated the conferral of the function (“**Historical Conduct**”).
3. The first of May 2017 is the date on which Sch 1 of the *Fair Work (Registered Organisations) Amendment Act 2016* (Cth) (“**RO Amendment Act**”) commenced and the date upon which the investigative function in s 331 was conferred upon the Commissioner. Schedule 2 of that Act commenced on 2 May 2017.
4. Prior to addressing the relevant operation of that Act and in order to provide an understanding of the AWU’s contention, it is necessary to outline in broad terms the legislative history of the provisions in the RO Act of relevance to the proper construction of s 331(2). Unless otherwise stated, a reference to the current terms of a legislative provision is an intended reference to the terms of that provision as at the date of the Decision.
5. The principal Commonwealth Act dealing with workplace relations is the *Fair Work Act 2009* (Cth) (“**FW Act**”). That Act received Royal Assent on 7 April 2009 and commenced substantially on 1 July 2009. Its legislative predecessor was the WR Act.Unlike the current arrangement, where provisions relating to registered organisations are dealt with by an Act (RO Act) separate from the principal Act (FW Act), the WR Act itself contained the legislative provisions relating to registered organisations. From 12 May 2003 and until 27 March 2006 provisions relating to registered organisations were dealt with in Sch 1B of the WR Act. On and from 27 March 2006, Sch 1B of that Act was renumbered as Sch 1. Unlike the bulk of the WR Act, Sch 1 was not repealed upon the commencement of the FW Act, but was renamed and became the RO Act (Item 3, Pt 1, Sch 22 of the *Fair Work Act (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (“**FW (TPCA) Act**”).
6. Neither the Commissioner nor the Commission were referred to in Sch 1 of the WR Act. Section 133 of the WR Act provided for the appointment of an “Industrial Registrar” to exercise powers and functions including those conferred by Sch 1 of the WR Act. Section 141 of the WR Act made the same provision for “Deputy Industrial Registrars”. Section 331 of Sch 1 of the WR Act was in the same terms as the current terms of s 331 of the RO Act, save that the provision empowered “a Registrar” (defined as the Industrial Registrar or a Deputy Industrial Registrar) rather than the “Commissioner” to conduct investigations.
7. However, s 305 of Sch 1 of the WR Act was in different terms to its current form in the RO Act. Its current form is as follows:

**305 Civil penalty provisions**

(1) Subject to this Part, an application may be made to the Federal Court for orders under sections 306, 307 and 308 in respect of conduct in contravention of a civil penalty provision.

(2) A ***civil penalty provision*** is a subsection, or a section that is not divided into subsections, that has set out at its foot a pecuniary penalty, or penalties, indicated by the words “Civil penalty”.

(3) For the purposes of this Part, any contravention of a civil penalty provision by a branch or reporting unit is taken to be a contravention by the organisation of which the branch or reporting unit is part.

(4) The Federal Court must apply the rules of evidence and procedure for civil matters when hearing and determining an application for an order under this Part.

1. The terms of s 305 and relevantly s 305(2) in Sch 1 of the WR Act differed because, at that time, a different technique was utilised for identifying which provisions were “civil penalty provisions”. Rather than the current approach in the RO Act of a provision self-identifying itself as a civil penalty provision, in Sch 1 of the WR Act, s 305(2) listed each of the 43 provisions designated to be “civil penalty provisions” and each of those provisions had a note stating “This [section/subsection] is a civil penalty provision (see section 305)”. Accordingly, each of the provisions there listed did not set out at its foot (as is the current approach) the words “Civil penalty”.
2. When Sch 1 of the WR Act was re-named the RO Act and commenced on 1 July 2009, many of the regulatory functions which had been held by the Industrial Registrar or Deputy Industrial Registrar (including the function under s 331 to conduct investigations) became the functions of an office created by s 656 of the FW Act and titled “General Manager of Fair Work Australia” (from 1 January 2013 “General Manager of the Fair Work Commission”) (“**General Manager**”). Those amendments were made by the FW (TPCA) Act, and in particular, by Pt 7 of that Act including by Items 540-546 which had the effect of omitting “Registrar” and substituting “the General Manager” wherever appearing in s 331. No transitional provisions addressed the issue of whether the investigation function then conferred upon the General Manager was subject to any temporal limitations, and in particular, limited to prospective conduct rather than conduct which had occurred prior to the conferral of the investigative function.
3. The FW (TPCA) Act made no amendments to s 237(1), other than substituting “the General Manager” for “the Registrar” and “with FWA” for “in the Industrial Registry” (Item 488 and 489 of Pt 7). No amendments were made to ss 285(1), 286(1) or 287(1).
4. The office of the General Manager remains an office established under the FW Act. However, the functions and powers of that office were altered in 2016 by the RO Amendment Act.
5. The office of the Commissioner and the Commission were established by the insertion of Pt 3A into the RO Act. Additionally, amongst other similar amendments, the RO Amendment Act amended s 331 of the RO Act, dealing with the conduct of investigations, by omitting “General Manager” wherever occurring and substituting “Commissioner” (Item 92, Pt 3A, Sch 1).
6. Also of relevance to the AWU’s contention, to which I will shortly return, Sch 2 of the RO Amendment Act repealed s 305(2) which had contained the list of civil penalty provisions and inserted the current form of s 305(2) set out above. Each of the provisions that had been listed in the former s 305(2) was amended by Sch 2 of the RO Amendment Act to add the words “Civil penalty” as well as a specification of the maximum penalty units applicable to a contravention of that provision.
7. Further, it is relevant to note that the RO Amendment Act conferred on the Commissioner a range of powers in relation to the conduct of an investigation that were not previously available to the General Manager. Those powers, include:
8. the power to require a person to take an oath or make an affirmation (s 335D(1));
9. the power to require a person to answer a question on pain of a criminal penalty (s 335D(3) and s 337(1)(d)(i)); and
10. the power to apply for a warrant which, on issue, would authorise a member of the AFP to obtain documents by executing the warrant upon specified premises with authority to use such force as is necessary and reasonable to enter on or into those premises, search the premises, break open and search anything and take possession of documents (ss 335K and 335L).
11. Division 6 of Pt 4 of Ch 11 of the RO Act imposes criminal sanctions upon a person who fails to comply with, or obstructs, the exercise of these powers.
12. Lastly, Pt 2 of Sch 1 of the RO Amendment Act sets out transitional provisions. Those transitional provisions include some provisions which identify the intended interaction between the functions and powers of the General Manager and those of the Commissioner. In particular, Item 130 of Sch 1 (“**Item 130**”) deals with “a process” begun under the RO Act by the General Manager or the Fair Work Commission (“**FWC**”). It is not in contention that an investigation of the kind contemplated by s 331(2) of the RO Act is a “process” within the meaning of Item 130. Item 130 is in the following terms:

**130 Commissioner to complete certain processes**

(1) This item applies if:

(a) a process begun under the Act is incomplete at the commencement time; and

(b) because of the amendments made by this Schedule, a function or power that the General Manager or the FWC was required, or able, to perform or exercise in relation to the process has become a function or power of the Commissioner.

(2) For the purposes of completing the process:

(a) the Commissioner must or may, as the case requires, perform the function or exercise the power; and

(b) things done by or in relation to the General Manager or the FWC before the commencement time have effect as if they were done by or in relation to the Commissioner.

1. The AWU contended that its proposition that the investigative function conferred upon the Commissioner by s 331(2) does not extend to Historical Conduct, is supported by the following considerations. *First*, that on 1 May 2017, the Commissioner was established “as a new entity with a new suite of coercive powers”. *Second*, that specific and limited provision was made for the Commissioner to perform a function or exercise a power that the General Manager or the FWC was required, or able, to perform or exercise before 1 May 2017. In particular, the AWU relied upon Item 130 providing for the Commissioner to assume only the functions and powers of the General Manager in relation to a process already commenced under the RO Act as at 1 May 2017. *Third*, that there is no provision in either the RO Act or the RO Amendment Act which provides for the Commissioner to generally assume the functions and powers of the General Manager or the FWC under the RO Act as in force before 1 May 2017.
2. Accordingly, the AWU submitted that by making specific and limited provision for the Commissioner to perform a function or exercise a power that the General Manager or the FWC was required, or able, to perform or exercise before 1 May 2017, and not providing for the Commissioner generally to assume the functions and powers of the General Manager or the FWC under the RO Act as in force before 1 May 2017, Parliament must be taken to have intended to limit the power of the Commissioner in relation to conduct that occurred before 1 May 2017.
3. Four further considerations were relied upon by the AWU in support of the Parliamentary intent contended for. The *fourth* and *fifth* considerations were each based on the suite of new powers available in the conduct of an investigation to the Commissioner. The AWU contended that, to read into the RO Act a general power for the Commissioner to conduct an investigation as to whether a civil penalty provision was contravened before 1 May 2017, would undermine the express limitations on the Commissioner’s powers provided for in Item 130 which confined the Commissioner to exercise only the functions and powers of the General Manager. Additionally, the AWU contended that as the exercise of the new powers would involve a substantial intrusion into fundamental common law rights, in the absence of clear language to the contrary, the principle of legality requires that s 331(2) of the RO Act be read as only authorising an investigation as to whether a civil penalty provision has been contravened after 1 May 2017.
4. *Sixth*, the AWU contended that concern about retrospectivity was another factor tending against any expansive or generous interpretation of the Commissioner’s powers and, applying well settled principles of the common law, it ought to be presumed that s 331(2) is not intended to have retrospective effect.
5. *Seventh*, the AWU relied upon the amendments made by the RO Amendment Act to s 305(2) to contend that the Commissioner is only empowered to conduct an investigation as to whether there has been a contravention of a provision that has at its foot the words “Civil penalty” and, that it must follow from the amendments made, that the power is confined to an investigation of a contravention suspected to have occurred after 2 May 2017. The AWU submitted that this is apparent from the ordinary meaning of the statutory text employed.
6. The Commissioner’s response to the construction of s 331(2) contended for by the AWU included the submission that it would result in irrational or absurd outcomes. The Commissioner contended that on that construction, other than for investigations already commenced by the General Manager prior to 1 May 2017, there would be no capacity to investigate suspected contraventions.
7. The AWU had two answers to that submission. *First*, that the function of investigating a contravention by Historical Conduct under s 331(2) remained with the General Manager. For that proposition the AWU relied upon s 7(2)(e) of the *Acts Interpretation Act 1901* (Cth). Section 7(2) relevantly provided:

(2) If an Act, or an instrument under an Act, repeals or amends an Act (the ***affected Act***) or a part of an Act, then the repeal or amendment does not:

(a) revive anything not in force or existing at the time at which the repeal or amendment takes effect; or

(b) affect the previous operation of the affected Act or part (including any amendment made by the affected Act or part), or anything duly done or suffered under the affected Act or part; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the affected Act or part; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.

Any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the affected Act or part had not been repealed or amended.

Note: The Act that makes the repeal or amendment, or provides for the instrument to make the repeal or amendment, may be different from, or the same as, the affected Act or the Act containing the part repealed or amended.

1. *Second* and in the alternative, the AWU contended that if there was a lacuna in the capacity for investigations to be conducted, that was to be rectified by an appropriate statutory amendment rather than by the Court impermissibly filling gaps by straining for a construction thought to be consistent with an assumed legislative purpose. The AWU submitted that the Commissioner’s interpretation departs from the statutory text and that it is unclear how the Commissioner’s interpretation can be reconciled with s 305(2) of the RO Act.

## Deliberation

1. The AWU’s construction of s 331(2) of the RO Act requires that the general words of s 331(2) be read down to impose a temporal limitation not expressly made. For the reasons that follow, none of the considerations relied upon by the AWU justify the construction of s 331(2) contended for.
2. Turning to each of the considerations relied upon by the AWU, the AWU’s contention that as at 1 May 2017 the Commissioner was a “new entity” is of itself, a neutral factor. I will return to the AWU’s reliance upon the Commissioner having “a new suite of coercive powers”. However, the fact that an entity, different to the General Manager in whom the investigative function provided for by s 331 had been reposed was newly established and given that function, does not of itself support the existence of an intended temporal limitation on the exercise of that function.
3. The AWU’s *second* point was that, by Item 130, specific and limited provision was made for the Commissioner to assume the functions and powers of the General Manager. However, on its own, that consideration is also neutral. It is only supportive of the AWU’s construction if the AWU’s *third* point is correct: that there is no provision in either the RO Act or the RO Amendment Act which provides for the Commissioner generally to assume the functions and powers of the General Manager.
4. The fundamental difficulty for the AWU is that s 331(2) of the RO Act is such a provision. It is helpful that the terms of that provision be set out again:

(2) If the Commissioner is satisfied that there are reasonable grounds for doing so, the Commissioner may conduct an investigation as to whether a civil penalty provision (see section 305) has been contravened.

1. The provision provides for the Commissioner to conduct an investigation as to whether a civil penalty provision has been contravened. The capacity there given to conduct an investigation is qualified by the need for the Commissioner to be satisfied that there are reasonable grounds for doing so, but in terms it is not otherwise qualified and, in particular, there is no temporal qualification or limitation expressed.
2. Prior to the amendment made to s 331(2) by the RO Amendment Act on 1 May 2017, the function conferred by that provision operated upon past events – namely, whether a civil penalty provision “has been” contravened. The operative scope of that function could have been limited to suspected contraventions that post-dated the amendment, but it was not. That aspect of the operation of s 331(2) was left textually unchanged. Whilst the language utilised may be characterised as general and thus susceptible to being read down if that course was justified, in the absence of such a justification the words are capable of bearing a sufficiently clear meaning to the effect that the function conferred is temporally unconfined in respect of conduct that may have contravened a civil penalty provision.
3. Item 130 provides no justification for reading down the text of s 331(2). Item 130 only serves to demonstrate the existence of the need for the transitional provisions to address the special case there dealt with. In so far as Item 130 concerns the function conferred upon the Commissioner by s 331(2), it is there to effectuate the performance of that function in particular or special circumstances. In the ordinary case, an investigation under s 331(2) will be conducted by a single entity. Given the change of entities effected by the amendments made to s 331(2) by the RO Amendment Act, a possibility arose that a single investigation may be conducted in part by the outgoing entity (the General Manager) and in part by the incoming entity (the Commissioner). Item 130 addresses such a special case, not only in relation to s 331(2), but in relation to any process begun by the General Manager or by the FWC which was incomplete as at 1 May 2017. That was obviously done to ensure that any process commenced by the General Manager or the FWC was able to be validly completed by the Commissioner.
4. The *fourth* point made by the AWU also relied upon the terms of Item 130. That contention is premised upon a construction of Item 130 that, in exercising powers when completing an investigation commenced by the General Manager, the Commissioner is confined to only exercising the powers formerly held by the General Manager and not any additional powers conferred upon the Commissioner by the RO Amendment Act. For that reason, the AWU contended that the express limitations on the Commissioner’s powers provided for in Item 130 would be undermined if it were intended that the Commissioner, using his new suite of powers, could conduct an investigation as to whether a civil penalty provision was contravened before 1 May 2017.
5. There are a number of difficulties with that proposition. *First*, it is not at all clear that Item 130 confines the Commissioner to the exercise of only those powers formerly held by the General Manager. Item 130(2)(a) provides that in completing the process begun by the General Manager, the Commissioner may exercise a power held by the General Manager. That provision is explicable including because a power exercised by the General Manager may have only been partly exercised as at 1 May 2017. It seems to me that it is that circumstance that Item 130(2)(a) is principally seeking to address, and in doing so, the provision operates to confirm that the Commissioner is reposed with the former powers of the General Manager. It is not necessarily the case that in providing for the Commissioner to complete a process commenced by the General Manager, the provision intends to exclude the exercise of a power held by the Commissioner but not formerly held by the General Manager. On its face, Item 130(2)(a) contains no words of limitation. It is not clear that an implied limitation was intended, although that may well be the better view.
6. However, even if I were to presume that the AWU’s construction is correct, the fact that the Commissioner’s powers are restricted to those that were available to the General Manager, in circumstances where an investigation had already been commenced by the General Manager, does not serve to undermine the proposition that the Commissioner has available to him his full suite of powers in dealing with an investigation commenced by him in relation to Historical Conduct. There is a basis for saying that, in relation to a process already underway, the goal posts ought not to be shifted. The existence of an intention consistent with that objective does not, however, support the idea that in relation to a process not yet commenced a limitation was intended upon the exercise of the powers conferred on the Commissioner.
7. In my view, Item 130 has nothing to say about how s 331(2) was intended to operate in the ordinary case where an investigation is commenced by the Commissioner in the expectation that it will be completed by the Commissioner.
8. The essence of the AWU’s *fifth* point about the principle of legality and the AWU’s *sixth* point about a concern for retrospectivity, is that clear words are required in order for s 331(2) to be read as authorising the Commissioner to conduct an investigation as to whether a civil penalty provision has been contravened by Historical Conduct. I would accept that if the principle of legality or the presumption against retrospectivity were attracted, the words of s 331(2) may need to be read down in the manner contended for by the AWU.
9. It may be accepted in favour of the AWU that the Commissioner has powers, the exercise of which may involve a substantial intrusion into fundamental common law rights sufficient to engage the principle of legality. One such power referred to by the AWU is a power potentially intrusive of the privilege against self-incrimination, to require a person to answer a question on pain of criminal penalty (ss 335D(3); 337(1)(d)(i); 337AD). It may also be accepted that, by reason of the principle of legality, a statutory provision will not be read as authorising an intrusion into fundamental common law rights or freedoms unless it does so in clear language: *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ).
10. However, the AWU did not contend that any particular provision conferring on the Commissioner a power, the exercise of which may intrude upon fundamental common law rights, suffered from an absence of clear language. For instance, the AWU was not contending that s 335D(3) did not, by clear words, empower the Commissioner to compel a person to answer a question despite the possible intrusion into the privilege against self-incrimination. To construe the RO Act as permitting the Commissioner to compel an answer in the context of a s 331(2) investigation into conduct occurring after 1 May 2017 was not said by the AWU to offend the principle of legality. However as I understood it, the AWU was contending that to construe the RO Act as permitting the Commissioner to compel such an answer in the context of a s 331(2) investigation into Historical Conduct would offend the principle.
11. That reveals that the vice that the AWU really had in mind was not an intrusion into common law rights *per se* but an intrusion involving retrospectivity. The AWU’s reliance upon the principle of legality is, in substance, no different to its reliance upon the common law presumption against retrospectivity. Indeed as French CJ, Crennan and Kiefel JJ observed in ***Australian Education Union*** *v Fair Work Australia* (2012) 246 CLR 117, the underlying rationale or assumption upon which the presumption against retrospectivity is based may be viewed as an aspect of the principle of legality. Relevantly, and at [30] their Honours said:

The preceding observations should not be taken as minimising the importance of the rationale underlying the common law principles of construction. In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality, which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law. The existence of those assumptions is, in the words of Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers’ Union*,

‘a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.’

1. I proceed on the basis that both the *fifth* and *sixth* points raised by the AWU turn on whether a presumption against retrospectivity is attracted to support the contention that, absent clear words, the RO Act does not authorise the Commissioner to conduct an investigation into whether a civil penalty provision was contravened before 1 May 2017 (except for the extent provided for in Item 130), or to exercise powers that were not available to the General Manager in the course of such an investigation.
2. In my view, a presumption against retrospectivity is not attracted.
3. There have been many formulations of the common law principle here being addressed. Some of the formulations were relied upon by French CJ, Crennan and Kiefel JJ (at [26]) in *Australian Education Union*:

The common law principles of interpretation require careful consideration of the adjective “retrospective” in its application to statutes. Interference with existing rights does not make a statute retrospective. Many if not most statutes affect existing rights. As Fullagar J said in *Maxwell v Murphy*:

‘I think that the word ‘retrospective’ has acquired an extended meaning in this connection. It is not synonymous with ‘ex post facto’, but is used to describe the operation of any statute which affects the legal character, or the legal consequences, of events which happened before it became law.’

In *Chang Jeeng v Nuffield (Australia) Pty Ltd* Dixon CJ referred to ‘the rules of interpretation affecting what is so misleadingly called the retrospective operation of statutes’. Repeating a passage from his judgment in *Maxwell v Murphy*, the Chief Justice said:

‘The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.’

1. Furthermore, as Winneke CJ, Gowans and Starke JJ said in *Robertson v City of Nunawading* [1973] VR 819 at 824, the presumption against retrospectivity:

is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that…The principle is concerned with the case where the enactment would apply to these antecedent facts and circumstances in such a way ‘as to impair an existing right or obligation’ or ‘as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events’.

1. The AWU did not identify as part of its submission on retrospectivity, existing rights, liabilities or obligations said to be affected by the amendments made by the RO Amendment Act to the functions and powers of the Commissioner in relation to the conduct of an investigation under s 331(2). The submission was undeveloped. In any event, no effect of the requisite kind is apparent.
2. A person whose conduct is the subject of a s 331(2) investigation has no right not to be subjected to such an investigation, let alone a right existing prior to 1 May 2017 to be subjected only to an investigation in which the powers available to the General Manager prior to that time may be utilised. Further, it may be accepted that the exercise of the Commissioner’s powers in relation to an investigation can affect the rights of persons, whether the subject of the investigation or not. For example, the right to silence or rights to property. However, the rights affected are not rights which are changed with effect prior to the commencement of the RO Amendment Act. The effect upon those rights cannot therefore be said to operate retrospectively.
3. As the Commissioner contended, the relevant facts here are not materially different to that considered by Marks J (with whom Murphy and McGarvie JJ agreed) in *Commissioner for Corporate Affairs v X and Y* [1987] VR 460.
4. The respondents in that case were acting as receivers and managers of a particular company between 1978 and 1980. On 1 July 1982, a new power was conferred upon the Commissioner for Corporate Affairs by s 541 of the *Companies (Victoria) Code* (“**Code**”). That provision empowered the Commissioner for Corporate Affairs to apply to a court for an order compelling persons who had taken part or had been concerned in the affairs of a corporation and who had been or may have been guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to that corporation, to be compulsorily examined in relation to the affairs of the corporation concerned. Non-compliance with that requirement gave rise to a criminal sanction. On 12 July 1985, the Commissioner for Corporate Affairs applied to the Supreme Court of Victoria for an order compelling the respondent receivers and managers to be examined in relation to their conduct in 1978-1980.
5. On those facts, the Full Court of the Supreme Court of Victoria rejected the proposition that the presumption against retrospectivity was attracted, holding that s 541 of the Code operated prospectively, stating at 464 “legislation is not properly called retrospective merely because events are by virtue of it the subject of prospective action such as examination under court order”.
6. The *seventh* consideration relied upon by the AWU turned on the amendments made by the RO Amendment Act to s 305(2). Relying on the terms of s 331(2) and in particular that “the Commissioner may conduct an investigation as to whether a civil penalty provision (see section 305) has been contravened”, the AWU contended that reading the definition of “civil penalty provision” provided by s 305(2) into s 331(2), has the consequence that the Commissioner only has the power to conduct an investigation as to whether there has been a contravention of a provision that has, set out at its foot, a pecuniary penalty indicated by the words “Civil penalty”. The AWU contended, by reference to the legislative history of s 305(2) to which I have referred, that it was only after 2 May 2017 that civil penalty provisions in the RO Act had, set out at their foot, a pecuniary penalty indicated by the words “Civil penalty”. It follows, so the AWU contended, that the Commissioner only has the power to conduct an investigation as to whether a provision of the RO Act was contravened after 2 May 2017. Any contravention that occurred before 2 May 2017 would necessarily involve a provision that did not have, set out at its foot, a pecuniary penalty indicated by the words “Civil penalty” and, so the AWU contended, the Commissioner has no power to investigate such a contravention under s 331(2) of the RO as in force at the time the Investigation commenced.
7. The RO Amendment Act introduced new provisions into the RO Act and designated some as civil penalty provisions. That, however, is not material. What is material, is that prior to the commencement of the RO Amendment Act some 43 provisions of the RO Act were designated to be civil penalty provisions and, by reason of s 331(2), a suspected breach of those provisions could have been the subject of a s 331(2) investigation. After the commencement of the RO Amendment Act those provisions continued as civil penalty provisions of the RO Act. The only relevant alteration made by the RO Amendment Act was to the means by which those provisions were identified as civil penalty provisions. Prior to the amendments being made, the provisions were listed in s 305(2) and designated as “civil penalty provisions”. After the amendments were made, those provisions self-identified as civil penalty provisions by containing the words “Civil penalty” in the manner provided for by the current terms of s 305(2).
8. The change made cannot be understood as anything more than the result of the adoption of a different drafting technique. The change was stylistic. There is nothing to support the idea that a change of any substance was intended by the amendment made to s 305(2) of the RO Act by the RO Amendment Act.
9. The AWU’s contention must be that despite the RO Amendment Act continuing the status of those provisions as civil penalty provisions, the RO Amendment Act stripped those provisions of that status in relation to their operation prior to the commencement date of that Act. In other words, the AWU’s contention is that the operation of those provisions was retrospectively altered so that they no longer operated as civil penalty provisions in the period prior to 2 May 2017.
10. The AWU offers no policy rationale to support any discernible Parliamentary intention to effectuate that retrospective alteration, the unameliorated consequence of which would be that persons who had contravened those provisions but who had not been dealt with by 2 May 2017, would effectively be immune, not only from a s 331(2) investigation, but also from proceedings for contraventions of civil penalty provisions in this Court.
11. The AWU’s contention must be rejected, including its reliance, in the alternative, on the inexplicable consequences of its construction being unintended but nevertheless unrectifiable in the absence of legislative amendment.
12. A complete answer to the AWU’s unattractive construction is provided by s 7(2)(b) of the Acts Interpretation Act. That provision relevantly provides that an amendment to an Act does not “affect the previous operation of the affected Act or part”.
13. As Gleeson CJ said in ***Attorney-General******(Q)*** *v Australian Industrial Relations Commission* (2002) 213 CLR 485 at [8]:

Acts of Parliament are drafted, and are intended to be read and understood, in the light of the *Acts Interpretation Act*. A particular Act, and the *Acts Interpretation Act*, do not compete for attention, or rank in any order of priority. They work together. The meaning of the particular Act is to be understood in the light of the interpretation legislation.

1. Prior to the amendments made by the RO Amendment Act, the relevant provisions operated as civil penalty provisions. By reason of s 7(2)(b) of the Acts Interpretation Act the operation of those provisions as civil penalty provisions was unaffected by the amendments made by the RO Amendment Act, and in particular, the amendments made to s 305(2). It ought to be presumed that those amendments were drafted on the basis that they would be read in light of the Acts Interpretation Act. A similar argument was made by the Commissioner by reference to s 7(2)(c) of the Acts Interpretation Act. I need not determine whether that provision would provide for the same result. I am satisfied that s 7(2)(b) is sufficient of itself. There can be no doubt that the application of that provision is not subject to any contrary intention (see s 2(2) of the Acts Interpretation Act).
2. Accordingly, the provisions in question bore the description used in s 331(2) of the RO Act “a civil penalty provision” and continued to bear that description in relation to their operation after 2 May 2017 without being affected by the amendments made to s 305(2) by the RO Amendment Act. The AWU’s seventh point must therefore be rejected.
3. Lastly, in so far as the AWU relied on the operation of s 7(2)(e) of the Acts Interpretation Act to contend that the General Manager still holds the function of conducting a s 331(2) investigation into Historical Conduct, I would conclude that that provision has no application because a contrary intention is demonstrated by the terms of s 331(2) as amended by the RO Amendment Act. That provision, as I have construed it, is clearly inconsistent with the survival of the General Manager’s investigative function: *Attorney-General (Q)* at [52] (Gaudron, McHugh, Gummow and Hayne JJ).
4. A number of contentions were raised by the Commissioner which, in the circumstances, it is unnecessary for me to address. Each of the parties referred to explanatory memoranda and the AWU also referred to amendments made to the commencement date of Sch 1 and 2 of the *Fair Work (Registered Organisations) Amendment Bill 2014.* Whilst I have considered that material, I have found it of little or no assistance in the interpretive task here addressed.
5. For all those reasons, I conclude that s 331(2) empowers the Commissioner, where satisfied that there are reasonable grounds to do so, to conduct an investigation as to whether a civil penalty provision has been contravened. There is no justification for reading into the text of that provision the temporal restriction contended for by the AWU. The Commissioner’s decision to conduct the Investigation under s 331(2) into conduct occurring before 1 May 2017 did not involve any misconstruction of the statutory task conferred upon him by that provision and was not affected by jurisdictional error as contended for by the AWU. Ground 1 of the AWU’s grounds of review must be rejected.

# ground 2 – Was the Commissioner validly satisfied that there were reasonable grounds for conducting the Investigation?

1. Under this ground the AWU challenged the Investigation contending that the condition on the Commissioner’s exercise of power to conduct an investigation under s 331(2), that “the Commissioner is satisfied that there are reasonable grounds for doing so”, was not validly met. There are two limbs to ground 2 but they are best addressed together. Before doing so it is necessary to set out the relevant legislative provisions.

## Relevant Legislative Provisions

1. Section 140(1) of the RO Act provides that a registered organisation “must have rules that make provision as required by this Act”. That is the current requirement but was also the requirement under s 140(1) of Sch 1 of the WR Act which was applicable at the time that each of the Donations were made.
2. Section 149(1) of the RO Act specifies that the rules of a registered organisation must provide conditions in relation to loans, grants and donations made by the organisation. Relevantly, s 149(1) provides:

**Rules to provide conditions for loans, grants and donations by organisations**

(1) The rules of an organisation must provide that a loan, grant or donation of an amount exceeding $1,000 must not be made by the organisation unless the committee of management:

(a) has satisfied itself:

(i) that the making of the loan, grant or donation would be in accordance with the other rules of the organisation; and

(ii) in the case of 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

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

1. At the time of the making of the Donations, a legislative predecessor to s 149(1) (s 149(1) of Sch 1 of the WR Act) specified the same requirements.
2. It is not in contest that at the time the Donations were made, the rules of the AWU (“**Rules**”) relevantly included r 57 which was in the following terms:

(1) A loan, grant or donation, must not be made by the Union or any Branch as the case may be, unless the National Executive of the Union has:

(a) Satisfied itself:

(i) that the making of the loan, grant or donation, would be in accordance with the Rules of the Union; and

(ii) 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

(b) Approved the making of the loan, grant or donation.

(2) Nothing in sub-clause (1) is to affect a Branch’s power to make donations, less than $1,000. However, National Executive may from time to time set a maximum donation figure lower than $1,000.

1. The Decision Record refers to r 57 and, as I will detail shortly, relies upon the possibility that the Donations were not made in accordance with r 57 as a basis for Mr Enright’s satisfaction that “there are reasonable grounds to conduct an investigation”.
2. Section 320(1) of the RO Act is a deeming provision which applies to certain acts done, by a collective body or office-holder of a registered organisation (or by person/s purporting to act as such), after the end of four years from the doing of those acts. Relevantly s 320(1) provides:

**Validation of certain acts after 4 years**

(1) Subject to this section and section 321, after the end of 4 years from:

(a) the doing of an act:

(i) by, or by persons purporting to act as, a collective body of an organisation or branch of an organisation and purporting to exercise power conferred by or under the rules of the organisation or branch; or

(ii) by a person holding or purporting to hold an office or position in an organisation or branch and purporting to exercise power conferred by or under the rules of the organisation or branch; or

the act, election or purported election, appointment or purported appointment, or the making or purported making or alteration or purported alteration of the rule, is taken to have been done in compliance with the rules of the organisation or branch.

1. At the time that the Donations were made, the legislative predecessor of s 320(1) the RO Act (s 89 of Sch 1 of the WR Act) was in similar terms.

## The AWU’s Contentions

1. Under the first limb of ground 2, the AWU contended that the Decision was affected by jurisdictional error because it was not open for Mr Enright to be satisfied that there were reasonable grounds to conduct the Investigation. The second and related basis for ground 2 was that, in not adverting to s 320 of the RO Act or, alternatively by proceeding on an erroneous view of that provision, Mr Enright misunderstood the law he was to apply.
2. The AWU contended that the ground (and only ground) relied upon by Mr Enright in being satisfied that there were reasonable grounds to conduct the Investigation as to whether ss 285(1), 286(1) and 287(1) had been contravened, was that the making of the Donations involved suspected non-compliance with the Rules and in particular r 57. The AWU contended that the basis for Mr Enright’s satisfaction was misconceived. Relying on the operation of s 320 of the RO Act, the AWU submitted that the making of the Donations was “taken to have been done in compliance with the Rules” at the end of the 4 year period after each of the Donations were made and that therefore, at the time of the Decision, there was no possibility of non‑compliance with the Rules in relation to the making of the Donations. Accordingly, so the AWU contended, it was not open for Mr Enright to have reached the state of satisfaction required by s 331(2) and the Decision was therefore affected by jurisdictional error and invalid.
3. The submission is inapplicable to the Decision so far as it concerned the conduct of an investigation into whether s 237(1) was contravened because that aspect of the Investigation had nothing to do with suspected contraventions of the Rules. Nevertheless, the AWU contended that the Decision, as a whole, was invalid. It may be that the AWU intended to say, as its submission did say in a similar context, that the Decision to conduct the Investigation is an integrated whole which cannot be severed without “radically recast[ing] its nature and effect” (*Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [55]).

## Deliberation – The Relevant Principles

1. It was not in contest that the state of satisfaction required by s 331(2) is a condition upon the exercise of the function or power there conferred. Nor was it in contest that whether the state of satisfaction required by s 331(2) exists, is a question amenable to judicial review. The applicable principle for assessing whether the formation of a statutory state of satisfaction is affected by jurisdictional error was recently stated by Kiefel CJ, Gageler and Keane JJ in ***Hossain*** *v Minister for Immigration and Border Protection* [2018] HCA 34. At [34] their Honours said that the “[f]ormation of the [decision-maker’s] state of satisfaction or of non‑satisfaction is in each case conditioned by a requirement that the [decision-maker] … must proceed reasonably and on a correct understanding and application of the applicable law”. For that proposition their Honours referred to a number of authorities including the survey of authorities provided by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, in which (at [133]) his Honour relied upon the following seminal observations of Latham CJ in *R v Connell; Ex parte* ***Hetton Bellbird*** *Collieries Ltd* (1944) 69 CLR 407 (at 430 and 432):

[W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.

…

It should be emphasized that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.

1. In *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [57], Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ, in support of their observation that the satisfaction required of the decision-maker by the legislative provision there under consideration had to be “formed … reasonably and on a correct understanding of the law”, said (quoting from *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189) that such a statutory condition had to be exercised by the decision-maker “according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself”.
2. Reasonableness as a condition of an opinion or state of satisfaction bears a relationship to reasonableness as a condition upon the exercise of a discretionary power, as formulated in *Minister for Immigration and Citizenship v* ***Li***(2013) 249 CLR 332. That relationship was explained by Gageler J in *Li* at [90]:

Implication of reasonableness as a condition of the exercise of a discretionary power conferred by statute is no different from implication of reasonableness as a condition of an opinion or state of satisfaction required by statute as a prerequisite to an exercise of a statutory power or performance of a statutory duty. Each is a manifestation of the general and deeply rooted common law principle of construction that such decision‑making authority as is conferred by statute must be exercised according to law and to *reason* within limits set by the subject-matter, scope and purposes of the statute.

1. However, as Gageler J observed in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [53], reasonable grounds as a condition of an opinion or state of satisfaction imposes a condition on the exercise of power on the repository of a “higher standard” than that imposed by the requirement that a statutory power be exercised within the bounds of reasonableness as an implied condition of the statutory conferral of the power.
2. His Honour relevantly referred to ***Prior*** *v Mole* (2017) 261 CLR 265 where the applicable principles on reasonableness as a condition of an opinion or state of satisfaction were helpfully summarised by Gordon J at [98]-[100] in the context of the formation of a predictive opinion:

[98] When a statute prescribes that there must be “reasonable grounds” for a state of mind, it requires the existence of facts sufficient to induce that state of mind in a reasonable person. It is an objective test. The question is not whether the relevant person thinks they have reasonable grounds.

[99] In explaining the connection between the “reasonable grounds” and the requisite “belief”, this Court in *George v Rockett* stated:

‘The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof.’

[100] Belief is not certainty. ‘Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture’.

1. *Prior* concerned s 128(1) of the *Police Administration Act* (NT). Under that section, a police officer was given the power to apprehend a person without a warrant where the police officer had reasonable grounds for believing, inter alia, that the person was intoxicated; was in a public place; and because of the person’s intoxication, the person may intimidate, alarm or cause substantial annoyance to people or is likely to commit an offence.
2. In that context, Gordon J continued at [101]:

Those considerations are important in this appeal. The matters set out in s 128(1)(c)(iii) and (iv) are the “subject matter” of the belief. That subject matter necessarily involves an element of opinion and judgment – a predictive opinion and judgment about what the person (here, Mr Prior) *may* or is *likely* to do in the future. That opinion and judgment is related to, but separate from, the objective facts and circumstances. Together, they constitute all of the relevant circumstances for assessing the reasonableness of the grounds. Accordingly, when considering whether there were reasonable grounds for the relevant belief for the purposes of s 128(1)(c)(iii) and (iv), matters of both fact and opinion must be considered.

1. Further, as Gageler J stated in *Prior* at [27] “[t]he Court must arrive at its own independent answer through its own independent assessment of the objective circumstances which the [decision-maker] took into account”; see further *George v Rockett* (1990) 170 CLR 104 at 114‑117 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). The circumstances that were taken into account by the decision-maker may or may not be set out in the reasons for decision provided by the decision-maker. If reasons are given by the decision‑maker which explain the basis for the decision-maker reaching the requisite state of satisfaction or opinion, it is to those reasons that a supervising court should look to understand how the state of satisfaction or opinion was reached. That is the approach taken by a supervising court in the related field of legal unreasonableness. I can see no reason why the same approach is not apposite.
2. As was stated by Allsop CJ, Robertson and Mortimer JJ in *Minister for Immigration and Border Protection v* ***Singh*** (2014) 231 FCR 437 at [47]:

where there are reasons for the exercise of a power, it is those reasons to which a supervising court should look in order to understand why the power was exercised as it was. The “intelligible justification” must lie within the reasons the decision-maker gave for the exercise of the power — at least, when a discretionary power is involved. That is because it is the decision-maker in whom Parliament has reposed the choice, and it is the explanation given by the decision-maker for why the choice was made as it was which should inform review by a supervising court

See further *Minister for Immigration and Border Protection v Haq* [2019] FCAFC 7 at [35] (Griffiths J with whom Gleeson J agreed) and at [91]-[97] (Colvin J).

## Deliberation – Application of the Principles to the Facts

1. Applying that approach and looking to the reasons given by Mr Enright for the Decision, for the reasons I will expand upon, I have come to the view that the only circumstance or ground relied upon by Mr Enright to form the opinion that there were reasonable grounds to conduct the Investigation as to whether ss 237(1), 285(1), 286(1) and 287(1) of the RO Act had been contravened was that there was a basis for suspecting that each of those provisions had been contravened and, further that Mr Enright’s only basis for the suspicion that ss 285(1), 286(1) and 287(1) had been contravened was that the Donations were not made in accordance with the Rules.
2. In relation to the suspected contraventions of s 237(1) it was not contested and, objectively considered by reference to the Decision Record, it is clear that Mr Enright had a reasonable basis for suspecting that, by the failure of the AWU to lodge a statement of particulars of donations made in the 2006 and 2008 financial years within 90 days of the end of each of those years, s 237(1) was contravened. It follows that it was open to Mr Enright to be satisfied that there were reasonable grounds to conduct an investigation as to whether s 237(1) “has been contravened” and the conduct of the Investigation for that purpose was not invalid because the requisite state of satisfaction did not exist.
3. However, in relation to the conduct of the Investigation for the purpose of investigating whether ss 285(1), 286(1) and 287(1) had been contravened, I have arrived at the opposite conclusion. In summary, that is because I have concluded that Mr Enright’s suspicion that various acts had occurred in contravention of ss 285(1), 286(1) and 287(1) was predicated upon the view that those acts, if done, were done in breach of the Rules and that, in each case, the breach of the Rules was the basis for the suspected contravention. It was for that reason that Mr Enright formed the opinion that there were reasonable grounds to conduct an investigation as to whether those provisions had been contravened.
4. Taking into account matters of both fact and opinion and objectively considered, the basis relied upon by Mr Enright to ground his suspicion could not sustain the opinion that there were reasonable grounds to conduct an investigation as to whether those provisions had been contravened. There was no basis for Mr Enright’s opinion that the suspected contraventions would be grounded in acts done in contravention of the Rules. That is because, by the operation of s 320 of the RO Act (which Mr Enright regarded as inapplicable), the suspected acts in question, if done, must be “taken to have been done in compliance with the [Rules]”. The circumstances relied upon by Mr Enright to form his opinion, were insufficient to induce a reasonable person to form the opinion that there were reasonable grounds to conduct an investigation as to whether ss 285(1), 286(1) or 287(1) had been contravened.
5. Consequently, the condition upon the exercise of the power given by s 331(2) for conducting an investigation as to whether ss 285(1), 286(1) and 287(1) had been contravened, was not satisfied. The statutory power to do so was not engaged and the Commissioner’s investigation in relation to those provisions exceeded the statutory power conferred by s 331(2) upon the Commissioner. To that extent, the AWU has established jurisdictional error under ground 2.
6. I turn then to provide the detail for the conclusion just expressed.
7. As Allsop CJ said in *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 (at [11]), in the related context of legal unreasonableness, the boundaries of power may be difficult to define and an evaluation of whether a decision has been made within those boundaries “is conducted by reference to the relevant statute, its terms, scope and purpose”. It is best therefore to commence with observations about the RO Act, the investigative task conferred upon the Commissioner by s 331 and any evident purpose for the imposition of the condition on the exercise of that power expressed by s 331(2).
8. The functions of the Commissioner specified in s 329AB as well as the terms of s 317, which provides a simplified outline of Chap 11 (including for Pt 4 where s 331(2) is found), make it clear that an important part of the Commissioner’s function is regulatory and concerned with compliance. The Commissioner’s statutory functions are concerned with contraventions or possible contraventions of specified provisions of the RO Act. The Commissioner is empowered to apply to this Court for orders, including for the imposition of civil penalties (s 310(1)). It is evident that, to facilitate that compliance function, the Commissioner has been given the power to make inquiries and the further power to conduct investigations.
9. Section 330 addresses the Commissioner’s discretionary power to make inquiries. Section 330(1) empowers the Commissioner to make inquiries as to whether Pt 3 of Chap 8 of the RO Act (dealing with records and accounts) is being complied with, including the reporting guidelines and regulations made under and for the purpose of that Part and rules of a “reporting unit” of a registered organisation relating to its finances or financial administration. Section 330(2) provides that the Commissioner “may make inquiries as to whether a civil penalty provision (see section 305) has been contravened”.
10. Subsections 331(1) and (2) are, save for one aspect of significance, in almost identical terms to ss 330(1) and (2). The difference is that the Commissioner need not be “satisfied that there are reasonable grounds for doing so” when exercising his discretion to conduct an inquiry but must be so satisfied when exercising his discretion to conduct an investigation. The reason for that disparity in treatment is, I think, revealed by the nature of the powers made available to the Commissioner for the purposes of making inquiries as compared to the powers available to the Commissioner to conduct an investigation. The difference in approach is most apparent from the terms of s 330(3) which, in relation to inquiries, provide (emphasis added):

(3) The person making the inquiries may take such action as he or she considers necessary for the purposes of making the inquiries. However, he or she *cannot compel a person to assist with the inquiries under this section*.

1. In contrast to the restriction imposed by that provision, in the conduct of an investigation under s 331 the Commissioner has available a wide array of coercive powers with potential consequences for the rights of others, including upon fundamental common law rights as discussed at [51]. As Gleeson CJ and Kirby J observed in ***McKinnon*** *v Secretary, Department of Treasury* (2006) 228 CLR 423 at [9], the conferral of statutory powers of search and seizure and arrest are often conditioned by the requirement of reasonable grounds for a state of mind such as a suspicion or belief.
2. The comparison with s 330 reveals a relation between the coercive powers conferred on the Commissioner and the limitation imposed on the investigative function for which those powers have been conferred. That relation suggests that the purpose of imposing upon the Commissioner the limitation upon his discretion to commence an investigation is not merely concerned with the utility of the investigation. It may well be that utility, economy, efficiency and even propriety of purpose are not considerations that the limitation has in mind at all. Considerations of that kind are obviously relevant to whether a statutory discretion involving time, effort and resources ought to be exercised and need not be spelt out. The requirement that the power conferred be exercised within the bounds of reasonableness is an implied condition of the conferral of the power.
3. The capacity given to the Commissioner to access coercive power through an investigation, and the fact that s 331 expressly imposes a limitation on the discretion and does so on the standard that the power is only to be exercised on “reasonable grounds”, are indicative of a protective purpose for the limitation on power in s 331(2). That limitation is to be understood as harbouring a concern for the rights ordinarily enjoyed by others and the capacity for those rights to be adversely affected by the conduct of an investigation.
4. Further, coercive powers are not usually conferred on fishing expeditions and the language of s 331(2) is specific. The Commissioner is not at large. The purpose of the investigation is to determine “whether a civil penalty provision has been contravened”. The subject of the power conferred is particular conduct which may have resulted in a particular contravention of a civil penalty provision.
5. All of those considerations should be kept in mind in the assessment of whether a particular investigation has been commenced within the boundaries of the power conferred by s 331(2).
6. The nature of the state of satisfaction required by s 331(2) was in contest. The AWU contended that there will be reasonable grounds to conduct an investigation to which s 331(2) refers if there are sufficient facts to satisfy a reasonable person that:

* there are reasonable grounds to believe that a civil penalty provision may have been contravened; and
* there are reasonable grounds to believe that the investigation will assist the Commissioner to establish that a civil penalty provision has been contravened.

1. The Commissioner contested the state of mind said by the AWU to be necessary for reasonable grounds to conduct an investigation to exist. In particular the Commissioner denied that he was required to have any state of mind about whether a civil penalty provision “had been contravened”. The Commissioner contended that the only question to be answered in the formation of the requisite opinion was “whether it was reasonable to investigate whether a civil penalty provision has been contravened”. Or “was it reasonable to think it appropriate to investigate” whether a civil penalty provision had been contravened. Those formulations, however, merely restated the criterion in non-statutory language. Those restatements did not assist in identifying the content of the criterion, that is, the considerations that need to be taken into account. In so far as the Commissioner’s submissions dealt with content, he only identified considerations that were said to be not necessary including, as I have detailed already, that the Commissioner have a state of mind as to whether a civil penalty provision had been contravened. Considerations said to be not necessary or not relevant, were unhelpfully supported in the Commissioner’s submissions by reference to authorities dealing with a different legislative provision with insufficient equivalence to s 331(2) (s 155 of the former *Trade Practices Act 1974* (Cth); *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 31 ALR 519 at 529-30; *Emirates v Australian Competition and Consumer Commission* [2009] FCA 312 at [103]; *Singapore* *Airlines Ltd v Australian Competition and Consumer Commission* [2009] FCAFC 136 at [37]).
2. I would agree with the Commissioner’s submission that the limitation on the exercise of power imposed by s 331(2) is directed at whether there are reasonable grounds to conduct an investigation. However, that acceptance does not deny the proposition that a necessary condition for satisfaction that there are reasonable grounds to conduct the investigation requires the Commissioner to have a state of mind as to whether the provision being investigated has been contravened. That such a state of mind is necessary for the Commissioner to “proceed reasonably”, and that the state of mind be at least a reasonable suspicion of a contravention, seems to me to be implicit from the text, context and purpose of the limitation to which I have already referred.
3. However, whether or not a suspicion that a civil penalty provision has been contravened is a necessary state of mind in the formation of the opinion required by s 331(2) is not a matter I need to determine. In determining whether Mr Enright failed to “proceed reasonably” in the formation of the satisfaction required by s 331(2), I need only assess whether the opinion was reasonably formed by reference to the reasons or grounds relied upon by Mr Enright. Whether or not he was required by the statute to do so, Mr Enright unquestionably held a state of mind about whether ss 237(1), 285(1), 286(1) and 287(1) had been contravened and relied upon that state of mind in forming the opinion that he did. The Decision Record demonstrates that that state of mind was the only ground relied upon by Mr Enright in being satisfied that there were reasonable grounds to commence an investigation into whether each of ss 237(1), 285(1), 286(1) and 287(1) had been contravened. In those circumstances whether it was necessary for Mr Enright to have had that state of mind is beside the point. The real question is whether by acting on that state of mind for the reason that he did, Mr Enright “proceeded reasonably”. The lack of a rational basis for the state of mind upon which Mr Enright’s satisfaction was based, would call into question whether Mr Enright “proceeded reasonably” and whether the opinion required by s 331(2) had really been formed.
4. Before turning to a further analysis of the Decision Record, a copy of which is attached to these reasons as **Appendix 1**, I need to deal with its provenance. There is no statutory obligation upon the Commissioner (or his delegates) to provide reasons for a decision, including a decision to conduct an investigation under s 331. Although not obliged to do so, Mr Enright deposed that it was his practice within the established processes of the Commission, to create a decision record in relation to any “significant decision”. He regarded a decision to commence an investigation as a significant decision. Mr Enright relevantly stated that “its our practice to – for me to do a case decision [record] setting out what the decision is and why I’ve made it”. I observe that the Decision Record adopts that structure. It is separated into two parts, the first is headed “Decision” and the second “Reasons”.
5. The intended accuracy and comprehensiveness of the Decision Record, as a record of Mr Enright’s reasons including as to the “reasonable grounds” relied upon by him, was also dealt with in Mr Enright’s evidence. A number of drafts of the Decision Record were in evidence. Mr Enright explained that staff of the Commission had assisted him in making the Decision including in preparing various drafts of the Decision Record. He said that preparatory material, including those drafts, were put together to assist him to come to a final decision and that the process was designed to make sure that “all of the relevant reasonable grounds” are identified. Mr Enright said this (emphasis added):

We were preparing drafts or – that’s what we do. *We prepare drafts of those to make sure that they crystallise all of the relevant reasonable grounds, for example, that I need to commence an investigation under 331*. We prepare notices, draft notices to produce in most cases, case decisions, investigation plans, those sorts of documents. So all of those in – when we get advanced – to an advanced level that’s possible to conduct an investigation, we continue to develop those until I’m satisfied that all the materials are – fall into place. I make a decision, if I do. Often I won’t, but I will make a decision not to do anything based on that we haven’t got enough, but when I do make the decision then we finalise the documents and commence the investigation.

1. That the Decision Record was intended to set out all of the grounds regarded by Mr Enright as constituting the “reasonable grounds” to conduct the Investigation and upon which his satisfaction was based, is underscored by other evidence.
2. Mr Enright deposed that the Commissioner often obtains legal advice, including in relation to advice about “our reasonable grounds”. There was evidence that in this case and for the preparation of the Decision Record the advice of Mr Chris O’Grady QC was obtained. The Commissioner tendered a memorandum of Mr O’Grady’s advice (“**Memorandum of Advice**”) dated 4 October 2017, some two weeks prior to the Decision. Mr Enright explained that he got the advice because he wanted Senior Counsel’s advice “about whether or not there were reasonable grounds to commence an investigation in this case, and whether the Commissioner’s discretion ought to be exercised to conduct the investigation” as well as to ensure that the legal bases for conducting such an investigation were properly considered.
3. It is evident from the Memorandum of Advice that the matters that Mr O’Grady had been requested to provide advice about included whether “there are reasonable grounds to exercise the Commission’s powers to commence an investigation under s 331”. Mr O’Grady identified the proposed investigation as relating to “possible contraventions of the RO Act associated with donations made by the [AWU] in the period 2005-2007”. I shall return to Mr O’Grady’s advice in more detail shortly, but it is useful to record now that in compiling a list of matters “suggesting that there may have been a contravention of the predecessor provisions warranting investigation”, Mr O’Grady referred to matters in relation to which either Mr Shorten or the Branch Secretary of the Victorian Branch of the AWU at the relevant time, Mr Cesar Melhem, are specifically mentioned. Those matters, which I will detail later, are not referred to at all in the Decision Record.
4. Mr Enright’s evidence was that the grounds considered relevant in reaching the satisfaction that he did were his own. When it was pointed out to him that the Decision Record made no reference to the advice he had received from Mr O’Grady and he was asked why that was so, Mr Enright said this:

I took into account the advice that I received from counsel, but this is my decision. These are decisions based on my – reasonable grounds that I [formed] a view about and, therefore, it’s my decision, taking into account a range of relevant factors, including the advice from counsel who asserted that the – there were grounds to commence the [Investigation].

1. Turning back to the content of the Decision Record in order to examine what grounds were relied upon by Mr Enright, it is apparent that there are no considerations relied upon for the satisfaction reached by Mr Enright other than considerations that he perceived supported a suspicion that either ss 237(1), 285(1), 286(1) and 287(1) had been contravened. So much is apparent from the matters set out on the second and third pages of the Decision Record which are preceded by the words “In my view, the reasonable grounds to conduct an investigation flow from the following”.
2. No matters going to other considerations are raised by the Decision Record. That is not an intended criticism. It merely demonstrates that Mr Enright construed s 331(2) as I have, recognising that his assessment of whether there were reasonable grounds had to focus upon whether there was a basis for suspecting a contravention of particular civil penalty provisions. As his conclusions at the foot of the Decision Record show, Mr Enright was of the view that there were reasonable grounds for conducting the Investigation because:

e i. there are reasonable grounds for suspecting the National Executive may have neither satisfied itself that the GetUp donations were made in accordance with the [Rules] nor approved the GetUp donations. The failure to report these and other donations made during the financial year ending 30 June 2008 [an intended reference to 30 June 2006] within the required statutory timeframes is also something that warrants investigation.

e ii. there are reasonable grounds for suspecting that the National Executive may have resolved to delegate its power to approve the political donations relating to the 2007 Federal Election. This further [gives] rise to reasonable grounds for suspecting that the National Executive may not have approved the aforementioned political donations or satisfied itself that the donations were made in accordance with the [Rules]. The failure to report these and other donations made during the financial year ending 30 June 2008 within the required statutory time frame is also something that warrants investigation.

1. When those conclusions are read in the context of all that preceded them, it is clear that the first sentence of each sub-paragraph is addressing the basis for Mr Enright’s suspicion that ss 285(1), 286(1) and 287(1) were contravened, whilst the second sentence of each sub‑paragraph addresses the basis for his suspicion in relation to contraventions of s 237(1).
2. Section 237(1) imposes an obligation upon a registered organisation to, within 90 days after the end of each financial year (or such longer period as the Commissioner allows), lodge with the Commissioner a statement showing the relevant particulars in relation to each loan, grant or donation of an amount exceeding $1,000 made by the organisation during the financial year. The requisite particulars are specified in ss 237(5) and (6).
3. That provision, as Mr Enright recognised, imposes an obligation upon a registered organisation to lodge within the required statutory timeframe the particularised statement specified.
4. The basis for Mr Enright’s suspicion that s 237(1) was contravened is made plain by the content of para c on the third page of the Decision Record as follows:

A review of the Loans, Grants and Donations Statements lodged by the National Office and the Victorian Branch of the AWU for the financial year ending 30 June 2006 and by the National Office for the financial year ending 30 June 2008 suggests that these statements were in each case lodged late in contravention of s. 237.

1. There is little doubt therefore, and the AWU did not contend to the contrary, that it was open for Mr Enright to come to the view, by reference to the consideration he relied upon, that there was a reasonable basis for suspecting contraventions of s 237(1) and that therefore, there were reasonable grounds for conducting an investigation as to whether s 237(1) was contravened by the AWU in the financial years ending 30 June 2006 and 30 June 2008.
2. However, whether objectively considered a reasonable basis existed for Mr Enright’s suspicion that ss 285(1), 286(1) and 287(1) were contravened, is far more problematic.
3. Broadly stated, s 285(1) requires an officer of a registered organisation to exercise powers and discharge duties with the degree of care and diligence that a reasonable person would do in the same circumstance occupying the same office and with the same responsibilities. It may be accepted, and the AWU did not contend to the contrary, that it is at least arguable that in exercising the powers and discharging the duties of his or her office an officer of an organisation may contravene s 285(1) because, in so doing, the officer acted in contravention of the rules of the registered organisation. In other words, it may be accepted that it is at least arguable that an act of that kind done in contravention of the rules of an organisation can, by reason that it was done in contravention of the rules, be the ground or basis for a finding of a contravention of s 285(1)
4. Of course, many other acts including acts done in compliance with the rules of an organisation are also capable of grounding a contravention of s 285(1).
5. Section 286(1) has two limbs. Broadly stated, it requires that an officer of an organisation must exercise his or her powers and discharge his or her duties in good faith, in what he or she believes to be the best interests of the organisation, and for a proper purpose. An exercise of power or the discharge of an officer’s duties not done in accordance with the rules of the organisation may, by reason of the contravention of the rules itself, arguably provide a ground for a finding that s 286(1) has been contravened. An act done without the authority of the rules is arguably capable of being regarded as an act not done “for a proper purpose”. Again, it is obvious that s 286(1) may be contravened by a range of acts including an act taken in accordance with the rules of the organisation.
6. Section 287(1) requires an officer of an organisation not to improperly utilise his or her position to either gain an advantage for himself or herself or for someone else or cause detriment to the organisation or to another person. It is not immediately apparent how a contravention of the rules of the organisation would of itself contravene s 287(1), unless the contravention of the rules of an organisation was itself the means by which an advantage was gained or a detriment caused. It was not contended by the AWU that an act done in contravention of the Rules was not capable of founding a ground of contravention of s 287(1). For present purposes, I will proceed on the basis that such a contravention is at least arguable. As stated in relation to ss 285(1) and 286(1), a contravention of s 287(1) may be grounded in a multitude of different acts and the provision may be infringed despite the infringing act being in compliance with the rules of the organisation concerned.
7. A fair reading of the Decision Record shows that Mr Enright suspected that a number of acts had occurred which may have contravened each of ss 285(1), 286(1) and 287(1). The acts are identified as acts of the “National Office” or of the “Victorian Branch” of the AWU or of the “National Executive”. The reference to “National Office” is presumably a reference to the office of the National Executive of the AWU. Specifically, the acts are described in the Decision Record under the heading “Decision”, as:
8. a “donation of $50,000 from the National Office of the AWU to [GetUp] during the financial year ending 30 June 2006”;
9. a “donation of $50,000 from the Victorian Branch of the AWU to GetUp during the financial year ending 30 June 2006”;
10. a number of “separate donations from the National Office of the AWU to a range of entities during the financial year ending 30 June 2008” (being the donations listed at para 3 of the Decision Record); and
11. the “alleged passing of a resolution in either 2006 or 2007 by the National Executive to delegate its powers to approve loans, grants and donations over $1,000 ... (and any related actions or omissions of the National Executive)”.
12. No particular officers or employees are named in the Decision Record as being the actors in relation to any of the acts relied upon by Mr Enright. However, it may be inferred that what Mr Enright had in mind was one or more of those officers or employees working in the National Office of the AWU in relation to the acts described at (i) and (iii) above; one or more of the officers or employees of the Victorian Branch of the AWU in relation to the act described at (ii) above; and the officers of the National Executive in relation to the acts described at (iv). The acts referred to at (i), (ii) and (iii), being the Donations, must have been perceived by Mr Enright to be acts involving the expenditure of the funds of the AWU. The primary act referred to at (iv) must have been regarded as an exercise of the power given to the National Executive to make resolutions. It is not clear what Mr Enright meant by “related actions or omissions” but, read in context, the better view is that he meant the exercise or failure to exercise the powers of the National Executive.
13. In relation to those acts, the only concern recorded in the Decision Record about them is that they may not have been done in accordance with the Rules. For the acts of expenditure (the making of the Donations), read fairly, the Decision Record is to be understood as recording Mr Enright’s suspicion that those acts were done in contravention of the Rules because the National Executive had not, in accordance with the requirements of r 57, satisfied itself that the Donations would be in accordance with the Rules and had not approved the Donations. In relation to the acts of the National Executive described at (iv) above, understood by reference in particular to the content of the first two sentences of para e ii (set out above), Mr Enright considered that the possibility that the National Executive had resolved to delegate its power to approve the donations described at (iii) above, supported his suspicion that those donations were made in contravention of the Rules. Additionally, there is some suggestion in the Decision Record (from the reference made to s 149(1) of the RO Act) that Mr Enright suspected that the act of resolving to delegate the approval function under r 57, may itself be a contravention of the Rules.
14. Whilst the whole of the Decision Record needs to be considered, those conclusions are most apparent from a consideration of paras 1, 2 and 3 of the Decision Record and from the matters identified on pages 2 and 3, said to be the matters from which “the reasonable grounds to conduct an investigation flow”. Those matters include the specific reference to s 149(1), the setting out of the terms of r 57 including the emphasis given to those parts considered of primary relevance, the content of para e (referred to above) and also by the content of para d which identified the source of Mr Enright’s concern as follows:

d. It has been reported in various media articles that the GetUp donations and the political donations relating to the 2007 Federal Election were not approved by the National Executive in accordance with Rule 57. I have invited the AWU to provide documents voluntarily as to whether each donation was approved by the National Executive in accordance with Rule 57, but the AWU has failed or refused to do so.

1. The Decision Record is sufficiently clear in demonstrating that the basis for Mr Enright’s suspicion that ss 285(1), 286(1) and 287(1) had been contravened was that the Rules had been contravened. However, beyond the Decision Record there was also extensive evidence of communications, either made directly by Mr Enright or made with his approval, which reported the basis for the Investigation as the making of donations not approved in accordance with the Rules (see [234], [246] and [257] below).
2. Further still and serving to underscore Mr Enright’s focus on suspected contraventions of the Rules, the evidence demonstrated that Mr Enright was selective in relation to the matters he chose to rely upon to form the opinion that he was satisfied that there were reasonable grounds to conduct an investigation as to whether ss 285(1), 286(1) and 287(1) had been contravened. There were two circumstances in particular which it appears Mr Enright chose not to rely upon. Each of those circumstances were not directly concerned with a contravention of the AWU’s Rules and each was suggested to Mr Enright by Mr O’Grady’s Memorandum of Advice as providing a basis for a reasonable person to form the view that there were potential contraventions of provisions of the RO Act warranting investigation.
3. In para 29 of his advice, Mr O’Grady set out what he characterised as “good grounds for suspecting” that a reasonable person could form the view that there were potential contraventions of provisions of the RO Act warranting investigation. Read in context, the provisions Mr O’Grady was referring to were ss 285(1), 286(1), and 287(1).
4. Mr O’Grady identified the making of the donations to GetUp at para 29(c). At para 29(d), he referred to the possible rule contravention (in context a reference to r 57) in relation to those donations. Earlier, at para 15, Mr O’Grady identified the “immediate significance” of r 57 as providing the context in respect of which conduct was to be assessed and said:

On the premise that the decision to make the donations described below relate to the financial management of the organisation, the fact that it would appear that the donations were made in a way that did not conform with the [Rules], goes to whether or not there is a basis for being satisfied that there are reasonable grounds that the AWU, the National Executive at the time, Mr Shorten and Mr Melhem engaged in conduct that warrants investigation as potentially involving non‑compliance with ss. 285, 286, 287 or 237 of the RO Provisions.

1. The Decision Record shows that a ground for suspicion that r 57 was contravened in the making of donations to GetUp was relied upon by Mr Enright in forming the opinion that he formed.
2. However, Mr O’Grady also suggested that the circumstance that Mr Shorten may have been a director of GetUp at the time the donations to GetUp were made by the AWU was also a circumstance giving “good grounds for suspecting” the possible contravention of the RO Act. Mr Enright’s decision record does not refer to those circumstances at all.
3. Similarly, Mr O’Grady advised that on the material provided to him by the Commission there were good grounds for suspecting that donations were made by the AWU to political campaigns, referred to by Mr O’Grady as the “2007 Federal Election Donations” which (again read in context) were not made in accordance with the requirements of r 57. That matter, going to the breach of the Rules, was taken up by Mr Enright as a ground for the Decision in relation to donations made during the financial year ending 30 June 2008 (although not confined to the three political campaigns which Mr O’Grady seems to have had in mind). However, Mr O’Grady’s basis for saying there were good grounds for suspicion went beyond the possible contravention of the Rules and were specific to possible circumstances attending Mr Shorten. In that respect, unlike Mr Enright’s position as recorded in the Decision Record, Mr O’Grady at paras 29(e) and (f) of his advice stated that there are grounds for suspecting that the National Executive delegated to Mr Shorten the capacity to make donations at his discretion to candidates in the 2007 Federal Election and that Mr Shorten donated $25,000 to his own political campaign. None of those matters are referred to in the Decision Record.
4. It is apparent then that, beyond possible contraventions of the AWU’s Rules, Mr O’Grady advised Mr Enright that there were grounds for suspicion which, broadly stated, may be characterised as giving rise to possible conflicts of interest for Mr Shorten, which could be relied upon to form the view that there were potential contraventions of ss 285(1), 286(1) and 287(1). However, those matters were not relied upon by Mr Enright.
5. Furthermore, in cross-examination Mr Enright was also taken to earlier drafts of the Decision Record including drafts which were based on there being reasonable grounds to conduct an investigation specific to the conduct of Mr Shorten in relation to the making of the Donations as well as two other officials of the AWU (see [230] and [232] below). Mr Enright was questioned as to why later drafts of the Decision Record were differently cast without reference to or naming any particular officials. Mr Enright indicated that it was his understanding that this had occurred because, consistently with his own view, the Investigation was an investigation “into a range of office holders at the AWU and no particular office holder – there were no office holders in particular”. Asked to further explain his answer, Mr Enright emphasised that “we weren’t focusing on any office holder in particular”.
6. Senior Counsel for the Commissioner accepted that Mr Enright’s “reasonable grounds” were set out in the Decision Record. The Commissioner denied, however, that Mr Enright’s suspicion of contraventions of ss 285(1), 286(1) and 287(1) were purely based in contraventions of the Rules. The Commissioner submitted that the fact that donations had been made by the AWU to GetUp at a time when the National Secretary (Mr Shorten) was a Board Member of GetUp, was part of the (assumed) factual matrix upon which Mr Enright’s suspicion of contraventions was based. Further, reference was also made to the donations made to Mr Shorten as an election candidate and it was said that there “may well be an argument about conflict of interest or [the] best interests of the AWU”.
7. Those matters hark back to the additional matters that Mr O’Grady had suggested could be relied upon by Mr Enright to substantiate the existence of “reasonable grounds” for the conduct of the Investigation. The difficulty for the Commissioner, however, is that on the basis of what is recorded in the Decision Record and on the evidence of Mr Enright to which I have referred, Mr Enright selected from the available information before him that which he considered he should rely upon to found his suspicion of possible contraventions and thus his satisfaction that reasonable grounds existed for the conduct of the Investigation. In so doing, Mr Enright did not select the very matters that the Commissioner now suggests he did. The matters the Commissioner now points to, were not part of Mr Enright’s reasons for suspecting contraventions of ss 285(1), 286(1) and 287(1). In that and various other respects the Commissioner’s submission strayed from an assessment of whether Mr Enright “proceeded reasonably” into an assessment of whether he could have proceeded reasonably if he had relied on matters that were not relied upon to form his satisfaction.
8. The position is similar to, although here more conclusive than, that dealt with by North J in *Cotterill v Minister for Immigration and Border Protection* (2016) 240 FCR 29 at [67]-[79]. His Honour was there considering a ground of appeal which, although agreeing with North J in the result, Kenny and Perry JJ considered unnecessary to deal with. The ground considered by North J was whether legal unreasonableness attended a conclusion made by the Minister for Immigration that the risk of the appellant reoffending was low. In considering that issue, the Minister had been provided with an Issues Paper prepared by his Department. The Minister contended that the Issues Paper could be taken into account in determining the reasoning of the Minister on the impugned conclusion. Applying the reasoning in *Singh* (referred to at [95] above) that the “intelligible justification” for a decision must lie within the reasons the decision-maker gave for the exercise of the power, North J rejected the contention that two matters raised by the Issues Paper, which could have been relied upon to support the impugned conclusion, should be regarded as part of the Minister’s reasons for concluding that the risk of the appellant reoffending was low. In the statement of reasons given by the Minister, the Minister stated that he had assessed the information set out in the Issues Paper and that he had considered all the evidence available to him. That, however, as North J stated at [79], did not amount to the adoption of the reasoning suggested in the Issues Paper. North J continued:

The Minister’s references to the Issues Paper say no more than that the Minister viewed and considered the material provided to him in the Issues Paper for the purpose of determining his own approach. The reasons provided by the Minister, however, made a selection from all of the material provided to him and thereby focused on the matters which the Minister regarded as determinative of his view. He did not select [the two matters raised in the Issues Paper] as matters which motivated his decision. Hence, those matters cannot be regarded as part of the Minister’s reasoning.

1. As, at the time of the Decision, more than 4 years had passed since the Donations were made, the AWU contended that s 320 of the RO Act has the effect that each of the Donations is taken to have been made in compliance with the Rules. Similarly, the AWU contended that any resolution of the National Executive referred to at [133] aboveis taken to have been passed in compliance with the Rules and that, moreover, any expenditure of funds made pursuant to that resolution is likewise taken to have occurred in compliance with the Rules. Given the effect of s 320 of the RO Act, the AWU contended that as at the time of the Decision, no reasonable person could have been satisfied that the possible contraventions of the Rules that Mr Enright had in mind, could have grounded a contravention of ss 285(1), 286(1) or 287(1).
2. It is necessary to commence this part of the analysis by reference to the terms of s 320 which have earlier been set out. Relevantly for present purposes, s 320 operates upon an “act” either (i) done by a collective body of an organisation or branch thereof purporting to exercise power conferred by or under the rules of the organisation or branch (s 320(1)(a)(i)); or (ii) by a person holding (or purporting to hold) office or position in an organisation or branch and purporting to exercise power conferred by or under the rules of the organisation or branch (s 320(1)(a)(ii)).
3. The exercise in which I am engaged, cannot and need not be done by reference to actual facts. Whether particular acts suspected to have occurred by Mr Enright fall within the scope of s 320 cannot be adjudged without knowing the actual nature and content of those acts. However, the objective reasonableness of Mr Enright’s opinion and its interaction with the possible operation of s 320 need only be analysed by reference to the facts as likely envisaged by Mr Enright in the hypothesis upon which he based his suspicion that acts had occurred in contravention of the Rules.
4. On Mr Enright’s hypothesis, as the matters set out at [133] demonstrate, the Donations were expenditure made by the AWU effectuated by an officer or employee of the National Office or the Victorian Branch of the AWU. Including because it is implicit from the terms of r 57 itself, Mr Enright’s hypothesis must have been predicated on the Rules conferring a power on the AWU to expend its funds by making donations. Further, the hypothesis is based upon that power being exercised, by an officer without authority under the Rules and thus as a purported exercise of the expenditure power conferred by the Rules. On that hypothesis, the Donations were acts which would fall within s 320(1)(a)(ii) as, in each case, an act by a person holding an office or position in the AWU or its Victorian Branch purporting to exercise the power conferred by or under the Rules to expend the AWU’s funds. I have arrived at that conclusion assisted by the proposition that acts that could have been done in accordance with the rules of an organisation, if done out of accordance with those rules, are taken to have been done by persons “purporting to exercise power conferred by or under” those rules: see *Geneff v Peterson* (1986) 19 IR 40 at 76 to 77 (Gray J); *Bailey v Krantz* (1985) 13 IR 339 at 392 (Gray J).
5. As for any resolution of the National Executive to delegate its powers of approval of loans, grants and donations, and on the assumption that Mr Enright regarded such a resolution as possibly grounding the contravention of ss 285(1), 286(1) or 287(1), Mr Enright’s hypothesis must have been that in contravention of the Rules, the National Executive exercised a power to delegate its functions. On that hypothesis, the act would fall within s 320(1)(a)(i) as an act of a collective body of the AWU purporting to exercise power conferred by or under the Rules.
6. For those reasons and despite the Commissioner’s submissions to the contrary, the hypothesis the subject of Mr Enright’s suspicion was based upon acts of the kind referred to in either ss 320(1)(a)(i) or 320(1)(a)(ii).
7. After the end of 4 years from the doing of those acts (if done), the effect of s 320(1) is that the doing of each of those acts “is taken to have been done in compliance with the rules of the organisation or branch”.
8. In *Egan v Harradine* (1975) 25 FLR 336 at 380, Sweeney and Evatt JJ said this of s 171F of the *Conciliation and Arbitration Act 1904-1975* (Cth), the terms of which were not materially different from s 320 of the RO Act:

The purpose of the section is quite clearly to prevent the challenge of acts as defined after the lapse of a period of four years. The language used in the section is that the act, etc., shall for all purposes be deemed to have been done in compliance with the rules of the organization or branch. It is language which is markedly different from that used in s. 171B which provides that certain acts done in good faith are to be valid and in s. 141 (5) or (6) which prevent the making of an order having the effect of treating elections as invalid.

Section 171F goes beyond the mere question of validity of the particular act and requires that the act shall be deemed to have been done in compliance with the rules of the organization or branch. The effect of this is to go beyond the mere validity of a particular act. As we said in the ruling, the section adjudges or determines conclusively that the act was done in compliance with the rules. Its effect is that if in fact there was not compliance with the rules the section notionally alters those facts (cf *Hunter Douglas Australia Pty. Ltd. v. Perma Blinds* (62)).

See further *Re Application for Inquiry into Election in Australian Workers’ Union* (1982) 2 IR 69 at 72 to 73 (Evatt J) and *Prichard v Krantz* (1983) 5 IR 437 at 443(Evatt J).

1. I well appreciate that the words in s 320(1) – “is taken to have been done in compliance with”, have substituted the words which did the same work in s 171F – “shall, for all purposes, be deemed to have been done in compliance with”. However, my view is that the modern formulation is not different in substance to that which it replaced, despite submissions made by the Commissioner to the contrary.
2. The Commissioner submitted by reference to the terms of s 331(2) that the subject matter of an investigation is whether a civil penalty provision *has* been contravened. The contention was that when the conduct suspected by Mr Enright to have occurred did occur, it was perfected and had crystallised. It was said that it was doubtful that s 320 does or can “expunge” or “remove” the existence of a contravention for the purposes of “the past tense inquiry”.
3. The Commissioner’s submission seems to be based on a view which only gives the deeming effect of s 320 prospective operation commencing from the end of the 4 year period referred to in the provision. That view is out of accord with the text of s 320, and in particular the words “have been done” as well as the settled interpretation of s 320. As Sweeney and Evatt JJ said in *Egan v Harradine* in the passage quoted above, the effect of s 320 is to notionally alter the facts so that the act in question is deemed to have been done in compliance with the Rules at the time the act was done.
4. Even if that analysis is wrong and the deeming effect of s 320 operates prospectively from the end of the 4 year period, the Commissioner’s position is not improved. On this approach, and as the Commissioner’s submissions accepted, the suspected contraventions “may not be capable of proof in Court if penalty proceedings were brought”. However, there is nothing to suggest that Mr Enright was satisfied that there were reasonable grounds to conduct an investigation of possible contraventions of ss 285(1), 286(1) and 287(1) on the basis of rule contraventions that could not be proved. To the contrary, given the limited basis for his satisfaction that reasonable grounds existed and the compliance purpose of the Commissioner, including his capacity to bring proceedings for a contravention of a civil penalty provision, Mr Enright’s satisfaction must be understood to have been based upon his suspicion that there were contraventions of ss 285(1), 286(1) and 287(1) capable of being proved. Mr Enright did not embark on an academic exercise to investigate historical facts of no or little relevance to the Commissioner’s functions. If he had, the grounds upon which he relied to form the satisfaction he did could hardly be regarded as reasonable and Mr Enright would not have “proceeded reasonably”.
5. The Commissioner put two further submissions. He said, apparently in the alternative to the submission just addressed, that it is arguable that s 320 cannot have the effect of defeating civil penalty proceedings. For that proposition the Commissioner relied on the absence of authorities where the operation of s 320 has been held to have that consequence. There may be many reasons for such an absence in the authorities, including that the plain intent of s 320 has been appreciated by those whom might otherwise have instituted proceedings. The absence of examples in the authorities does not support a contention which, if it is to be made, must be made by reference to the text of s 320 and its intended operation. There is neither textual or contextual support for construing the deeming effect of s 320 as being selective in its operation, so that it would have no operation on an act when that act is relied upon to found a contravention of a civil penalty provision. Furthermore, the terms of s 320(2) support the operation of s 320(1) in relation to court orders or other judicial acts made after the end of the 4 year period referred to in s 320(1).
6. Next, the Commissioner relied upon s 321 of the RO Act which provides that where, having had regard to the interests of the organisation, or members or creditors of the organisation or persons having dealings with the organisation, this Court is satisfied that the application of s 320 in relation to an act “would do substantial injustice”, s 320 does not apply and is taken never to have applied to that act. It was said that the potential operation of s 320 of the RO Act could rarely (if ever) deprive the Commissioner of reasonable grounds in circumstances where the Commissioner would have standing to bring an application under s 321 and where the Court could be expected to make a declaration of substantial injustice in relation to an act which was contrary to the interests of members and in contravention of the RO Act.
7. The submission is highly speculative and impermissibly departs from Mr Enright’s reasoning to take up a possibility which played no part in the formation of Mr Enright’s satisfaction that reasonable grounds existed. It is speculative in a number of respects but, primarily, it suffers from the Commissioner failing to provide any basis for the assumption which he has made that a declaration of “substantial injustice” to the interests of members would be made. That an act was done out of accordance with the rules of an organisation is a necessary characteristic of every act to which s 321 can have application. If that was all that was required, every such act would satisfy the criteria of “substantial injustice”. Some vice or detriment beyond the fact that the act was not authorised under the Rules is called for by s 321. No additional element of that kind was identified by the Commissioner’s submission.
8. However and more pertinently, no such factor was identified by Mr Enright as having been relied upon by him in forming his suspicion of contraventions of ss 285(1), 286(1) and 287(1). Mr Enright thought that s 320 “didn’t have any – any work to do”, and “that it was not applicable in this case”. He had not requested that Mr O’Grady turn his mind to s 320, as Mr Enright had his “own view” about that provision.
9. As Gordon J in *Prior* said (at [101]), referring to Gleeson CJ and Kirby J, in *McKinnon* at [12], in the objective assessment of whether reasonable grounds existed matters of “both fact and opinion must be considered”. The assumed facts which were central to Mr Enright’s suspicion of contraventions – the various acts done in contravention of the Rules – could not have existed as acts done in contravention of the Rules at the time Mr Enright formed his opinion that there were reasonable grounds for the Investigation. Further, no part of that opinion relied upon the operation of s 321 of the RO Act. Objectively considered, Mr Enright’s rationale for his suspicion and in turn the opinion which relied upon that suspicion, was critically flawed. A reasonable person with a correct understanding of the operation of s 320 upon the assumed facts central to Mr Enright’s suspicion of acts in breach of the Rules could not have been satisfied, as Mr Enright was satisfied, that by reason of that suspicion, reasonable grounds existed for the conduct of an investigation into whether ss 285(1), 286(1) and 287(1) had been contravened.
10. I should add that even if I had been satisfied that there were matters beyond the contraventions of the Rules which grounded Mr Enright’s suspicion of contraventions of ss 285(1), 286(1) and 287(1), I would have arrived at the same ultimate conclusion as that just expressed. That is because there is nothing in Mr Enright’s Decision Record to suggest that the suspicion he arrived at and the satisfaction he formed based upon it, would have been arrived at by Mr Enright in the absence of his reliance upon his view that “there are reasonable grounds for suspecting” contraventions of the Rules: see *Gill v Minister for Immigration and Border Protection* (2017) 250 FCR 309 at [94] (Griffiths and Moshinsky JJ).
11. Given my conclusion on the first limb of ground 2, it is not strictly necessary for me to determine the second limb. If it had been necessary, I would have rejected the second limb. I will set out my reasons briefly.
12. I do not accept the AWU’s contention that Mr Enright did not consider s 320 of the RO Act. He said he regarded the provision as inapplicable in this case. That suggests that s 320 was considered but given no work to do because it was regarded as inapplicable. Mr Enright did not explain why he regarded the provision as inapplicable but nor was he pressed on that matter or challenged as to the veracity of that evidence. There is no basis for the AWU’s contention that Mr Enright ought not be accepted as to the evidence he gave which supports the conclusion that s 320 was considered.
13. The alternative submission made by the AWU is that, if Mr Enright thought that s 320 was inapplicable, Mr Enright must have misunderstood the operation of s 320. For the reasons already given, I accept that Mr Enright was wrong to have regarded s 320 as inapplicable for the purpose of arriving at the suspicion and the consequent opinion arrived at by him. But that did not constitute jurisdictional error of itself.
14. Mr Enright needed to form his opinion on a correct understanding of s 331(2). If Mr Enright had misunderstood s 331(2) that misunderstanding would have, in the words of Kiefel CJ, Gageler and Keane JJ at [34] in *Hossain*, involved Mr Enrightnot proceeding “on a correct understanding and application of the applicable law”. As the passage from the judgment of Latham CJ in *Hetton Bellbird* referred to at [87] demonstrates, “misconstruing the terms of the relevant legislation”, means to misconstrue the law under which the decision-maker is required to reach the requisite opinion. In this case that law was s 331(2) and not s 320 of the RO Act.
15. Accordingly, the misconstruction by Mr Enright of s 320 would not, of itself, have given rise to jurisdictional error. However, the misconstruction of s 320 contributed to Mr Enright “not proceeding reasonably” under s 331(2) because a reasonable person proceeding on a correct construction of s 320 could not have formed the opinion that was formed by Mr Enright. Accordingly, the AWU has succeeded in its reliance on s 320 for the first limb of ground 2 but not for the second limb.
16. For those reasons, I hold that Mr Enright’s decision to conduct the Investigation for the purpose of investigating whether ss 285(1), 286(1) and 287(1) were contravened is affected by jurisdictional error and, to that extent, the Decision to conduct the Investigation is invalid. Whether the Decision is an integrated whole so that, that part of it which concerns an investigation into whether s 237(1) of the RO Act has been contravened cannot be severed, has not been the subject of any submissions. I will return to that issue when I consider the question of what relief should be granted.

# Grounds 3, 4 and 5 – Was the decision to conduct the Investigation invalidated by an improper political purpose, an irrelevant consideration or an impermissible direction?

1. Grounds 3, 4 and 5 of the AWU’s Grounds of Review are distinct grounds but, as they involve consideration of many of the same facts, they are most conveniently dealt with together. As earlier outlined, ground 3 impugns the Decision on the basis that it was made for an improper political purpose of aiding in, assisting or promoting Minister Cash’s political purpose. Ground 4 impugns the Decision because the AWU contends that an irrelevant consideration was taken into account, namely Minister Cash’s political purpose. Ground 5 is based on the assertion that Mr Enright impermissibly acted upon the advice or direction of Minister Cash.

## The Nature of the Relationship between the Commissioner and the Minister under the RO Act

1. The AWU made a submission in support of each of these three grounds which addressed the nature of the relationship between the Commissioner and the Minister permitted by the RO Act. It is convenient to deal with that issue now.
2. The AWU emphasised that the Commission was established as an independent regulator. It was independent of government, with the Commissioner holding an independent statutory office. Section 329FA was referred to. That provision provides:

(1) The Minister may, by legislative instrument, give written directions to the Commissioner about the performance of the Commissioner’s functions.

Note: Section 42 (disallowance) and Part 6 (sunsetting) of the *Legislative Instruments Act 2003* do not apply to the direction (see sections 44 and 54 of that Act).

(2) The direction must be of a general nature only.

(3) The Commissioner must comply with the direction.

1. The AWU contended that this was a general directions power only and that the provision denies the capacity of the Minister to direct the result in a specific case being dealt with by the Commissioner. Further, the AWU submitted that only limited provision was made under the RO Act for political oversight of the Commissioner, with s 329FB providing the Minister with a capacity to direct the Commissioner to provide the Minister “specified reports relating to the Commissioner’s function”. Finally, the AWU contended that political considerations were both impermissible and irrelevant to the Commissioner’s regulatory functions both as a matter of likely parliamentary intent and also as a limitation upon those considerations that a public servant is entitled to take into account.
2. Although not directly addressed, none of those contentions made by the AWU were put in contest by the Commissioner. In determining the AWU’s third, fourth and fifth grounds of review, I proceed on the basis that the AWU is correct in its characterisation of the nature of the relationship between the Commissioner and the Minister with responsibility for the Commission under the RO Act.
3. The AWU also contended that the purposes for which the power to conduct an investigation under s 331(2) may be exercised do not include the purposes of causing a particular political party (or individual associated with that party) to gain a political advantage or causing a particular political party (or individual associated with that party) to incur a political disadvantage. It was submitted that such an object is wholly extraneous to the subject matter and objects of Part 3A of the RO Act. Addressing the functions conferred upon the Commissioner under the RO Act, the AWU contended that there was nothing in those functions indicative of any parliamentary intention that the Commissioner was to perform a political role, or to be able to exercise his or her powers for political purposes. Those contentions are uncontested and must be accepted.

## The Facts

1. Before turning to outline the facts, it is convenient to first introduce each of the witnesses who are mentioned in the outline of facts which follows. The position or office held by the person at the relevant time is also included.
2. As I have outlined already each of the witnesses were called by the AWU and gave evidence in response to a subpoena. The AWU’s witnesses included Mr Enright. The Commissioner did not call any witnesses. The following persons gave evidence:

* Mr Enright, Executive Director of the Commission
* Mr Russo, Media Adviser at the Commission
* Mr Lee, Media Director at the Fair Work Ombudsman
* Minister Cash, Minister for Employment
* Mr Davies, Chief of Staff to the Minister
* Mr De Garis, Senior Adviser to the Minister

1. Some of the evidence given was disputed. Some of it was subject to relevance objections which I need to determine. How the evidence should be characterised and what inferences may be drawn from it is also the subject of a great deal of dispute. In so far as it is necessary, I will deal with the disputation later. It is helpful to set out here those facts and matters, the existence of which is not in dispute, even if their characterisation is. For that purpose, I have largely relied upon a detailed chronology provided by the AWU, the content of which is not subject to criticism by the Commissioner other than for its selectivity. That criticism has some force. To the extent necessary, I have addressed the problem including by reference to the chronology provided by the Commissioner.

### Events of 12 to 14 August 2017

1. On 12 August 2017, the *Weekend Australian* published an article written by Mr Brad Norington. The article was titled “Shorten’s AWU donated $100,000 to [GetUp]”. Amongst a range of comments, the article alleged that Mr Shorten “was a big union donor to [GetUp]” when GetUp was first established giving about $100,000, possibly more. It further stated that Mr Shorten was “a founding board member of [GetUp] when it was launched in August 2005”. The article stated that senior sources from GetUp and the AWU had confirmed that Mr Shorten “was personally behind an AWU donation of about $100,000” it further stated that Mr Shorten had been asked if he recalled the donations made to GetUp and whether they were documented in resolutions and donated under r 57 of the Rules requiring approval by the AWU’s National Executive.
2. On the same day and in the same publication a further article written by Mr Norington was published. That article was titled “Union and ALP links test [GetUp] ‘Independence’”. This article was more wide ranging than the first, focussing on the activities of GetUp. Some of the content of the first article to which I have referred, was repeated. The article stated that it was not suggested that Mr Shorten had done anything illegal or inappropriate but that some issues remained unclear. It then stated that the initial donation to GetUp of about $100,000 came from the AWU’s National Office and said “Under the Union’s Rule No 57, a loan, grant or donation cannot be made unless approved by the national executive.” It was further stated that several members of the AWU’s National Executive from that time had confirmed that Mr Shorten sought a donation of at least $100,000 for GetUp in 2005 and that that amount was provided and “[o]thers recall it was discussed but have no memory of a vote”. The article also suggested that donations to GetUp had been made through the Victorian Branch of the AWU. A reference to Mr Shorten being on the Board of GetUp when a $100,000 donation was made was sourced to a former senior AWU official.
3. On the Saturday morning that these articles were published, Mr Enright read “this article” (it not being clear, on the evidence, which of the two articles he was referring to). Mr Enright deposed that the article had attracted his attention, that he was concerned about the amount of money and the allegations which appeared to be made by former members of the AWU about a substantial amount of their money being donated “contrary to either the law or the rules of the AWU”. He said those matters were of significant concern to members of the AWU and to the Commission.
4. On the morning of Monday 14 August 2017, Mr Enright asked his staff to commence inquiries and in particular to locate documents including statements of loans, grants and donations that might assist in addressing the allegations made by former members of the AWU which were detailed in Mr Norington’s article.
5. On 14 August 2017, Senator the Honourable Eric Abetz, a Liberal Senator from Tasmania wrote to the Commissioner. Senator Abetz referred to “reports in *The Australian* on 12 August 2017 in relation to a sum of funds provided by the Australian Workers Union to GetUp”. The letter attached the first article from which it quoted and then said:

If these reports are correct, it would appear that this donation may have been in violation of the Union’s own rules and does not appear to have been included in its financial disclosures under the relevant Registered Organisations reporting framework.

On the basis of these reports, I respectfully request that the Commission examine this matter in further detail. I appreciate your consideration of this matter.

1. Senator Abetz’s letter was brought to the attention of Mr Enright shortly before 5.00pm on 14 August 2017.
2. The letter received from Senator Abetz was uploaded to a file created within the Commission to deal with the matter. Correspondence was emailed to Senator Abetz’s office confirming receipt of his letter.

### Events of 15 August 2017

1. On 15 August 2017, *The Australian* published a further article by Mr Norington titled “Thomson case provides ammo for Shorten attack”. The article said that Minister Cash had told Parliament that Mr Shorten had “‘serious questions to answer’ over an AWU donation of about $100,000 to help establish activist group [GetUp] in 2005” and that Minister Cash’s question for Mr Shorten was “[w]as this $100,000 donation of AWU members’ money validly authorised under the [Rules]?” and “did Mr Shorten declare a conflict of interest?”
2. The article stated that the Minister “further raised whether or not Mr Shorten had gained proper authorisation for ‘another generous donation’ made to Labor in the seat of Maribyrnong by the AWU when Mr Shorten was first a candidate in the seat in 2007, and still national secretary of the AWU”. Mr Norington stated that the Minister’s comments created the possibility that questions about Mr Shorten’s AWU donations may be referred to the Commission.
3. The article of 15 August 2017 was circulated within the Commission that day.
4. On the morning of Tuesday 15 August 2017, Mr Enright met with the Commissioner in a regular Tuesday morning meeting. The matters discussed included the correspondence from Senator Abetz and the Commissioner was informed about efforts being made in relation to the “loans, grants and donations issues emerging from the media on 12 August and Mr Abetzs’ letter”. Mr Enright informed the Commissioner that the issue for him was whether the loans had been approved and that in order to establish this he was seeking the relevant minutes from the AWU going back to 2005. Also on that morning, Mr Enright was involved in requesting or directing that archived material in relation to AWU statements of loans, grants and donations be obtained. Material was delivered to the FWC where they were inspected by a staff member of the Commission.
5. On 15 August 2017, Minister Cash sent a letter of referral to the Commissioner requesting that he consider investigating the matters raised in the letter (“**first referral letter**”). The letter stated:

***Referral of matters relating to the Australian Workers Union***

I refer to recent media reports (enclosed) regarding a donation of $100,000 reportedly made by the Australian Workers Union to the political organisation “Get Up” in 2005. These reports have questioned whether or not this donation was validly authorised in accordance with the [Rules].

I am advised that Rule 57 of the [Rules], as they applied in 2005 to donations by the AWU, required that the donation had to be approved by the National Executive of the union and must otherwise be in accordance with the [Rules]:

[Rule 57 was then set out]

I note that it has been reported that the AWU has not been able to indicate whether this rule was observed in this case. Accordingly, I request that you give consideration to investigating this matter in any way that you may consider appropriate.

1. On or around 15 August 2017, Mr Norington approached the then Media Advisor to Minister Cash, Mr Graeme Mason, to ask what Minister Cash’s position was on this issue. Mr Mason informed Mr Norington about the first referral letter.

### Events of 16 August 2017

1. On 16 August 2017, *The Australian* published an article by Mr Norington titled “Probe for Shorten over AWU’s [GetUp] donation”. The article stated that Minister Cash had made a referral to the Commission following the *Weekend Australian*’s “revelation” that Mr Shorten gave about $100,000 to GetUp, and that Mr Shorten “will be investigated over a large donation of union funds he made to [GetUp] when he was leader of the [AWU]”. The article stated that Minister Cash had said that “the Opposition Leader and the AWU might ‘have something to hide’ after failing to provide any evidence that [GetUp] funding was properly authorised” and that the referral was made as Mr Shorten had “failed to provide any minutes of the AWU’s national executive, or any other written authority for this donation.”
2. At 9.21am, Mr Enright sent an email to Ms Maryanne Guina, Principal Adviser, Compliance and Mr Bill Steenson, both employees at the Commission, attaching a draft letter addressed to Mr Daniel Walton, the National Secretary of the AWU. Mr Enright stated in the email “I am assuming from the media reports that we will be received [sic] something from the Minister” and noted that the draft letter was for review. At 9.43am, Mr Steenson replied to Mr Enright’s email with tracked changes, noting “I’ve worded it in such a way that we can dispatch it proactively without waiting for a referral/request/query from the Minister”.
3. At 9.24am Mr Hunt circulated a “Wednesday news update” email which attached Mr Norington’s article of that date and noted “Employment Minister Michaelia Cash has referred the AWU’s GetUp donation to the [Commission]”.
4. At 9.30am Mr Enright called Mr Walton and left a voice message to contact the Commission. Mr Enright spoke to Mr Walton at 11.35am. Mr Enright indicated that he wanted to speak to Mr Walton about the GetUp issue that had been in the media. Mr Enright told Mr Walton that the Commission was interested in documents or other material the AWU had or might have which might assist in determining “that the [Rules] and [RO Act] had been complied with”. Mr Enright indicated that he was proposing to send Mr Walton a letter requesting assistance and documents and stated that he was not exercising his powers under the Act.
5. Shortly after midday enquires were received by Mr Hunt in relation to whether the Commission was investigating the Donations. Mr Hunt approached Mr Enright saying that journalists had been asking him what the Commission was doing. Mr Enright deposed that he responded by making enquiries around the office to see whether any letter from Minister Cash had been received. He established that that was not the case and said that he needed to find out about the letter. At 1.38pm Mr Enright contacted the Department of Employment (“**Department**”) “to confirm that referral had been made as per media reports”. Mr Enright spoke with Ms Sharen Huender from the Department who recommended that he ring Minister Cash’s office directly. Mr Enright contacted Minister Cash’s office and left a message for Ms Elise Little.
6. At 1.42pm, Ms Sarah Wilkin, Senior Adviser, Compliance, at the Commission, emailed Mr Enright attaching the letter to Mr Walton and the article of 15 August 2017 as a PDF file.
7. Mr Davies returned Mr Enright’s call to the Minister’s office at 2.28pm. Mr Enright advised Mr Davies that the Commission had received media enquiries about a potential referral from the Minister. Mr Davies advised that the letter had been sent to the Department the night before and was probably still in transit and that he would forward Minister Cash’s letter.
8. At 2.59pm, Mr Davies emailed Mr Enright the first referral letter.
9. At 3.22pm, Mr Enright emailed Mr Walton in relation to “AWU loan, grant or donation to GetUp”. He referred to the earlier telephone discussion and attached a letter requesting the assistance of the AWU. In the letter Mr Enright referred to recent media reports suggesting that the AWU had donated money to GetUp in 2004 or 2005. He referred to s 237 of the RO Act and the requirement on registered organisations to lodge statements concerning loans, grants or donations. He referred to the requirement under the Rules that there be prior approval by the National Executive of any loan, grant or donation over $1,000. He advised that the Commission was in the process of conducting a preliminary assessment of the issues to which he had referred. Mr Enright requested that the AWU assist by providing documents showing that the National Executive had endorsed any loans, grants or donations made to GetUp including minutes of relevant meetings of the National Executive. Additionally Mr Enright sought any “relevant statement … lodged with the regulator” or alternatively copies of the AWU statements of loans, grants and donations for the 2004/2005 and 2005/2006 financial years for all Branches and also for the National Office.
10. At 3.50pm, Mr Hunt sent an email to the publication *Workplace Express* attaching the following statement from the Commission: “The Registered Organisations Commission has received and is reviewing a referral from the Minister’s office”.

### Events of 17 August 2017

1. On Thursday 17 August 2017, a further article was published in *The* *Australian* written by Mr Norington. The article was headed “Shorten donated AWU funds to his political campaign”. The article claimed that the AWU’s National Executive had passed a resolution on 23 November 2006 declaring that “the request for donations and assistance from candidates for the next federal election be left in the hands of the national secretary”. The article asserted that as the National Secretary, Mr Shorten who was also running for Parliament as an ALP‑endorsed candidate, received a $25,000 donation from the AWU to help his campaign. The article referred to Mr Shorten being investigated over donations to GetUp and the referral to the Commission by Minister Cash. Specific reference was made to r 57 of the Rules and it was said that there is no provision in the Rules for general approvals, or approvals by individuals such as the National Secretary. The article also stated that Mr Shorten’s apparent authorising of union spending on his own campaign and those of at least two other ALP candidates “could also be drawn into the [Commission’s] investigation”.
2. At 10.32am Ms Wilkin of the Commission sent an email to Mr Davies enclosing a letter to Minister Cash which acknowledged the first referral letter and stated that a file had been created and that the allegations outlined in the first referral letter “will now be examined and your office contacted once this process is complete.”
3. Minister Cash sent a further letter to the Commissioner on 17 August 2017 (“**second referral letter**”) which stated the following:

***Referral of matters relating to the Australian Workers Union***

I refer to my recent correspondence regarding matters relating to the Australian Workers Union. Since that correspondence, I have been made aware of further reports regarding political donations by the AWU that, it is alleged, may not have been made in accordance with the [Rules] (enclosed).

In particular, these reports have queried whether any power to authorise donations under Rule 57 was properly made, whether such a power could be delegated, and whether the powers under any such delegation were validly exercised. The reports also query whether there was a conflict of interest in this situation.

Accordingly, I respectfully request that you give consideration to reviewing this matter as part of any investigation that you may undertake in relation to other AWU matters.

1. Mr Norington made an inquiry of Minister Cash’s office and was informed of the second referral letter.

### Events of 18 August 2017

1. On 18 August 2017, a further article written by Mr Norington was published in *The Australian* titled “‘Unaccountably shifty’: Bill flayed”. The article stated that Minister Cash had referred Mr Shorten to the Commission for investigation of his use of “union funds to finance his election campaign in 2007, possibly without proper authority”, and noted that it was the second referral that week.
2. At about midday, Mr Enright called Mr Walton. Mr Walton indicated that he could not get the loans, grants and donations documents by that day. An email was sent shortly thereafter by Mr Walton indicating that he would provide a response by no later than 25 August 2017.
3. At 2.50pm Mr Enright called the Minister’s office to advise that the Commission had not received the second referral letter suggested in *The Australian* article and asked to speak with Mr Davies or Ms Little. Mr Davies then rang Mr Enright; Mr Enright indicated that he had made enquiries with the Department about the location of the second referral letter. Mr Enright “[s]uggested that there may be a different way of ensuring correspondence be provided to [the Commission] to ensure timeliness”.
4. Mr Enright’s handwritten notes from the conversation with the Minister’s office state “Rang Minister’s office still haven’t got the latest letter from the Minister Re Mr Shorten”, and that he advised Mr Davies that he had spoken to a Departmental officer and that he was “trying to get the Minister’s letters to us in a timely way”. His oral evidence was that in order for him to provide an efficient response and efficient advice to the Commissioner, it was necessary to follow up to see whether there was a second letter, and if so, where it was.
5. Mr Davies’ evidence was that Mr Enright contacted him and indicated that he was aware of the existence of a second referral letter which had not been brought to his attention and asked if it could be resent to him. Mr Davies then arranged for the second referral letter to be sent at 5.26pm.

### Events from 22 to 29 August 2017

1. At about midday on 22 August 2017, Mr Enright contacted the Minister’s office and spoke to Ms Belinda Wren. He asked her “if [the Commission] should be acknowledging letters received from [the] Minister’s office”. She said she was not sure but would check and advise.
2. At 12.44pm on 22 August 2017, Mr Hunt sent an email to Mr Lee which stated “we may begin an [sic] formal inquiry into Bill Shorten if the AWU does not produce documents by this coming Friday. If such an inquiry begins, it will probably be published innocuously on our website as ‘AWU formal inquiry’.”
3. At 3.58pm on 24 August 2017, Mr Enright received an email from Mr Hunt which included information about the AWU’s financial accounts for 2005/2006 that Mr Hunt had been advised of by Mr Norington. In his evidence-in-chief Mr Enright deposed that he didn’t recall speaking to Mr Hunt after receiving the email, and deposed that he would have been “interested” that Mr Norington had rung Mr Hunt and would have been involved and interested in the matters that Mr Norington raised.
4. On 25 August 2017, the AWU’s solicitors, Maurice Blackburn, sent a letter to Mr Enright in response to his letter of 16 August 2017 to the AWU. The letter stated that the AWU was “concerned about the apparent politicisation of the assessment process” being conducted by the Commission and noted that the concerns arise from the fact that the letter did not refer to Minister Cash’s referral which was reported in *The Australian* on 16 August 2017. The letter stated that the Minister did not have the power to make a referral under the RO Act and that the present assessment process was “potentially invalidated by being drawn into a political campaign by the Minister” against Mr Shorten. The AWU requested a copy of the referral letter and correspondence or records of correspondence between Minister Cash or anyone on her behalf and the Commission.
5. The letter attached the s 237 statements (that Mr Walton had been requested to provide) filed by the AWU Victorian Branch and the National Office concerning the GetUp donations and noted that they were being provided without prejudice. The letter stated that “those s 237 Statements were filed over 10 years ago to the then regulator, and disclose the GetUp Donation”. In his evidence, Mr Enright acknowledged that the letter drew attention to the fact that the statements had been filed over 10 years ago.
6. The Commission received the physical copy of the second referral letter at 12.26pm on 28 August 2017.
7. On 29 August 2017 Mr Enright responded to Maurice Blackburn’s letter. Mr Enright acknowledged receipt of the statements attached to Maurice Blackburn’s letter of 25 August 2017. Mr Enright attached the first referral letter. Mr Enright stated that it would not be appropriate to provide details of correspondence requested but advised that the Commissioner and his delegate “jealously guard a high degree of independence in the discharge of all [the Commission’s] functions and power.” Mr Enright requested that the AWU provide the Commission with copies of the “AWU National Executive Minutes which demonstrate that the National Executive satisfied itself of the matters required by rule 57”, and noted that he was not yet exercising his powers of inquiry under the RO Act.

### Events of September 2017

1. At 4.16pm on 1 September 2017, Mr Hunt sent an email to Mr Lee attaching a statement from the Commission in response to an inquiry by Mr Ewin Hannan, a journalist from *The Australian*, about the Minister Cash referral and a background sheet to provide new journalists who were not familiar with how the Commission functions. The statement read the “Registered Organisations Commission has received and is reviewing a referral from the Minister’s office.”
2. On 7 September 2017, Maurice Blackburn wrote to Mr Enright in response to his letter. Maurice Blackburn noted that given the Commission declined to provide the requested correspondence and did not deny that there was further communication, that Mr Enright’s response heightens the AWU’s “concern that there has been an attempt by the Minister to politicise the function presently being conducted by the [Commission].” The letter renewed the AWU’s request for the documents concerning correspondence with the Minister.
3. On or around 8 September 2017, Mr Enright and the Commissioner visited the Minister’s office in Canberra and met with some of Minister Cash’s staff and had a discussion with Ms Little.
4. At 8.29am on Monday 11 September 2017, Mr Enright sent an email to Ms Wilkin asking her to commence preparing the relevant documents to commence an investigation. Mr Enright deposed that although the email did not specify what documents were requested, he was referring to the preparatory documents for commencing an investigation including the case management record, scoping letters and the case decision record. Mr Enright exchanged emails with his staff about engaging counsel later that day.
5. On 14 September 2017, Mr Enright emailed Ms Wilkin to see how the work was progressing. In response to a query about briefing counsel from Ms Guina, Mr Enright noted that he “wanted to think through this because the implications are significant”. Mr Enright spoke with Mr O’Grady QC, and advised staff that Mr O’Grady would receive the brief.
6. On 14 September 2017, Mr Lee wrote to Mr Davies to apply for the position of Senior Media Adviser for the Minister. Mr Davies sent Mr Lee a text message on 15 September 2017 to arrange a time to talk.
7. On 15 September 2017, Mr Enright wrote a letter to Maurice Blackburn in response to its letter of 7 September 2017. Mr Enright referred to the course of correspondence between the Commission and the AWU and stated:

Your letter asserts, among other things, an intention not to provide copies of further documents to assist this assessment.

As previously advised, I am not at this point exercising the powers of inquiry or investigation provided in the RO Act and I acknowledge that as a consequence there is no obligation on the AWU to provide documents in response to my request for assistance.

In the circumstances, the Registered Organisations Commission will consider the options open to it and will formally advise the AWU what, if any, action is proposed to be taken.

1. On 20 September 2017, the Commissioner and Mr Enright attended a regular meeting with executives and senior people from the Department. At that meeting the Commissioner reported on the “AWU GetUp matter”. The matters that he reported about were largely from information provided by Mr Enright. The Commissioner noted that informal inquiries were underway and that the AWU had voluntarily provided some documents and that the lawyers for the AWU had made various allegations including that the Commission was participating in a politicised process and that the Minister did not have the power to refer the matter to the Commission. It was reported that Maurice Blackburn had sought all communications between the Commission and the Department and between the Commission and the Minister – that request was declined. It was said that proceedings against the Commission were threatened and might materialise “if and when we make any decision to move to a formal enquiry or to an investigation – we will deal with that then”. That the issue “may come up at Senate Estimates” was also raised.

### Events of October 2017

1. As earlier indicated, the advice of Mr O’Grady was provided to the Commission on 4 October 2017.
2. At 5.49pm on 4 October 2017, Ms Wilkin emailed Mr Coyle, Principal Lawyer – Litigation, Compliance, at the Commission and advised that she was preparing the following documents for the AWU:
3. A memo to Chris [Enright] to start the investigation.
4. A Case Decision to start the investigation.
5. Letters of commencement of the investigation.
6. A memo from Chris to [the Commissioner] for [the Commissioner] to issue Notices to Produce
7. Notices to Produce

Ms Wilkin attached a draft letter of commencement to the email which stated:

Having now reviewed the available materials in relation to this matter, I am satisfied that there are reasonable grounds to commence an investigation under section 331 of the RO Act. The investigation concerns the circumstances surrounding the approval of the AWU National and Victorian Branches of donations to GetUp Limited in 2006 and also the alleged donations of Mr Bill Shorten of $25,000 to his own political campaign and a further $50,000 to two other campaigns for the 2007 Federal Election.

The investigation will examine the conduct of former officers of the AWU including Mr Shorten [sic] Mr Cesar Melhem who were at the relevant times the National Secretary and Victorian Branch Secretary of the AWU respectively. Following investigation of the matter, I intend to write to any person about who I propose to make findings (if any), as a matter of fairness, inviting submissions in respect of those matters.

1. At 5.48pm on 12 October 2017, Mr Hunt sent an email to Mr Enright and the Commissioner titled “Suggestions on announcing sensitive investigations” which referred to the fact that “Federal parliament is sitting for the next 2 weeks from Monday 16th October.” Mr Hunt stated

Federal parliament (and Question Time) doesn’t sit on Fridays. I suggested to the Commissioner the best time to publish a sensitive investigation (such as AWU GetUp) on the [Commission’s] website is Friday afternoon. We control the timing further if Mark Lee is authorised to ring a certain journalist and alert them to look at the website

1. At 2.29pm on 17 October 2017, Ms Wilkin emailed a draft of the Decision Record to Mr Coyle. Her draft, dated 18 October 2017, expressly named Mr Shorten, Mr Melhem, the National Executive and Mr Paul Howes for investigation. At 5.34pm on 17 October 2017, Ms Wilkin sent a revised Decision Record to Mr Coyle “[a]s discussed” which was also dated 18 October 2017. In this version, there was no mention of Mr Shorten, the National Executive or any other named officer of the AWU. Following correspondence between Mr Coyle and Ms Wilkin revising the Decision Record, Mr Coyle sent a draft to Mr Enright for review at 5.25pm on 18 October 2017.
2. At 6.09pm on 18 October 2017, Mr Lee was formally offered the position of Senior Media Adviser in Minister Cash’s office commencing on 6 November 2017.
3. At 3.04pm on 19 October 2017, Mr Russo, who had taken over from Mr Hunt as Media Advisor at the Commission, sent a draft media statement to Mr Enright for his approval, “in anticipation of publishing the investigation commencement … possibly tomorrow”. At 8.34am, Mr Enright sent Mr Russo some changes to the draft media statement. Mr Enright added a paragraph to the draft media statement that said (underlining in original):

In summary, t~~T~~he investigation relates to whether donations made to GetUp Limited during the financial year ending 2006 were approved under the [Rules] and separately, whether donations to a range of recipients during the financial year ending 30 June 2008 were approved under the [Rules].

1. On 20 October 2017 after various drafts had been prepared and considered, Mr Enright signed a final version of the Decision Record. The decision to investigate was then communicated to Mr Walton and Mr Davis, the Branch Secretary of the Victorian Branch of the AWU.
2. At 1.33pm on 20 October 2017, Mr Russo sent the media statement to Mr Lee and a link to the website. At 1.39pm Mr Russo sent the media statement to the Commissioner and Mr Enright. At 2.02pm Mr Lee responded to Mr Russo asking “Has anyone notified the MO”, by which he meant the Minister’s office. Mr Lee informed Mr De Garis at 2.01pm that the website had been updated. Mr De Garis responded “Can you text me the link? I can’t find it”. Mr Lee provided him the link, and Mr De Garis replied “Perfect”. At 2.56pm, Mr Lee and Mr De Garis spoke by phone.
3. At 3.00pm, Mr Lee and Mr Norington spoke on the phone. At 3.07pm, Mr Lee sent the media release to Mr Norington, carbon copying in Mr Russo and noting that Mr Russo had replaced Mr Hunt as Media Adviser at the Commission. Mr De Garis also called Mr Norington to advise him that an investigation had been commenced following an inquiry from Mr Norington about the commencement of the Investigation. Mr Lee sent the media release to other journalists on subsequent days.
4. On 21 October 2017 and also on 23 October 2017, articles written by Mr Norington were published in *The Australian*. The articles reported that the Commission had commenced the Investigation. The articles focused on Mr Shorten and repeated various allegations previously made by Mr Norington about donations to GetUp and also to Mr Shorten’s campaign as a candidate in the 2007 elections as having been made without proper approval under the Rules.
5. At around 11.10am on 23 October 2017 Mr Enright was made aware that an anonymous informant had contacted the Commission. Mr Enright deposed that “steps commenced immediately” to verify the information provided by the informant, and those steps “were taken by a number of people, including me”. Mr Enright deposed that after being made aware of the disclosure by the informant that he “considered every potential option that was available to us, and in relation to the option of a warrant, I contacted the AFP”. Mr Enright contacted Acting Superintendent Cameron Watts of the AFP and informed the AFP that the Commission was “considering a range of options and one of which was the warrant.”
6. At 12.48pm, Acting Superintendent Watts recorded that “the [Commission] are finalising their affidavit” and had “indicated that they would like to (if they obtain a warrant in the next few hours) undertake any warrant activity today”.
7. Mr Enright provided a memorandum to the Commissioner in which he recommended that the Commissioner exercise the power provided in s 335K of the RO Act to make an urgent ex parte application to the Magistrates’ Court of Victoria to have a warrant issued empowering the AFP, with the assistance of staff members of the Commission, to attend the National Office and the Victorian Branch of the AWU in order to enter and search premises and seize documents. In making that recommendation, Mr Enright said:

Having carefully considered the information which has been made available to the [Commission], I have formed the view that there is a likelihood that section 337AC of the RO Act may be been contravened and that a person or persons unknown may be engaging in conduct that results in a concealment or destruction of documents relating to a matter being the investigation which has been commenced under section 331(2) of the RO Act.

1. Mr Enright’s recommendation was approved by the Commissioner on 23 October 2017.
2. An affidavit was made by the Commissioner in support of the application to the Magistrates’ Court of Victoria to issue search warrants.
3. At 3.22pm, Mr Enright sent his sworn affidavit in support of the application for the search warrants to Acting Superintendent Watts.
4. Mr Enright had a strategy prepared for dealing with the media interest in the execution of the search warrants which was “to engage, prior to the execution of the warrants, with the AWU and ensure that the warrants were executed with as much cooperation, with as minimum fuss and as timely as was possible in order to avoid, entirely, the involvement of any media, if that was ever going to be possible.” The strategy included the drafting and redrafting of media statements, which continued throughout 23 and 24 October 2017.
5. At 3.23pm on 23 October 2017, Mr Russo sent a “provisional draft statement” to Mr Enright for review. The draft media statement noted that the Commission had received information that led it to believe that there had been a contravention of s 337AC of the RO Act at the AWU National Office and the Victorian Branch, and that the “Commission suspects that documents may be concealed or have been destroyed”. The statement said that the Commission has received a warrant from a magistrate and said:

In summary, the investigation relates to whether donations made to GetUp Limited during the financial year ending 2006 were approved under the [Rules] and separately, whether donations to a range of recipients during the financial year ending 30 June 2008 were approved under the [Rules].

1. At 9.40am on 24 October 2017 the search warrants were issued by his Honour Magistrate Reynolds.
2. On 24 October 2017, Mr Enright allowed Mr Russo to provide some information to Mr Lee on a confidential basis regarding the search warrants. This is dealt with further below at [337].
3. At about 12.00pm, Acting Superintendent Watts spoke with Mr Enright to discuss “briefing of relevant Ministers”. After speaking with the Commissioner and at about 12.14pm, Mr Enright spoke with Acting Superintendent Watts and told him that “we don’t brief Minister on operational issues and don’t propose to brief on this”. Acting Superintendent Watts advised that the AFP would brief Minister Keenan and could not ensure that Minister Cash would not be made aware as a result.
4. At 1.17pm on 24 October 2017, Mr Lee called Mr Davies. There is a dispute in the evidence as to what was said during the call. I address this later at [331]-[333].
5. At 2.42pm on 24 October 2017, members of the AFP and the Commission, including Mr Enright, met to discuss the execution of the search warrants.
6. Between midday and 4.00pm on 24 October 2017, Mr Davies called Mr De Garis into his office and told Mr De Garis that search warrants were to be executed at approximately 4.00pm on “one or two, probably two, offices” of the AWU. After this conversation Mr De Garis contacted Mr Michael Tetlow, a media adviser in the office of the Minister for Justice. He told Mr Tetlow that search warrants were going to be executed at the AWU offices in Melbourne and Sydney at approximately 4.00pm or 4.30pm. Mr De Garis and Mr Tetlow then organised to disseminate the information to the media together. Mr De Garis called several print journalists and Mr Tetlow called the TV media. Mr De Garis’ intention was to get “media coverage”. He contacted *The Australian*, the *Daily Telegraph* and Fairfax. He told them that the execution of the search warrants would take place at the AWU at approximately 4.00pm or 4.30pm.
7. At 4.20 pm, Mr Enright tried to call Mr Walton on his mobile but there was no answer, he then rang Mr Davis and left a message. He subsequently received a call from Mr Davis and he explained to him “what I was hoping to achieve by a low-key safe execution of a warrant, total absence of any media”. During that explanation, Mr Davis started to get a bit upset and he indicated that the media were already outside and hung up.
8. At about 4.25pm to 4.30pm, the search warrants were executed at the National Office of the AWU in Sydney and the Victorian Branch Office of the AWU in Melbourne.
9. At 4.33pm Mr Enright contacted the Minister’s office and spoke with Ms Little to advise that the media were attending at the execution of the search warrants.
10. At 4.55pm Mr Enright sent a text message to the Commissioner which said “media were waiting for arrival before we even got to both Sydney and vic branches. All team safe and will keep you posted”. The Commissioner replied “Thanks Chris. G to hear team safe. I guess leak from Court???”. Mr Enright responded “No idea but not from us because it was definitely not in our interests”.
11. At 4.51pm on 24 October 2017, Mr Russo sent Mr Enright a draft of the media statement which he noted “is provisional currently”. At 5.58pm Mr Enright sent a revised draft back to Mr Russo and the Commissioner and noted “[h]ere is a version Counsel is comfortable with”. The draft sent by Mr Enright commenced by stating:

The [Commission] commenced an investigation on 20 October 2017 into whether donations made to GetUp Limited during the financial year ending 2006 were approved under the [Rules] and separately, whether donations to a range of recipients during the financial year ending 30 June 2008 were approved under the [Rules]. Those investigations relate to whether the making of any of these donations amounted to contraventions of numerous civil penalty provisions of the predecessors to the [RO Act].

At 6.02pm the Commissioner responded to the email, “Looks a little more accurate…I am okay with this”. At 6.17pm Mr Enright emailed Mr Russo the approved media statement. At 6.19pm Mr Russo sent Mr Enright the final copy of the statement.

1. At 6.54pm Mr Lee emailed the Commissioner and Mr Enright and informed them that he had sent the media statement to various media outlets and that “[t]he Minister’s Office has also asked for a copy of the statement, which I have provided.”
2. On 25 October 2017, Mr De Garis resigned from his position with Minister Cash. Mr Lee did not take up the position as senior media advisor for the Minister.
3. On 26 October 2017, Minister Cash wrote to the Commissioner and stated:

I refer to recent public discussion regarding the media awareness of the raids that were undertaken by the AFP on the offices of the AWU in Sydney and Melbourne on 24 October 2017.

It appears that information may have been inappropriately divulged.

In the circumstances I am writing to inquire what steps the Registered Organisations Commission is taking as appropriate to establish the facts of this matter.

I note that as Minister I do not have power to direct you in relation to such a matter however one course of action which I would ask you to consider is referring the matter to the [AFP].

## Ground 3 – Was the Investigation Commenced for an Improper Political Purpose?

### AWU’s Contentions

1. The AWU submitted that the Court should find that on the balance of probabilities the Investigation was commenced for the improper purpose of aiding in, assisting or promoting what I have earlier described as Minister Cash’s political purpose, that is, the purpose of discrediting, embarrassing or politically harming Mr Shorten. The submission was that the Court should make that finding for the following seven reasons:
2. that Minister Cash had the political purpose ascribed to her by the AWU of discrediting, embarrassing or politically harming Mr Shorten;
3. that Mr Enright knew that Minister Cash had that purpose, or a political agenda of the same kind;
4. that Mr Enright took steps to accommodate and look after Minister Cash’s interests in a proactive fashion;
5. that Mr Enright was not transparent about his communications with Minister Cash’s office or about the particular focus of the Investigation upon matters concerning Mr Shorten, which it was contended bespeaks a consciousness of guilt;
6. that Mr Enright took steps immediately upon receiving the referrals from Minister Cash, and shortly after visiting Minister Cash’s office in Canberra in September 2017;
7. that Mr Enright overlooked, or showed no interest at all in s 320 of the RO Act which, it was contended, revealed a mindset that was fixed on carrying out the referrals made by Minister Cash; and
8. that in the context of the RO Act it was improper for Mr Enright to have had regard to the referrals from Minister Cash.

### Applicable Legal Principles

1. The relevant legal principles were not in contest although some difference in emphasis was placed on those principles in the submissions of the parties. The Commissioner accepted that the power to commence an investigation under s 331(2) of the RO Act must be exercised for the purpose or purposes for which that power is conferred and not some other purpose. The Commissioner accepted that if it were established that the Decision was made for the purpose of aiding in, assisting or promoting Minister Cash’s political purpose of discrediting, embarrassing or politically harming Mr Shorten, that purpose would amount to a relevant improper purpose.
2. The principles regarding improper purpose were conveniently summarised by Martin CJ in ***Hunter*** *v The Minister for Planning* [2012] WASC 247 at [24]-[27] and endorsed by Martin CJ and Murphy JA in *A v Corruption and Crime Commissioner* [2013] WASCA 288 at [140]:

[24] [t]he expression ‘improper purpose’ does not necessarily connote a purpose which is corrupt, immoral or lacking in probity. Rather, it connotes a purpose which is ulterior or extraneous in the sense that it is beyond the scope of the purposes for which the relevant power is conferred (see, for example, ***Thompson v Randwick Corporation*** [1950] HCA 33; (1950) 81 CLR 87, 106 (Williams, Webb & Kitto JJ)). Accordingly, where the relevant power derives from legislation, the purposes for which the power has been conferred will be derived by a process of construction of the legislation: see ***R v Toohey; Ex Parte Northern Land Council*** [1981] HCA 74; (1981) 151 CLR 170, 186 (Gibbs CJ), 233 (Aickin J).

[25] The ulterior purpose need not be established to be the sole purpose for the exercise of the power. It will be sufficient if it is established that the purpose is a substantial purpose, in the sense that the power would not have been exercised but for the ulterior or extraneous purpose: ***Thompson v Randwick*,** 106; see also ***Re Minister for the Environment; Ex Parte Elwood*** [2007] WASCA 137 [173].

[26] The party impugning the exercise of power on the basis of improper purpose bears the onus of establishing such a purpose (***Municipal Council of Sydney v Campbell***[1925] AC 338, 343; ***Industrial Equity Ltd v Deputy Commissioner of Taxation*** [1990] HCA 46; (1990) 170 CLR 649, 671 (Gaudron J)). In the absence of evidence establishing improper purpose or displacing all possible legitimate purposes, it will be presumed that the power was exercised for a purpose falling within the scope of the purposes for which the power was conferred. An improper purpose will not lightly be inferred. If the purpose for which the power was exercised must be ascertained by inference from other facts, the presumption of regularity will be applied, so that the inference of improper purpose will only be drawn if the evidence cannot be reconciled with the proper exercise of the power (***Industrial Equity Ltd,*** 672 (Gaudron J)).

[27] There are some authorities which draw a distinction between a substantial purpose, in the sense in which that term is used in the decision in ***Thompson v Randwick***, to which I have referred, and a ‘dominant’ purpose (see, for example, ***Haneef v Minister for Immigration and Citizenship*** [2007] FCA 1273 ; (2007) 161 FCR 40 [287]). However, at this stage of these proceedings, it is unnecessary to determine whether there is any material distinction between a test cast in terms of substantial or dominant purpose. It is sufficient for present purposes to observe that the purpose must have motivated the exercise of the power, in the sense that the power would not have been exercised but for the existence of that purpose or motive.

See further *Minister for Foreign Affairs v Lee* (2014) 227 FCR 279 at [54] (Robertson J) and *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2014) 227 FCR 1 at [434]-[438] (Middleton J).

### Deliberation

1. As earlier stated, the power conferred upon the Commissioner by ss 330 and 331 to make inquiries and to conduct investigations has been conferred to facilitate the Commissioner’s compliance function. It is for that purpose that an investigation may be commenced pursuant to s 331(2). The AWU’s contention is that the decision to conduct the Investigation was motivated by the political purpose it has ascribed to Mr Enright. For the AWU to succeed, I would need to be satisfied that the political purpose was a substantial purpose which induced Mr Enright to decide to commence the Investigation, in the sense that he would not have commenced the Investigation but for the motivation provided by the political purpose.
2. That requirement, taken from the passage just quoted from *Hunter*, is, in my view, akin to the requirement expressed by Gaudron J in *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 672, that given the presumption of regularity, an improper purpose “will only be inferred if the evidence cannot be reconciled with the proper exercise of the power”.
3. The Decision Record purports, on its face, to set out Mr Enright’s reasons for deciding to commence the Investigation and Mr Enright’s unchallenged evidence (earlier referred to) was that the Decision Record sets out the basis for the Decision. The Decision Record contains no hint of the political purpose which the AWU contended for. Further, as I will shortly detail, Mr Enright expressly denied that he was motivated by Minister Cash’s political purpose.
4. In the absence of direct evidence, the AWU can only establish the political purpose it seeks to prove by way of inference. In accordance with the authorities to which I have referred, the existence of an improper purpose will not lightly be inferred and, in the approach to inferential fact-finding which I am bound to take, I will need to be satisfied that the circumstances appearing in the evidence give rise to reasonable and definite inferences and not merely to conflicting inferences of equal degrees of probability: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at [38] (Weinberg, Bennett and Rares JJ)
5. I accept the Commissioner’s contention that the allegation that Mr Enright was motivated by the political purpose ascribed to him by the AWU, is a very serious allegation. It is an allegation made against a senior public servant that he acted inconsistently with the statutory function conferred upon him. That is a grave allegation, the gravity of which is enlarged by the aspersion which it casts that Mr Enright has conducted himself in a politically partisan manner inconsistently with his obligations as a public servant. This is not an allegation based on inadvertence, it is an allegation which can only be characterised as involving intentional impropriety. Section 140 of the *Evidence Act 1995* (Cth) has application. By reference to the principle in ***Briginshaw*** *v Briginshaw* (1938) 60 CLR 336, the allegations made by the AWU cannot be proven on the strength of “inexact proofs, indefinite testimony or indirect inferences”: *Briginshaw* at 362 (Dixon J);further see *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8 at [100]-[107] and [219]-[220] (Ryan J). For the AWU to succeed I would also need to be persuaded that Mr Enright’s denial of the alleged political purpose should be rejected.

#### Mr Enright’s Knowledge or Understanding of the Minister’s Political Purpose

1. The AWU sought to build its case about the existence of Mr Enright’s alleged political purpose on the back of its case that Minister Cash had the political purpose of seeking to discredit, embarrass or politically harm her political opponent Mr Shorten. There were three steps in the approach contended for by the AWU:
2. that the Minister had the political purpose;
3. that Mr Enright knew that the Minister had the political purpose; and
4. that Mr Enright was motivated to commence the Investigation in order to aid or assist in Minister Cash’s political purpose.
5. For reasons which I will expand upon later, that three-stepped approach has turned out to be redundant. It was, however, the approach taken and consequently there was evidence received, including evidence received on a conditional basis, which focused upon Minister Cash’s political purpose. The evidence received conditionally was the subject of a relevance objection made by the Commissioner. In particular, the Commissioner objected to the reception of evidence dealing with events which occurred after 20 October 2017.
6. In so far as the evidence objected to was probative of whether Minister Cash had a disposition to try and discredit, embarrass or politically harm Mr Shorten, the Commissioner’s relevance objection should be rejected. Although the evidence in question has, for reasons I will expand upon shortly, not been of any assistance, that evidence could have, if it were accepted, rationally affected (directly or indirectly) the assessment of the existence of a fact in issue (s 55, Evidence Act). Given the AWU’s three-stepped approach, a fact in issue was whether Minister Cash held the alleged political purpose at or shortly prior to 20 October 2017 being the date of the Decision. That fact involved a particular disposition or state of mind the existence of which was capable of being proved by reference to evidence that the particular disposition or state of mind existed in the period later than but proximate to 20 October 2017. The existence of an earlier disposition or practice may be inferred from later events which demonstrate the disposition or practice: *HK Systems Australia Pty Ltd v Debus* (2008) 169 FCR 46 at [43]-[44] (Weinberg J); *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33 at [82] (Ormiston JA, with whom Chernov and Eames JJA agreed); *Lodestar Anstalt v Campari America LLC* (2016) 244 FCR 557 at [194] (Katzmann J); *E and J Gallo Winery v Lion Nathan Australia Pty Ltd* (2010) 241 CLR 144 at [76] (Heydon J).
7. Although probative of a fact in issue, the evidence relevant to whether the Minister had the alleged political purpose, has been overtaken by evidence given by Mr Enright which has made the AWU’s three-stepped approach redundant. On the second last day of the trial, Mr Enright conceded that he had assumed the existence of Minister Cash’s political purpose. The relevant exchange with Senior Counsel for the AWU, including Mr Enright’s denial that he acted to accommodate Minister Cash’s purpose, was as follows:

MR BORENSTEIN: I want to put to you firstly, Mr Enright, that you were aware of the Minister’s political purpose in writing to you and asking you to look into these allegations against Mr Shorten and the AWU?---Well, I was aware of what the Minister’s agenda was. Clearly, the Minister was on a particular – a political side of parliament that had an agenda. I was clearly aware of that.

Yes?---What was in her mind exactly I don’t know, but I accept that I was clearly aware that she would have had it – well, in my view. I can’t read into her mind, but it’s – I assume she had an agenda, if I can put it that way.

And I put to you, secondly, that the steps that you took to advance the inquiries you were making were intended by you to accommodate or assist the Minister’s purpose?---I entirely reject that proposition.

1. That evidence is to be understood in the light of Mr Enright’s earlier evidence that:

Invariably, people who provide information or referrals to agencies and regulators or police agencies have some preferred outcome in mind or have their own agendas and it’s incumbent upon skilled investigators to be alive to that, so yes.

1. Consistent with that evidence is Mr Enright’s earlier evidence, about the possible implications of his investigation:

Now, can I ask you whether you had any view about whether the inquiries that you were engaged in would potentially be politically damaging for Mr Shorten if they received media exposure?---That’s a possibility, yes.

…

And you indicated earlier that you were conscious of the potential for this investigation to do harm if it was exposed in the media?---Yes.

1. The Commissioner did not concede that Mr Enright understood that, in sending the referral letters, Minister Cash’s purpose included wanting the AWU to be investigated by the Commissioner in order to discredit, embarrass or politically harm Mr Shorten. The Commissioner contended that the evidence set out above “does not go as high as the AWU seeks to take it”. That contention was made in a footnote which continued:

The excerpted passages make clear that in response to that specific allegation being put to him, Mr Enright assumed that the Minister had some form of agenda or purpose in sending the referrals to the Commissioner, and that this may have been political in nature: quite rightly, he could not say what that purpose was because he could not know.

1. That submission sought to suggest that Mr Enright’s understanding, based on the assumption he made, was about some general agenda, not necessarily a political purpose and not about a specific understanding that Minister Cash wanted to discredit, embarrass or politically harm Mr Shorten, as that purpose had been formulated in the AWU’s grounds of review. That suggestion should be rejected. Mr Enright’s evidence was clear enough. Although the questioning put to him which he acceded to, referred to the “Minister’s political purpose” without further definition, I have little doubt that Mr Enright’s answer was directed to the Minister’s purpose as formulated in the AWU’s case. Mr Enright had no difficulty with the question. He sought no clarification. The centrality of his position in the case, put him in a good position to understand precisely what the questioner was asking him about. Nothing in the answers that he gave suggested any lack of appreciation as to what the questioner meant by “the Minister’s political purpose in writing to you”.
2. I find that at the time of the Decision, Mr Enright held an understanding (based on an assumption made by him) that Minister Cash’s purpose in sending the letters of referral to the Commissioner included that she wanted the AWU to be investigated by the Commissioner in order to discredit, embarrass or politically harm Mr Shorten.
3. Having made that finding, it is not necessary for me to make findings as to whether or not Minister Cash actually held the political purpose and whether Mr Enright had knowledge of it. It is not necessary for the AWU to establish steps one and two in its three-stepped approach in order to prove step three. In any event, even if step one (the Minister’s political purpose) was demonstrated, step two (that Mr Enright had knowledge of it) was not. The only evidence that the AWU relied upon to prove that Mr Enright “knew” of the Minister’s political purpose was the evidence of the assumption made by him. Although that was evidence of his understanding, the understanding was based on an assumption the basis for which was not given. In those circumstances whilst I find Mr Enright had his own understanding of the Minister’s purpose, there is no basis for a finding that he had knowledge of any actual purpose held by the Minister.
4. As it is not necessary for me to make findings about the political purpose which the AWU contended Minister Cash had, it is neither necessary or appropriate that I address the adverse credit findings sought by the AWU in relation to the evidence given by Minister Cash in denying that she held the political purpose contended for by the AWU of discrediting, embarrassing, or politically harming Mr Shorten and that she sent the letters of referral for that purpose.
5. Of itself, the fact that Mr Enright held an understanding that, in sending the referral letters, Minister Cash was likely to be motivated by the purpose of wanting Mr Shorten discredited, embarrassed or politically harmed, provides little support for the finding contended for by the AWU that Mr Enright acted in aid of the political purpose he assumed the Minister to have had. That Mr Enright formed the understanding is entirely unremarkable. Most people with an understanding of the relevant political landscape and the strategies commonly utilised by politicians, would have assumed that Minister Cash saw political mileage for her side of politics in the Commissioner investigating the AWU over suspected misconduct whilst Mr Shorten was its National Secretary. As an experienced investigator, Mr Enright was well attuned to informers having their own agendas and there is nothing surprising about Mr Enright having ascribed an agenda to Minister Cash. In that respect, I found Mr Enright’s evidence candid and credible.
6. I have so far addressed reasons (i) and (ii) relied upon by the AWU to support a finding that Mr Enright held an improper purpose. I will assess each reason (set out at [261] above) and each matter relied upon in support of each reason individually. I will later assess whether, cumulatively, the matters relied upon by the AWU demonstrate the proposition it contended for. I will do that in the context of any findings I should make as to the reliability of Mr Enright’s evidence and the weight that should be given to Mr Enright’s denial of an improper purpose.

#### Did Mr Enright Seek to “accommodate” the Minister?

1. The AWU’s reason (iii) in support of the finding it seeks, was that Mr Enright took steps to accommodate and look after the interests of Minister Cash in a proactive fashion. A large number of matters were relied upon as supporting the existence of this ground or reason.
2. *First*, the AWU contended that the Court should find that Mr Enright understood the referral letters from Minister Cash as connoting a direction from the Minister that the Commissioner consider the matters referred. The AWU here relied on the same evidence that it seeks to rely upon to make out its fifth ground of review, that Mr Enright impermissibly acted upon the advice or direction of Minister Cash. I will deal with that evidence further in addressing that ground which I ultimately dismiss, including because I do not accept that the AWU has demonstrated that Mr Enright regarded the referral letters as directions from the Minister to conduct an investigation. However, even if I made the finding sought by the AWU that Mr Enright regarded the referral letters as connoting a direction from Minister Cash, I fail to see how that finding would assist the AWU’s proposition that Mr Enright took steps to accommodate and look after the Minister’s interests in a proactive fashion. That proposition might have been made out if there had been any evidence that, knowing that the Minister lacked any power to make a direction, Mr Enright raised the status or authority of the referral letters to that of directions so as to enhance the prospect of the commencement of an investigation. However, there was no such evidence and no apparent support for the AWU’s proposition that in this respect Mr Enright was proactively accommodating the interests of Minister Cash.
3. *Second*, the AWU contended that Mr Enright took steps to chase up the first referral letter prior to its receipt. The AWU submitted that the only rational explanation for doing so is that Mr Enright regarded the first referral letter from the Minister as important and as something which he should consider and act upon. This contention also falls flat. It is entirely understandable, as Mr Enright essentially explained himself, that in circumstances where the media had reported that a referral letter had been sent to the Commissioner, steps should be taken to chase up the first referral letter because it would have been inefficient or embarrassing for the Commission not to have the referral letter (see [286] below). That Mr Enright did so, does not sustain the suggestion made by the AWU’s contention that Mr Enright gave the first referral letter some special attention or especial importance in an attempt to proactively accommodate the interests of Minister Cash.
4. The *third* basis relied upon by the AWU is closely related to the *second* and is also unsupportive of the AWU’s primary proposition. The AWU contended that Mr Enright took action immediately upon receiving the first referral letter, that is, that some 23 minutes after receiving the referral letter correspondence was emailed to Mr Walton of the AWU requesting documents. The AWU further stated that while the correspondence to Mr Walton was ready earlier in the day, the Court should find that Mr Enright sent it only after waiting for and receiving the Minister’s first referral letter. Why that conduct should be regarded as evidence of Mr Enright proactively taking steps to look after the Minister’s interests is not clear to me. It was not put to Mr Enright that, by this conduct, he was being especially keen or enthusiastic or accommodating let alone that, in doing so, he was motivated to look after the Minister’s interests.
5. Even if I was to accept that Mr Enright’s conduct indicated that he was giving the AWU matter some special attention, the inference which the AWU’s contention suggests I should draw – that the special attention was part of giving the Minister special treatment – is not an obvious or necessary inference. A more likely inference (or at least an equally available inference) for Mr Enright’s enthusiasm (if that be a proper characterisation of his state of mind), is that Mr Enright was motivated by the fact that the AWU issues he was already inquiring into were in the public domain and receiving significant public attention. It is instructive in that respect to note Mr Enright’s evidence that “[it] wasn’t efficient” (by which I took him to mean “it would have been embarrassing”) for the Commission to field media enquiries about the first referral letter in circumstances where that letter had not yet been received.
6. I see little or no significance to this issue in whether or not Mr Enright waited to receive the referral letter before sending correspondence to Mr Walton. In any event, Mr Enright’s evidence that he was not waiting to receive the first referral letter was not implausible.
7. The *fourth* matter relied upon by the AWU, is that Mr Enright chased up Minister Cash’s second referral letter having read about it in the newspaper. The AWU here sought to make the same point as it sought to make in relation to its *second* point addressed above. The same response is available. As Mr Enright explained, given the Commission’s experience in relation to the first referral letter, including that the Commission did not have it when it was being asked questions by the media and, in circumstances where there were media reports of a second referral letter which the Commission had not received, he regarded it as necessary in order “to provide an efficient response [to the media], and efficient advice to the Commissioner”, that he chase up to see where the second referral letter was. That explanation is not implausible and I have no reason to doubt it.
8. *Fifth,* the AWU submitted that there was no evidence to suggest that Mr Enright did not want to accommodate Minister Cash or that he positively disclaimed any reliance upon the letters of referral or his knowledge or belief as to the Minister’s purpose in sending him those letters. That submission is misconceived. There was evidence to that effect. It was given by Mr Enright in the denial made by him set out at [272] above. Somewhat inconsistently with the submission just recorded, the AWU later submitted that “Mr [Enright’s] denial that he took steps that were intended to accommodate or assist the Minister’s purpose should not be accepted”. I will deal further with whether I should accept or reject that evidence, but the existence of that evidence is undeniable.
9. *Sixth,* the AWU sought to rely on Mr Enright alerting Minister Cash’s office to the execution of the search warrants shortly after they were executed. The AWU contended that by so doing Mr Enright “sought to accommodate the Minister”.
10. That conduct occurred well after Mr Enright’s decision to conduct the Investigation. Nevertheless, I accept that evidence that Mr Enright sought to accommodate the Minister at the time of the execution of the search warrants, is capable of shedding some light on whether or not Mr Enright had a disposition to accommodate the Minister at the time that he made the Decision. However, the purpose for which Mr Enright may have sought to accommodate Minister Cash is important. It cannot be said that Mr Enright’s conduct on the day of the execution of the search warrants was to accommodate the Minister’s interest to have an investigation commenced in order that Mr Shorten be discredited, embarrassed or politically harmed. By the time the search warrants were executed the Investigation had already commenced.
11. I would accept that in contacting the Minister’s office on the day the search warrants were executed, Mr Enright sought to assist the Minister. Absent the conspiratorial tone with which the term “accommodate” is used by the AWU, I would accept that by his conduct Mr Enright sought to accommodate Minister Cash. So much is evident from the evidence that Mr Enright gave. Mr Enright contacted the Minister’s office after he became aware of media presence at the AWU offices in both Melbourne and Sydney through his conversation with Mr Davis. He deposed that his anticipation was that the media “would be flooding” both the Minister’s office and his own office with enquiries about what was going on. In that context, Mr Enright said he felt it was important to advise the Minister’s office. His evidence was to the effect that once the matter of the execution of the search warrants had become a matter of public attention, he understood that he had a responsibility to the Minister to provide her with information about the execution of the search warrants because he had anticipated that she would be asked questions about it either in Parliament or by the media.
12. The AWU criticised Mr Enright, contending that his understanding of parliamentary accountability was incorrect and that his conduct betrayed “a misguided willingness to assist the Minister without needing to be asked for assistance”.
13. The AWU’s characterisation is harsh. It is not implausible that Mr Enright genuinely believed that he had some responsibility to contact the Minister’s office to alert that office of a matter unexpectedly in the public spotlight concerning a statutory office for which the Minister had oversight responsibility. Whether that understanding was legally misguided is beside the point. That Mr Enright had a willingness to assist Minister Cash on the particular occasion in question and in the very specific circumstances that arose on the day that the search warrants were executed does not of itself establish some general disposition to accommodate the Minister. More particularly, it does not establish some general disposition to accommodate the Minister that existed at the time Mr Enright decided to commence the Investigation. Even if such a general disposition had been demonstrated, a general disposition to accommodate the Minister in furtherance of a purpose which Mr Enright considered appropriate is not demonstrative of a disposition to assist the Minister through improper or inappropriate conduct in derogation of a statutory responsibility.

#### Was Mr Enright Transparent about his Communications with the Minister’s Office?

1. I turn then to the AWU’s reason (iv) for the proposition that the Investigation was commenced for the improper purpose: that Mr Enright was not transparent about his communications with the Minister’s office or about the particular focus of the Investigation on matters concerning Mr Shorten. The AWU said that that conduct bespeaks a consciousness of guilt.
2. The *first* matter relied upon by the AWU concerned an issue dealt with already at [145] above in relation to various drafts of the Decision Record including early drafts which had named Mr Shorten. The AWU contended that the removal of Mr Shorten’s name from later drafts suggested that the naming of Mr Shorten in official documents (as opposed to informal indications), was done to conceal a target of the Investigation. Mr Enright denied direct involvement in the drafting changes made, to which the AWU specifically referred. However, as set out at [145], he indicated his understanding that later drafts of the Decision Record were drafted without reference to any particular AWU official because, consistently with his own view, the investigation was an investigation into a range of office holders and no office holder in particular. Additionally, Mr Enright denied that particular office holders had not been named because of the “political sensitivities” of the matter.
3. The AWU’s suggestion that the Investigation was a stalking horse for a wider investigation into the conduct of Mr Shorten in particular, is not entirely bereft of support. It will be recalled (see [215] above) that on 22 August 2017, Mr Hunt sent an email to Mr Lee which stated “we may begin an [sic] formal inquiry into Bill Shorten if the AWU does not produce documents by this coming Friday. If such an inquiry begins, it will probably be published innocuously on our website as ‘AWU formal inquiry’.”
4. However, that communication was not put to Mr Enright and any association Mr Enright may have had with the characterisation of the inquiry made by Mr Hunt, including Mr Hunt’s perceived need to disguise it, was not demonstrated.
5. Further, it is apparent that at least Ms Wilkin who had been given the responsibility for drafting the Decision Record thought that Mr Shorten would be a particular and a named subject of the Investigation. This is apparent from her communications to Mr Coyle of 4 October 2017 (see [230] above) and also her communication with Mr Coyle on 17 October 2017 (see [232] above). How or why it was that between 2.29 pm on 17 October 2017 and 5.34 pm on 17 October 2017 all mention of Mr Shorten was removed from the draft Decision Record was not explained.
6. Although it might have been expected that Mr Enright may have had some involvement with providing instructions to Ms Wilkin about the drafting of the Decision Record. Mr Enright’s evidence disassociating himself with changes made to drafts of the Decision Record was not demonstrated to be false. Furthermore, Mr Enright’s evidence that it was his view that the Investigation was not an investigation into any AWU office holder in particular, was consistent with the evidence earlier outlined supporting the conclusion that Mr Enright’s sole basis for his suspicion of possible contraventions of ss 285(1), 286(1) and 287(1) of the RO Act were possible contraventions of the Rules.
7. In those circumstances, the evidence does not permit a finding of some “consciousness of guilt” on the part of Mr Enright in relation to the manner in which the Commission dealt with whether or not Mr Shorten should be the subject of the Investigation, in relation to conduct particular to him.
8. Furthermore, in the absence of the AWU establishing an ulterior motive for why Mr Shorten was not individually named or targeted by the Decision Record or other documentation evidencing the nature of the Investigation, the fact that Mr Shorten was not so named or targeted is inconsistent with the proposition that Mr Enright’s purpose was to aid in discrediting or politically harming Mr Shorten.
9. The *second* matter relied upon was that Mr Enright lacked transparency or frankness about the full extent of his communications with the Minister’s office. That was also said to reveal a consciousness of some impropriety on his part. I will return to that matter shortly in addressing the credibility of Mr Enright as a witness.
10. The AWU’s *third* point again relied upon the allegation (already addressed) that Mr Enright had not been open and transparent about the implications of the Investigation for Mr Shorten but also relied upon an allegation that Mr Enright refused to provide Maurice Blackburn with all correspondence with the Minister’s office. That concerned Mr Enright’s failure to disclose and provide to Maurice Blackburn the Minister’s second referral letter.
11. Maurice Blackburn wrote on behalf of the AWU by letter dated 25 August 2017 as detailed above at [217]. The contents of that letter suggest that the author was aware that Minister Cash had referred “the matter of the GetUp Donation to the [Commission]”. The contents of the letter do not suggest an awareness that, by that time, a second letter of referral had been sent. Maurice Blackburn requested that the Commission provide a copy of “the Minister’s referral of this matter to [the Commission]” and secondly any correspondence or record of communication between the Minister and the Commission “in relation to this matter”. The letter also raised concern about “the apparent politicisation of the assessment process presently being conducted by the [Commission]”.
12. Mr Enright’s letter in reply of 29 August 2017, which is detailed above at [220], specifically dealt with each of the two categories of requests. In relation to the first – the Minister’s referral of this matter to the Commission – Mr Enright attached the Minister’s first referral letter. He did not attach the second referral letter despite the fact that it had been in the Commission’s possession since 18 August 2017. In relation to the second more general request for communications between the Minister and the Commission, Mr Enright said that it would not be appropriate to accede to that request. No specific reason was given, although Mr Enright asserted that the Commissioner and his Delegate “jealously guard a high degree of independence in the discharge of all [Commission] functions and powers”. There is perhaps a suggestion in that explanation that the provision of copies of communications received by the Commission might compromise the Commission’s capacity to receive a range of information from a range of sources.
13. When, in his evidence, Mr Enright was taken to the fact that he had failed to disclose and provide the second referral letter, he initially said that that was so because he was not sufficiently familiar with the second referral letter at that time. That response was surprising including because Mr Enright had had the letter for some ten days prior to responding to Maurice Blackburn.
14. Later, Mr Enright was taken to the response he gave to the second category of request which he had refused on the basis that “it would not be appropriate” to accede to it. When asked to explain, Mr Enright stated that correspondence of the kind sought was very often provided to the Commission in confidence. He relied on that as one reason for refusing to provide documents to Maurice Blackburn including the second referral letter. The second reason given by Mr Enright was that it would be onerous for the Commission to provide documents of the kind requested given the large number of inquiries the Commission conducts. Mr Enright was then confronted with needing to explain why he did provide the first referral letter in circumstances where he regarded the provision of the second referral letter to “not be appropriate”. He deposed that he had drawn a distinction between the two letters based on his familiarity with the issues raised by the first referral letter and that he had “nowhere near that level of understanding in terms of the second [referral] letter”.
15. I harbour concern about the reliability of the evidence given by Mr Enright on this aspect of the case. The second referral letter was short and it attached a single newspaper article. It raised allegations of donations having been made by the AWU not in accordance with the Rules, as had the first referral letter. The matters raised were closely related to the matters raised by the first referral letter. The allegations had been put into the public domain by Mr Norington. Mr Enright had personally contacted the Minister’s office to get a copy of the second referral letter and his evidence was that that had been necessary “to provide an efficient response [to the media], and efficient advice to the Commissioner”. In that context, and given that by the time he responded to the letter from Maurice Blackburn, Mr Enright had had the second referral letter for ten days, it is difficult to accept Mr Enright’s evidence that he lacked familiarity with the second referral letter and that his lack of familiarity was the reason for its non-disclosure. What may be revealed by the unsatisfactory nature of Mr Enright’s evidence on this aspect of the case will be addressed later.

#### Mr Enright’s Visit to the Minister’s Office

1. The next reason or basis relied upon by the AWU (reason (v)) to establish an improper purpose, was that Mr Enright took steps immediately upon receiving the letters of referral and shortly after visiting the Minister’s office in Canberra in September 2017. The first aspect of that has already been dealt with (see [285]-[287] above). The second aspect relates to Mr Enright’s trip to Canberra, which is referred to above at [223], when he and the Commissioner met some of the Minister’s staff and had a discussion with Ms Little on or around Friday 8 September 2017. The AWU relied upon the proximity of that event with the event on the following Monday 11 September 2017 when Mr Enright gave a direction to his staff to prepare the documents for “the commencement of an investigation”. The AWU contended that the Court should infer that the Minister’s “referrals” (or the subject matter of the AWU’s donations) were discussed at the meeting between Mr Enright and the Minister’s staff.
2. I accept the Commissioner’s contention that it would be wrong to conclude that any firm decision to commence the Investigation was made by Mr Enright on Monday 11 September 2017. However I also accept that on that day, Mr Enright did determine that preparation of the documentation necessary to commence an investigation should be undertaken. That decision was of sufficient significance for the argument the AWU seeks to make good.
3. There were other objectively rational explanations for why Mr Enright may have requested that those preparations be commenced on that day. As the Commissioner contended, the timing of that request is more likely to be explained by the letter from Maurice Blackburn on the immediately preceding Thursday (7 September 2017), making it plain that the AWU was not going to voluntarily provide any documents.
4. Mr Enright could not recall the primary reason for the Commissioner and himself being in Canberra on 8 September 2017. He confirmed, however, that they had attended at the Minister’s office. He said that the purpose of that attendance was to reciprocate an earlier “meet and greet” from the Minister’s staff. Two of the Minister’s staff had visited the Commission and the Commission had undertaken to “return the meet and greet favour”. For that reason he and the Commissioner “called into the Minister’s office and had a discussion”. Mr Enright recalled meeting Ms Little, there may have been other staff around but she was the only person they sat down and had a discussion with. The Minister was not in attendance.
5. The coincidence in timing upon which the AWU relies provides no more than a highly speculative basis for the connection or nexus sought to be made. Mr Enright expressly denied that there was any discussion at the meeting with Ms Little about the AWU matter. No *Jones v Dunkel* inference (*Jones v Dunkel* (1959) 101 CLR 298) can be drawn by reason of the Commissioner not being called to give evidence in relation to the meeting. However, I do harbour some concern about Mr Enright’s evidence on this issue and I will return to deal with that later.

#### Mr Enright’s View that s 320 was Inapplicable

1. Next (reason (vi)), the AWU contended that the fact that Mr Enright overlooked or showed no interest at all in s 320 of the RO Act was revealing of a mindset that was fixed on carrying out the Minister’s “referral”. The difficulty with that submission is that the evidence was that Mr Enright had a long-standing view as to the inapplicability of s 320 of the RO Act in circumstances such as those he was considering in relation to the Investigation. He deposed that he had been considering and dealing with s 320 since 2013. He said that he very often considered s 320 and that he did not “think it had any applicability in this case”. Mr Enright said:

As I’ve said earlier on, I gave the evidence that I’ve always held – when I say ‘always’ – for some time now, I’ve had a particular view about the – about section 320, and I apply it in – in most cases and, routinely, in matters that we deal with. We deal with all sorts of administrative matters, and I apply it in most matters, and I applied it in this case, and it was my view that it didn’t have any – any work to do, that it was not applicable in this case.

1. If accepted, that evidence reveals that Mr Enright’s understanding of s 320 was not formulated or arrived at in relation to the subject raised by the letters of referral made by the Minister. If I had been satisfied that Mr Enright’s view of the operation and inapplicability of s 320 was peculiar to his decision to commence the Investigation, this consideration could have provided significant support for the AWU’s case.
2. The AWU contended that Mr Enright’s evidence of a firm and settled view about s 320 of the RO Act was implausible and inconsistent with the evidence he gave about his usual approach to significant inquiries or investigations. I therefore need to consider whether I should accept Mr Enright’s evidence that his view as to the inapplicability of s 320 of the RO Act was a genuine and long‑standing view held by him.
3. Mr Enright’s stated view that s 320 had no application to circumstances such as those raised by the Investigation is not merely wrong, it is both curious and surprising. However, I am not able to conclude that it is implausible that he held the view he says he held. In reaching that conclusion, I have taken into account that Mr Enright was not really challenged about whether his view was genuinely held. I have also taken into account my assessment of Mr Enright’s reliability as a witness, a matter which I deal with further below.
4. My reasoning as to why s 320 of the RO Act was not merely applicable but critical to whether or not Mr Enright’s suspicions of contraventions of ss 285(1), 286(1) and 287(1) of the RO Act were or were not well-founded, has been addressed in relation to the second ground of review (see [149]-[165]). On that assessment of the law, if Mr Enright believed that s 320 was inapplicable to the Investigation that he commenced, his belief was plainly wrong. But, if Mr Enright is to be believed, the extent of his error is deeper still. That is because the tenor of Mr Enright’s evidence suggests that he took the view that the applicability of s 320 of the RO Act was not even arguable.
5. Mr Enright deposed that it was common for the Commission to obtain legal advice because (referring to many of the inquiries and investigations undertaken by the Commission) “this is such an untested area of the law”. As recorded earlier, advice was sought from Mr O’Grady as to whether reasonable grounds existed to warrant the commencement of the Investigation. Mr Enright deposed that in seeking that advice, he did not request Mr O’Grady to turn his mind to s 320. Mr Enright said that was because “I had my own view about it … and I didn’t think it had any applicability in this case”.
6. Despite being firm in his view that it was unnecessary to obtain Mr O’Grady’s advice on the applicability of s 320, Mr Enright later deposed that at a subsequent time Mr O’Grady’s advice about s 320 was sought and provided in relation to the Investigation. Mr Enright was evasive as to what motivated him to change his mind about the need to seek advice about s 320. He was asked on several occasions to identify the impetus for that changed position but deflected the questioning with dismissive observations such as that he was “always better served by getting advice from clever counsel”.
7. In truth, there was no impetus for a changed position. That became apparent after the AWU called for the production of the further advice of Mr O’Grady. The existence of an advice in relation to s 320 of the RO Act provided to the Commissioner was confirmed, but production of it was resisted. It was agreed that no further advice on s 320 had been sought or provided in relation to the Investigation and that an advice in relation to s 320 had been sought and provided to the Commissioner for a different investigation. Mr Enright had been mistaken and he had reconstructed events, perhaps unconsciously.
8. As indicated already, the basis for a contravention of ss 285(1), 286(1) or 287(1) of the RO Act need not be grounded in a contravention of the rules of a registered organisation and, in those circumstances, s 320 of the RO Act could have no applicability for an investigation into suspected contraventions of that kind. However, where the suspected basis of the contravention of those provisions is grounded *only* (or even largely) in the fact that the conduct in question was taken in contravention of the rules of a registered organisation and that occurred more than 4 years earlier, it is highly surprising that, a person with Mr Enright’s experience and performing the role that he did, would, in the absence of legal advice, confidently hold the view that s 320 had nothing to say as to whether a contravention was then in existence.
9. However, there are several possible explanations as to why such a view could have been genuinely held by Mr Enright, including that he genuinely misunderstood the operation and effect of s 320 of the RO Act. While somewhat surprising given the confidence with which that understanding seems to have been held, that reason is not implausible. Taking into account the paucity of support which otherwise exists for the AWU’s contention that Mr Enright acted for the improper purpose alleged, that reason is a more plausible reason than the reason that Mr Enright knowingly and deliberately ignored the applicability of s 320 in order to aid and assist Minister Cash. Importantly, Mr Enright was never really challenged as to the genuineness of his belief. The basis for his belief was not explored with him and it was never put to him that he had knowingly and deliberately avoided bringing s 320 into account to facilitate the improper purpose. As Mansfield and Gilmour JJ said in *Ashby v Slipper* (2014) 219 FCR 322 at [77] “as a general proposition, evidence, which is not inherently incredible and which is unchallenged, ought to be accepted”.

#### Improper Regard to “referrals” from the Minister

1. By reason (vii), the AWU contended that in the context of the RO Act it is improper to have regard to referrals from the Minister. I will deal with that matter more fully in my discussion of the fifth ground of review. However, in the absence of any evidence of knowing impropriety, I fail to see how that contention assists the AWU’s assertion that Mr Enright was involved in knowingly improper conduct.

#### The Leak to the Media

1. The AWU also relied upon the leak to the media of the impending execution of the search warrants on the AWU offices as being probative of Mr Enright seeking to accommodate the interests of Minister Cash in deciding to conduct the Investigation. The AWU contended that Mr Enright had authorised for information about the impending execution of the search warrants to be provided to the Minister’s office. Some of the evidence dealing with this topic was subject to a relevance objection. The evidence was received conditionally. The objections made are not sustained on the basis that (as noted at [271]) the existence of an earlier disposition or practice may be inferred from later events.
2. As detailed earlier at [252], Mr De Garis and Mr Tetlow were responsible for communicating to the media that search warrants were about to be executed at the Melbourne and Sydney premises of the AWU. It was Mr Davies who informed Mr De Garis of the imminent execution of the search warrants and instructed Mr De Garis to have discussions with the media in which he would be required to “articulate the information” about the execution of the search warrants on the AWU. Each of Mr De Garis and Mr Davies understood that there was political mileage for Minister Cash in leaking the information to the media, including because of the political implications for Mr Shorten.
3. Mr De Garis understood that the Investigation allegedly implicated Mr Shorten in the affairs of the AWU at the time when he was an official of that union. He also understood that those matters fell within Minister Cash’s area of responsibility. Mr De Garis agreed that it was in the Minister’s political interest to get media coverage of what the Commissioner was looking into. He agreed that the Minister’s interest in getting media exposure was not incompatible with the Minister’s interest in getting media coverage that would be seen to be detrimental to Mr Shorten’s political standing. Mr De Garis frankly admitted that he informed the media about the imminent execution of the search warrants “in order for it to get media coverage” and said that in deciding to do that, the impact on Mr Shorten’s reputation “would have been at least part of my thinking, I’m sure”.
4. Mr Davies was of the view that the media’s broadcasting of the execution of the warrants was of political detriment to Mr Shorten. He told the Court:

There were obvious political implications as well, given the backgrounds to the investigation

…

The political implications were that the investigation related to donations made during the period in which Mr Shorten was responsible for the AWU. There were unanswered questions as to whether they had been lawfully authorised, and the political significance was that there was evidence to suggest that the current leadership of the AWU under Mr Walton or people associated with him may have been engaging in activities to destroy evidence that may have been unfavourable to Mr Shorten

…

The political implications were an obvious inference that there was evidence to suggest some kind of cover-up or document destruction to conceal evidence that may be unfavourable to Mr Shorten and the actions of the current AWU leadership and the reasons why they would be undertaking such document destruction, for whose interests they were undertaking such document destruction, and at whose behest they may have been undertaking such document destruction.

1. On the evidence, the only available conduit connecting the conduct and purpose of Mr De Garis and Mr Davies with Mr Enright is Mr Lee. At the time, Mr Lee was the Media Director at the Fair Work Ombudsman but involved in assisting Mr Russo who had just been appointed as the Media Adviser for the Commission.
2. As detailed earlier at [250], at 1.17 pm on the day the search warrants were executed, Mr Lee called Mr Davies. Mr Davies deposed that Mr Lee told him that the Commission was conducting an investigation into the AWU, that the Commission had been contacted by a whistle blower who provided information to the effect that the AWU was seeking to destroy documents or interfere with evidence and that, as a result, the Commissioner had applied for search warrants, which had been granted and that the search warrants were to be executed later that day at the Melbourne and Sydney offices of the AWU.
3. Mr Lee agreed that he spoke with Mr Davies at 1.30pm or so. He denied that he told Mr Davies any of the matters deposed by Mr Davies and set out above. He deposed that the conversation with Mr Davies only dealt with issues to do with him taking up a position in the Minister’s office. Mr Lee also denied that he was aware, at the time of that conversation, when any search warrants that might be obtained would be executed. He deposed that he did not think that the execution of search warrants was imminent and had not realised that search warrants would be executed later that day.
4. The evidence of Mr Davies and Mr Lee on whether Mr Lee advised Mr Davies of the impending execution of the search warrants was in direct conflict. For various reasons, the AWU contended that I should accept the evidence of Mr Davies in preference to that of Mr Lee. The cause of the conflict is likely to be that one or other of Mr Davies or Mr Lee was not truthful. That is a serious matter with potentially very serious consequences for the individuals involved. The direct conflict is not easily resolved. Neither account of the conversation is corroborated by other evidence and there is no compelling reason why I should reject either account. I should not make a grave finding that a witness has been deliberately untruthful unless I can do so with confidence.
5. However, the difficulty in resolving that conflict is of no consequence as I have come to the view that a necessary connection between Mr Lee and Mr Enright is not established on the evidence and that, consequently, the finding the AWU seeks should not be made. Without determining the conflict, I can proceed on the sequence of events contended for by the AWU, that Mr Lee did tell Mr Davies of the imminent execution of search warrants on the AWU’s Melbourne and Sydney offices.
6. The finding the AWU sought was that Mr Lee was authorised by Mr Enright to tell Mr Davies of the impending execution of the search warrants. There is no basis for such a finding. Even if there had been, that would not be sufficient of itself. Some impropriety or improper purpose on Mr Enright’s part in communicating information about the search warrants to the Minister’s office would also need to be established. The idea that Mr Enright shared in Mr De Garis’ and Mr Davies’ purpose of bringing media attention to the execution of the search warrants for political advantage or that Mr Enright sought media attention for some other purpose, is unsupported by the evidence. I accept the evidence of Mr Enright that his intention was for the warrants to be executed with the cooperation of the AWU and as “low key” as possible, without the involvement of any media. Contemporaneous records evidence Mr Enright’s intent not to brief Minister Cash in accordance with the Commission’s normal practice of not briefing the Minister on operational issues (see [249] above).
7. Further, as the Commissioner contended, the evidence supports the finding that Mr Enright had nothing relevant to do with any of the actions, conduct, activities or states of mind of any of Mr De Garis, Mr Davies, Mr Lee or Minister Cash on 24 October 2017. Mr Enright had not spoken to or otherwise communicated with any of those persons, in any way relevant to any leak to the media. No suggestion was raised with Mr Enright that he had any such communication.
8. Mr Enright did speak to Mr Russo about obtaining and executing the search warrants. As detailed earlier at [248], Mr Enright was approached in the early afternoon of 24 October by Mr Russo about Mr Russo obtaining assistance from Mr Lee in relation to media enquiries that might be made about the execution of the search warrants at the behest of the Commissioner. In circumstances where Mr Russo was newly employed and lacked the facilities and contacts to deal with the media out of work hours, Mr Enright agreed that Mr Russo could seek Mr Lee’s assistance and provide him with some information about the search warrants on a confidential basis. Mr Enright deposed that the information he authorised Mr Russo to convey to Mr Lee was limited to informing Mr Lee of there being a possibility that the Commission was going to execute search warrants. Mr Russo confirmed that Mr Enright had given him authority to speak to Mr Lee about the potential for a search warrant being executed. Mr Russo deposed that he had an in-confidence discussion with Mr Lee and “mentioned to him that there was – there may be a search warrant executed and if there was – if there was, he may receive media inquiries”. None of the evidence supports the finding sought by the AWU, that through Mr Russo, Mr Enright authorised Mr Lee to communicate information about the impending execution of the search warrants to the Minister’s office.

#### The Reliability of Mr Enright’s Evidence

1. A number of the AWU’s grounds or reasons addressed above, including those suggesting a lack of transparency in Mr Enright’s communications with Minister Cash and conduct which “bespeaks a consciousness of guilt”, require that consideration be given to Mr Enright’s reliability as a witness. The AWU contended that Mr Enright was not a credible witness. The AWU asserted that he gave his evidence as an advocate for the Commissioner, that he was not a dispassionate witness of fact, that at times he was belligerent or inconsistent and sometimes gave implausible evidence.
2. I have already addressed my concern about the reliability of the evidence given by Mr Enright in relation to why he refused to disclose to Maurice Blackburn the second referral letter. The evidence given involved inconsistency and was not plausible. I have also found that Mr Enright’s evidence about obtaining legal advice about s 320 of the RO act involved him reconstructing events. A further example of Mr Enright reconstructing events was Mr Enright’s initial evidence that a reason for chasing the Minister’s second referral letter was the fact that a hard copy of the first referral letter had taken 10 days to arrive, a matter he could not have known of at the time when he made enquiries with the Minister’s office about the second referral letter.
3. In my view, those examples support the observation that Mr Enright was, at times, overly protective of his own conduct and the conduct of the Commission and that he was prone to giving evidence as an advocate protecting himself and the conduct of the Commission from criticism. That overly protective approach also came through in some of Mr Enright’s evidence of his various communications with the Minister’s office, including of his visit to the Minister’s office. At times, when giving evidence about those matters, Mr Enright looked uncomfortable and his evidence came across as guarded. There was good reason for Mr Enright to be uncomfortable. It was unwise for the person about to embark upon an independent investigation in which he recognised Minister Cash to have a political interest, to have had direct contact with the Minister’s office. In the context of Mr Enright’s concession that he understood that the Minister had a political agenda in sending the referral letters, the contact he had with the Minister’s office must have been understood by him as capable of being perceived by others as compromising the Commission’s independence. I suspect that that was the source of Mr Enright’s discomfort and the protective approach that it seems to me he took in relation to his evidence about those communications. If there was a lack of transparency or a consciousness of guilt revealed by the way in which that evidence was given, the more likely reason is Mr Enright’s unconscious reconstruction of events in order to protect or defend his own conduct in relation to the particular challenge made as to the propriety of the conduct with which his evidence dealt.
4. The AWU’s attempt to draw a nexus between evidence given by Mr Enright, which was attended with some difficulty or concern, and Mr Enright having the improper purpose which the AWU has ascribed to him, is not made out. It is more likely that the difficulties which I have with Mr Enright’s evidence reveal a witness prone to unconsciously reconstructing events in order to defend his own particular conduct under challenge when the evidence was given, than a person motivated to aid or assist Minister Cash in discrediting or politically harming Mr Shorten. It is also more likely, as stated earlier, that aspects of Mr Enright’s conduct which can be characterised as overly enthusiastic or exuberant are better explained by reference to the public attention that accompanied the matter he was dealing with than any motivation to aid or assist the Minister.

#### Where is the Motive?

1. The question of Mr Enright’s motives more generally was raised by the Commissioner in a submission which, in my view, has both relevance and force to the issue of whether Mr Enright commenced the Investigation for an improper purpose. As the Commissioner correctly contended, the AWU has not presented any evidence or even suggested a case concept or narrative that provides a motive for the knowing and deliberate conduct that it ascribes to Mr Enright. What was Mr Enright’s motive? Why would Mr Enright have wanted to aid or assist the Minister in discrediting or politically harming Mr Shorten? There was no suggestion in the evidence that Mr Enright had any affinity, association or relationship with the Minister’s side of politics as opposed to Mr Shorten’s side of politics. There was no suggestion in the evidence of any degree of antipathy or disapproval of Mr Shorten. The evidence was that Mr Enright has held a range of positions and performed various roles serving governments of the Minister’s political persuasion as well as those on Mr Shorten’s side of politics.
2. The absence of any suggestion of a motive is particularly problematic where conduct of the kind ascribed by the AWU to Mr Enright would ordinarily require a strong motivation. Mr Enright is a career public servant with a significant record of public service. So far as I am able to say from the evidence before me, he has had a successful and unblemished career. What he is alleged to have done is something that clearly would have been recognised by him as improper and, if discovered, highly prejudicial to his career as well as to his reputation. To my mind, a strong motivation would have been required to have induced a person in Mr Enright’s position to put his career and reputation at risk. As I have said, there is no suggestion in the evidence of such motivation.

#### Conclusion on Ground 3

1. I have assessed each of the reasons put forward by the AWU as supporting a finding that, in commencing the Investigation, Mr Enright’s purpose included aiding or assisting Minister Cash to discredit or politically harm Mr Shorten. Assessed individually none of those reasons are of any significant assistance to the finding contended for by the AWU. Assessed cumulatively, the position is unchanged. There is also some weight to be given to Mr Enright’s denial.
2. I accept the AWU’s submission that evidence of purpose needs to be treated with caution and should normally be critically scrutinised because it may often be ex post facto and self-serving: *Universal Music Australia Pty Ltd v Australia Competition and Consumer Commission* (2003) 131 FCR 529 at [256] (Wilcox, French and Gyles JJ). Caution and critical scrutiny is particularly appropriate in relation to Mr Enright’s denial that he held or acted in furtherance of the improper purpose, given that I have some concern with some of the evidence he gave. Nevertheless, when assessed against the entirety of the evidence, the denial is plausible and deserves to be given some weight.
3. For those reasons, the AWU’s third ground of review – that, in commencing the Investigation, Mr Enright acted for an improper political purpose must be rejected.

## Ground 4 – Was an Irrelevant Consideration Taken into Account?

1. Under this ground of review, the AWU contended that in commencing the Investigation, Mr Enright took into account an irrelevant consideration being the Minister’s political purpose. The Commissioner accepted that if, in deciding to commence the Investigation, Mr Enright took into account Minister Cash’s purpose of discrediting, embarrassing or politically harming Mr Shorten, then the Decision would be affected by jurisdictional error so long as the taking account of the irrelevant consideration materially affected the decision reached. I accept that if Mr Enright did take into account the Minister’s alleged political purpose, that consideration was an irrelevant consideration in the *Peko-Wallsend (Minister for Aboriginal Affairs v Peko‑Wallsend Ltd* (1986) 162 CLR 24 at 40) sense and, if doing so materially affected the decision reached, jurisdictional error would be established: *Hossain* at [25]-[30] .
2. As the Commissioner contended, at the factual level, this claim rises no higher than the AWU’s third ground regarding improper purpose. All of the considerations put by the AWU in support of its contention that Mr Enright took into account an irrelevant consideration, were also relied upon in support of the AWU’s contention that Mr Enright acted in furtherance of the alleged improper political purpose. All of those considerations have already been addressed. Neither individually nor cumulatively do they demonstrate that Mr Enright took into account the consideration of assisting or aiding Minister Cash to discredit, embarrass or politically harm Mr Shorten.
3. I have reached that conclusion on the basis that it was necessary for the AWU to demonstrate that Mr Enright had regard to the alleged irrelevant consideration as a materially motivating factor in deciding to commence the Investigation. A decision-maker does not take account of an irrelevant consideration simply by examining but then discarding it without allowing it to affect his or her decision: *Australian Conservation Foundation v Forestry Commission* (1988) 19 FCR 127 at 135 (Burchett J).
4. Further, I have regarded this allegation as a grave allegation. It is based on Mr Enright having the same state of mind as was contended for in relation to the AWU’s case on improper purpose. The only suggestion open on the AWU’s case is that the irrelevant consideration was taken into account by Mr Enright deliberately, and knowing that to do so would be improper. In that circumstance I have taken the same approach to fact finding as I did in relation to the AWU’s case on improper purpose (see [268] above).

## Ground 5 – Was the Investigation Commenced at the Direction of the Minister?

1. Under this ground, the AWU contended that Mr Enright’s decision to commence the Investigation was affected by jurisdictional error because Mr Enright “impermissibly acted upon the advice or direction of the Minister”.
2. The Commissioner did not dispute that in making the decision under s 331(2) of the RO Act, Mr Enright was not permitted to simply follow the direction or dictation of Minister Cash. The Commissioner conceded that the decision to commence the Investigation would be invalid if the actions and attitudes of others (namely, Minister Cash) had controlled the decision such that Mr Enright simply gave automatic effect to the direction of Minister Cash. The Commissioner contended that the AWU submissions significantly downplayed the applicable test for this ground of jurisdictional error.

### The Applicable Legal Principles

1. The ground of jurisdictional error here advanced by the AWU is often referred to as the “dictation” ground, although as the learned authors state in Aronson M, Groves M, Weeks G, *Judicial Review of Administrative Action and Government Liability* (6th ed, Thomson Reuters, 2017) at [5.340] “that terminology might be too strong for some contexts”.
2. The extent to which a repository of a statutory power can be permissibly influenced or directed by the views of a government or a minister in the exercise of that power is, as stated by Mason and Wilson JJ in ***Bread Manufacturers*** *of NSW v Evans* (1981) 180 CLR 404 at 429, not a problem “which admits of an answer having universal application”. As their Honours went on to say when identifying the considerations most helpful in providing the case specific answer:

So much depends on a variety of considerations, for there are few cases in which the statute explicitly provides that the [repository of the power] is bound to give effect to, or to give weight to, a ministerial direction. One must take into account the particular statutory function, the nature of the question to be decided, the character of the tribunal and the general drift of the statutory provisions in so far as they bear on the relationship between the tribunal and the responsible Minister, as well as the nature of the views expressed on behalf of the Government.

1. Those observations were echoed in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 (see in particular French CJ at [37] and Kiefel J at [292]).

### The AWU’s Contentions

1. The AWU submission referred to those observations but did not otherwise address them. The submission is difficult to follow. At the outset one set of propositions is advanced but then those propositions are not applied in terms, but are substituted for others, namely:
2. Minister Cash had no power to give the Commissioner (or his/her delegate) a direction about the exercise of power under s 331(2) of the RO Act;
3. the referral letters from Minister Cash were directions and were taken into account and acted upon (at least in part) by Mr Enright; and
4. even if the referral letters were not directions, they were impermissibly taken into account and acted upon by Mr Enright.

### Deliberation

1. The AWU’s first proposition is not in contest. The terms of s 329FA of the RO Act, which are detailed above at [175], make it sufficiently clear that the Minister may only give directions of a general nature. It would be impermissible for the Minister to direct the Commissioner to conduct an investigation pursuant to s 331 because that would not be a direction “of a general nature only” (s 329FA(2)). Similarly, it would be impermissible for the Minister to direct the Commissioner to consider whether to conduct a particular investigation pursuant to s 331. In that respect, although it is not defined, I would regard the term “direction” as used in s 329FA as contemplating an instruction about the performance of the Commissioner’s functions which the Commissioner is statutorily bound to follow.
2. Before turning to the AWU’s second and third propositions, it is necessary to consider the terms of the referral letters which have been set out at [193] and [207] above. Each of those letters refer to media reports in which allegations are made about the propriety of various donations that may have been made by the AWU. The content and tenor of the Minister’s remarks strongly suggest to the reader that the Minister is concerned that there may have been impropriety in relation to the expenditures referred to. In the first referral letter, that concern is confined to whether the expenditures were validly authorised by the Rules. The second referral letter raises the same concern as well as a concern of “a conflict of interest”. In so far as the first referral letter encourages any action on the part of the Commissioner, that encouragement is expressed as follows:

Accordingly, I request that you give consideration to investigating this matter in any way that you may consider appropriate.

1. A similar encouragement to action is contained in the second referral letter as follows:

Accordingly, I respectfully request that you give consideration to reviewing this matter as part of any investigation that you may undertake in relation to other AWU matters.

1. Given the familiarity that both the writer and the intended reader must be regarded as having with the RO Act, the reference to “investigating” or “any investigation” in the referral letters must be understood as an intended reference to an investigation under s 331 of the RO Act. However, the call to action made by each of the letters is not directed to the actual conduct of an investigation but refers only to the Commissioner giving consideration to conducting such an investigation. In each case, the call to action is not made using imperative language but is expressed as a “request”. That is not the language of a command or binding instruction. Objectively considered neither of the referral letters contain a direction within the meaning of that term in s 329FA.
2. The AWU’s submission characterised the referral letters as containing an “unlawful direction”. But rather than making good the objective characterisation contended for, the submission focused instead on Mr Enright’s perceptions and how it is alleged he subjectively characterised the referral letters. Although somewhat confusing, ultimately the submission did focus on the correct perspective.
3. To my mind, what matters for the “dictation” ground of jurisdictional error is the extent to which the repository of the power is influenced by others in the exercise of that power. So much is clear from *Bread Manufacturers*. That approach requires a subjective analysis taken from the perspective of the repository of the power. It is that person’s perception which matters, rather than any objective characterisation of the nature of the communication said to have influenced the person. That is not to say, however, that an objective characterisation of the relevant communication or other stimulus will not assist in assessing the extent to which that stimulus subjectively influenced the repository of the power.
4. The AWU contended that a finding should be made that Mr Enright understood the referral letters as connoting a direction to consider the letters. The AWU also contended that Mr Enright took into account the referral letters and took actions consequent upon them.
5. The AWU’s submission is not particularly clear as to what it is that Mr Enright is alleged to have taken into account. Was it the fact that the Minister held the probity concerns expressed in the letters of referral? Was it the making by the Minister of the requests that consideration to investigating the AWU be given? Was it both? Assuming the AWU intends to rely on all of the above, what was the action taken by Mr Enright in consequence thereof? Was it, as requested, that Mr Enright give consideration to commencing an investigation? Alternatively, was the action the actual making of the Decision?
6. If it is the latter, as it must be, there is little attention given by the submission as to the extent to which any aspect of the referral letters caused or contributed to the Decision.
7. The submissions seem to proceed on the basis that if Mr Enright “at least in part” acted upon “the referral”, Mr Enright’s decision to conduct the Investigation is affected with jurisdictional error. The degree of influence or effect of the referral letters that was necessary to undermine the Decision is not specified. The submission seems to proceed on the basis that any degree of influence is sufficient. That appears to be relied upon by the AWU as the test for what amounts to “dictation” for the purposes of a decision made under s 331(2) of the RO Act.
8. Turning to consider what is the appropriate test for s 331(2), I would characterise the considerations specified in *Bread Manufacturers* set out at [354] above as follows:
9. the particular statutory function is a compliance function in relation to possible civil penalty contraventions;
10. the nature of the question to be decided is whether reasonable grounds exist warranting an investigation of possible civil penalty contraventions. Considerations to be largely determined on the basis of a forensic assessment of whether civil penalty contraventions have possibly occurred;
11. the character of the Commissioner in relation to an investigation is that of an independent statutory officer exercising judgment entirely independently of government; and
12. the general drift of the statutory provision which bear on the relationship between the Commissioner and the responsible Minister is that the Minister has oversight responsibility only in relation to the general performance of the functions of the Commissioner, without any role or responsibility in relation to any particular exercise of the Commissioner’s investigative function.
13. One further consideration referred to in *Bread Manufacturers* is “the nature of the views expressed on behalf of the Government”. This is a reference to the communication which is alleged to constitute the asserted “dictation”. The referral letters are described above. Their nature is not that of a direction. The concerns expressed and the requests made by the referral letters deal with a matter which is the sole responsibility of the Commissioner. When viewed in context, the letters are apt to be understood, as indeed they were understood by Mr Enright, as driven by a political agenda.
14. In assessing the extent of permissible influence from the Minister, I take into account that the conduct of an investigation under s 331 of the RO Act should be understood as a step which is preliminary of the possible institution of proceedings seeking a civil penalty and in relation to which an extensive range of coercive powers have been conferred upon the Commissioner. Whilst not forming part of the course of justice (cf *R v Rogerson* (1992) 174 CLR 268) an investigation under s 331 is to be understood as facilitative of the administration of justice and sufficiently proximate to the administration of justice to be regarded as intended to be free of any political influence or pressure from government.
15. That consideration, in particular, provides a point of distinction from the result in *Bread Manufacturers*. In the scheme there in question which concerned social welfare and economic considerations, the influence of government was to be tolerated to a far higher degree. It could be taken into account (at [429]), as long as the ultimate decision remained that of the repository of the power. As Mason and Wilson JJ said:

the Act requires the Commission to make up its own mind, to come to a decision of its own, in fixing the maximum price of bread, without dictation from the Minister and without merely deferring to the Minister so that the decision ceases to be that of the Commission and becomes that of the Minister.

(and see Gibbs CJ at 418)

1. In the scheme here in question, there is no tolerance for the Commissioner to be actuated by the view of the Minister on the largely forensic and entirely independent question of whether or not an investigation is warranted as a means of assisting the Commissioner to determine whether or not legal proceedings alleging contravention of a civil penalty provision of the RO Act should be instituted. Jurisdictional error will be demonstrated, where a communication from the Minister is a material and operative reason for the decision to conduct an investigation pursuant to s 331(2) of the RO Act.
2. That was not the test applied in the AWU’s submission. Nor was it the test suggested by the Commissioner, whose submission essentially adopted the test utilised in *Bread Manufacturers* as though it was a universal test, despite the observations there made that the appropriate test will always be case specific.
3. At the factual level, the AWU has failed to demonstrate that, the concerns of Minister Cash raised by the referral letters and as understood by Mr Enright and her requests that the subject of those concerns be considered for investigation, were a material and operative reason for Mr Enright’s decision to conduct the Investigation.
4. Mr Enright deposed as to his understanding of the necessary independence of the Commission and that he takes every step to guard it. He assumed that Minister Cash had a political agenda and his evidence displayed a strong understanding that such an agenda was of no relevance to his task of determining whether an investigation was warranted. Although for the reasons I have given in dealing with ground 2 Mr Enright was mistaken, he subjectively considered that there were reasonable grounds for conducting the Investigation. He had his reasons and they were expressed in the Decision Record. The AWU made no real attempt to demonstrate that Mr Enright’s account of his subjectively held reasons were not genuine. Those reasons provide a subjective explanation of Mr Enright’s decision to conduct the Investigation. Although not asked the question directly, Mr Enright’s evidence denies that, in addition to those reasons, he took into account the referral letters as a motivating reason for making the Decision.
5. Against those weighty considerations, the AWU pointed to much of the same evidence that it relied upon for its improper purpose ground. That evidence was largely directed at Mr Enright’s interactions with Minister Cash’s office including conduct said to be in anticipation of and taken in response to the referral letters. It was conduct which the AWU in essence contended was demonstrative of an enthusiasm to pursue the referral letters and obey what was perceived by Mr Enright to be their direction to investigate.
6. It is not necessary to address each aspect of the conduct relied upon by the AWU. Each has essentially already been addressed in relation to the improper purpose ground, where the AWU’s contention that the conduct was explicable for the impugned purpose relied upon by the AWU was not accepted. Whether considered alone or cumulatively, the evidence relied upon by the AWU does not demonstrate that the referral letters were treated by Mr Enright as a direction to undertake the Investigation. Nor, on any other basis, has the AWU demonstrated that the referral letters were a material and operative reason for Mr Enright’s decision to conduct the Investigation.
7. One matter heavily relied upon by the AWU, additional to those considerations relied upon for the improper purpose ground, was Mr Enright’s use of the term “referral” in relation to the referral letters, an argument I referred to earlier at [325]. The AWU contended that Mr Enright was unwilling to make the reasonable concession that he should have made: that a referral of a matter connotes a direction to consider it. The AWU contended that the Court should find that that is how Mr Enright understood the letters. Mr Enright denied that that was his understanding and there is an insufficient basis for rejecting that denial. In any event, even if it were accepted that Mr Enright had understood that, as “referrals”, the letters required their content to be considered, the fact that the letters were considered because Mr Enright perceived that so much was required, falls short of demonstrating that the letters provided a material and operative reason for Mr Enright’s decision to conduct the Investigation.

# Ground 6 and 7 and the Relief Sought by the AWU

1. Grounds 6 and 7 challenge the validity of the search warrants which on 24 October 2017 were issued by his Honour Magistrate Reynolds of the Magistrates’ Court of Victoria.
2. The AWU’s essential point on ground 6 was that the existence of a valid investigation is an essential pre-requisite for the validity of the search warrants. The AWU contended that as there was no valid investigation on foot, the Commissioner was not authorised under s 335K of the RO Act to apply to a magistrate for the search warrants to be issued and that, accordingly, the search warrants are invalid.
3. Ground 7 also challenges the validity of the search warrants on the basis that the Commissioner was not authorised to apply for them to be issued. This ground was pressed in the alternative and on the basis that the Investigation was valid. It is premised on the proposition that in the conduct of an investigation as to whether a civil penalty provision was contravened by Historical Conduct, the Commissioner is only permitted to exercise powers that were or would have been available to the General Manager in the course of such an investigation, such powers not extending to a power to apply for search warrants to be issued. As that premise has already been rejected (see [46]-[49] and [51]-[62] above), I need not deal further with ground 7.
4. The submissions of the parties on ground 6 were relatively short and, it seems to me, insufficient consideration was given to matters of some consequence.
5. The relief sought by the AWU in relation to the search warrants is:
6. a declaration that the search warrants are invalid;
7. an order in the nature of prohibition prohibiting the AFP from giving any further effect to the search warrants;
8. in the alternative to the declarations sought, an injunction prohibiting the AFP from giving any further effect to the search warrants; and
9. although para 7 of the prayer for relief in the Originating Application is ambiguous, as I would understand it, an injunction requiring the AFP to return to the AWU the documents seized in the execution of the search warrants without otherwise giving further effect to the search warrants.
10. Ordinarily, a challenge to the validity of a search warrant is brought by way of an application for judicial review of the decision made to issue the search warrant: see as examples *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 (Logan, Rangiah and Bromwich JJ); *Wong v Commissioner, Australian Federal Police* [2014] FCA 443 (Pagone J). Ordinarily, the person who has issued the search warrant is a party to such an application for judicial review.
11. It seems to me that the validity of the search warrants turns upon the validity of the decision to issue the search warrants under s 335L of the RO Act. That section relevantly provides:

(1) This section applies if, on an application under section 335K, the magistrate is satisfied that there are reasonable grounds to suspect that there are, or may be within the next 3 days, on particular premises, particular documents whose production could be required under section 335.

(2) The magistrate may issue a warrant authorising a member of the Australian Federal Police, whether or not named in the warrant, together with any person so named, with such assistance, and by such force, as is necessary and reasonable:

(a) to enter on or into the premises; and

(b) to search the premises; and

(c) to break open and search anything, whether a fixture or not, in or on the premises; and

(d) to take possession of, or secure against interference, documents that appear to be any or all of those documents.

1. The submissions of the parties did not address that provision at all. Nor have the parties addressed the question of whether, given the relief sought, Magistrate Reynolds should have been a party to the proceeding.
2. The submissions of the AWU and the Commissioner on the validity of the search warrants focused upon the validity of the application made for the search warrants to be issued. That matter is dealt with by s 335K as follows:

(1) If the Commissioner has reasonable grounds to suspect that there are, or may be within the next 3 days, on particular premises in Australia, documents whose production could be required under section 335, he or she may:

(a) lay before a magistrate an information on oath or affirmation setting out those grounds; and

(b) apply for the issue of a warrant to search the premises for those documents.

(2) On an application under this section, the magistrate may require further information to be given, either orally or by affidavit, in connection with the application.

1. However, without hearing from the parties, my current view is that a failure to comply with the requirements of s 335K would not, of itself, lead to the invalidity of the search warrants. Invalidity depends upon the validity of the decision to issue the warrants and, in that respect, whether the requirements of s 335L were satisfied. A valid application made in accordance with s 335K may well be a necessary pre-condition for the validity of the decision to issue the search warrants pursuant to s 335L. However, as stated, no submissions directed to s 335L were made.
2. Furthermore, why a declaration that the search warrants are invalid is necessary, is also a matter which the Court has not been addressed on.
3. I presume from the notation on the orders made by Kenny J on 27 October 2017, that pursuant to the search warrants, documents were produced to the AFP; that those documents are held by the AFP; and that the AFP has committed to refrain from giving the seized documents to the Commissioner until the final determination of this proceeding or further order. Further, from the related relief claimed by the AWU and set out at para [382] above, I assume that what the AWU primarily seeks is that the AFP return to the AWU the documents seized in the execution of the search warrants, without otherwise giving any further effect to the search warrants. However, the parties have not made any submissions, as to the Court’s power or as to the Court’s discretion, in relation to the orders sought by the AWU that no further effect be given to the search warrants and that the documents seized be returned to the AWU.
4. If that relief were granted, there may be no utility in a declaration being made that the search warrants were invalidly issued.
5. Turning to the other relief sought by the AWU, a declaration is sought that the Decision to commence the Investigation is invalid and orders are sought quashing that decision and prohibiting the Commissioner from giving it further effect. That relief, as well as the relief sought in relation to the search warrants, is premised on the whole of the Decision being invalid. However, at [172] I have set out my conclusion that only part of the Decision is directly affected by jurisdictional error, that being the decision to conduct an investigation as to whether ss 285(1), 286(1) and 287(1) had been contravened. I have not been addressed as to whether that conclusion renders invalid the whole of the Decision to conduct the Investigation. If it does not, I need to hear the parties as to what orders or other relief is appropriate if the Decision is only invalid as to part.

# conclusion

1. I have rejected the AWU’s first, third, fourth, fifth and seventh grounds of review. I hold that the second ground of review is made out in part, that being, that the decision to conduct an investigation as to whether ss 285(1), 286(1) and 287(1) of the RO Act had been contravened was affected by jurisdictional error and is invalid.
2. The nature of the relief that should be ordered in consequence of the findings made by the Court requires further submissions from the parties and the Court’s further consideration. The orders I will make will facilitate that course.

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| I certify that the preceding three hundred and ninety-three (393) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg. |

Associate:

Dated: 11 October 2019

## Appendix 1







