

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 16/12/2019 12:01:16 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	VID1358/2019
File Title:	REGISTERED ORGANISATIONS COMMISSIONER v AUSTRALIAN WORKERS' UNION & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 16/12/2019 2:50:40 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 122
Rules 36.01(1)(b); 36.01(1)(c)

Notice of appeal

No. VID of 2019

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

On appeal from the Federal Court of Australia

Registered Organisations Commissioner

Appellant

Australian Workers' Union and another named in the schedule

Respondents

To the Respondents

The Appellant appeals from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Federal Court of Australia
305 William Street, Melbourne VIC 3000

Filed on behalf of (name & role of party)	The Appellant, the Registered Organisations Commissioner		
Prepared by (name of person/lawyer)	Jonathon Lovell		
Law firm (if applicable)	Ashurst Australia		
Tel	(03) 9679 3028	Fax	(03) 9679 3111
Email	jon.lovell@ashurst.com / abigail.cooper@ashurst.com		
Address for service (include state and postcode)	Level 26, 181 William Street MELBOURNE VIC 3000		



Date:

Signed by an officer acting with the authority
of the District Registrar

The appellant appeals from the declaration and orders of the Federal Court given on 26 November 2019 at Melbourne.

Grounds of appeal

Scope of the investigation

1. The primary judge erred by finding (at [96] and [98]) that the appellant's decision (via his delegate) to commence the investigation under section 331(2) of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO Act**) into potential contraventions of sections 285-287 of the FWRO Act, was made solely on the basis that the relevant acts were done in contravention of, or non-compliance with, the rules of the first respondent.
2. Further or alternatively to ground 1, the primary judge erred by finding (at [166]) that even if there were matters beyond breaches of the rules of the first respondent which grounded the appellant's suspicion (via his delegate) of contraventions of sections 285-287 of the FWRO Act, that the appellant (via his delegate) would not have made the decision to investigate under section 331(2) of the FWRO Act in the absence of suspected breaches of the rules of the first respondent, including where the finding:
 - (a) was not based on any evidence or was not otherwise open on the evidence;
 - (b) was not put to the appellant's delegate during the course of the trial; and
 - (c) was not the subject of any argument, address or submission.

Operation of section 320

3. The primary judge erred by finding (at [155]-[161]) that the effect of section 320 of the FWRO Act was to notionally alter facts in a manner which had the effect that a contravention of any of sections 285-287 of the FWRO Act by an officer of an organisation or a branch which relied on acts done in contravention of, or non-compliance with, the rules of the organisation or branch, could no longer subsist after the expiry of four years from the doing of the acts.
4. Further or alternatively to ground 3, the primary judge erred by finding that the appellant's delegate was acting upon, or by otherwise attributing to the appellant's



delegate (at [134]-[135] and [152]-[154]), certain hypotheses or states of mind which may have attracted the operation of section 320 of the FWRO Act, when those hypotheses and/or states of mind:

- (a) were not based on any evidence or were not otherwise open on the evidence;
- (b) were not the subject of any argument, address or submission;
- (c) were wrong and/or involved an erroneous interpretation of section 320 of the FWRO Act and a conflation of the different acts engaged in by different persons validated by that provision; and/or
- (d) were merely one of a number of equally likely hypotheses or states of mind.

5. Further to grounds 3 and 4, the primary judge erred by not finding that section 320 of the FWRO Act:

- (a) had no effect and/or operation on any potential contraventions of sections 285-287 of the FWRO Act by officers or former officers of the first respondent being investigated (or capable of being investigated) by the appellant (via his delegate) under section 331(2) of the FWRO Act; and
- (b) was not relevant to assessing whether the appellant (via his delegate) could have been satisfied that there were reasonable grounds to commence an investigation under section 331(2) of the FWRO Act.

Reasonable grounds to conduct an investigation

6. The primary judge erred by finding (at [113]) that for the appellant to be satisfied under section 331(2) of the FWRO Act that there were reasonable grounds to commence an investigation as to whether a civil penalty provision has been contravened, the appellant:

- (a) must have a state of mind as to whether the provision being investigated has been contravened; or alternatively
- (b) if a state of mind is necessary, that the state of mind must be (at least) a reasonable suspicion that the provision being investigated has been contravened.

7. Further or alternatively to ground 6, the primary judge erred by finding (at [114]) that the appellant's delegate held a state of mind that sections 237(1), 285(1), 286(1) and 287(1) of the FWRO Act had been contravened.



8. Further to ground 6, the primary judge erred by finding (at [165] and [171]) that in order for the appellant (via his delegate) to be satisfied that there were reasonable grounds to commence an investigation as to whether a civil penalty provision has been contravened, the appellant (via his delegate) had to hold a correct understanding of the legal effect of section 320 of the FWRO Act on the relevant acts.

Jurisdictional error

9. Further or in the alternative to grounds 1-8, the primary judge erred by finding (at [171]-[172]) that the appellant's misconception (via his delegate) of section 320 of the FWRO Act meant that:
- (a) the appellant (via his delegate) did not proceed reasonably in forming the opinion required under section 331(2) of the FWRO Act;
 - (b) the appellant's decision (via his delegate) to commence the investigation was affected by an error which was jurisdictional in nature; and/or
 - (c) to the extent that the decision to commence the investigation involved an investigation as to whether sections 285(1), 286(1) and 287(1) of the FWRO Act had been contravened, that the decision was invalid.

Orders sought

- 1. The appeal be allowed.
- 2. The declaration and orders of the Court made on 26 November 2019 be set aside.
- 3. In lieu thereof, the Court make the following orders:
 - (a) The originating application dated 25 October 2017 be dismissed.
 - (b) There be no order as to costs.

Appellant's address

The Appellant's address for service is:

Place: Ashurst, Level 26, 181 William Street, Melbourne VIC 3000

Email: jon.lovell@ashurst.com and abigail.cooper@ashurst.com

The Appellant's address is Level 12, 414 LaTrobe Street, Melbourne VIC 3000.

**Service on the Respondent**

It is intended to serve this application on all Respondents.

Date: 16 December 2019

A handwritten signature in black ink, appearing to read "Jonathon Lovell", is written over a horizontal line.

Signed by Jonathon Lovell
Ashurst Australia
Lawyer for the Appellant

**Schedule**

No. VID of 2019

Federal Court of Australia

District Registry: Victoria

Division: Fair Work

On appeal from the Federal Court of Australia

Second Respondent

Commissioner of the Australian Federal Police