



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

MICHAEL RAVBAR
First Plaintiff

WILLIAM LOWTH
Second Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Defendant

MARK IRVING KC
Third Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)**

Part I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: OUTLINE OF ORAL SUBMISSION

2. Applying the reasoning of this Court in *Work Choices*, it may be accepted that the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) is supported by s 51(xx) of the *Constitution*: SA, [6]-[7]; DS, [24]-[29]; *New South Wales v Commonwealth* (2006) 229 CLR 1, 153 [322] (V14, T56).
3. However, on the material before the Court, it is unclear whether the CFMEU is a trading corporation for the purposes of s 51(xx). The following principles apply to the characterisation of a corporation for this purpose: when assessing the trading activities of a corporation, the question is whether those activities are significant relative to the non-trading activity (SA, [10]-[11]; *R v Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190 (V15, T64)); a corporation's purpose can be relevant to discerning whether certain activities should be understood to be incidental (SA, [13]-[14]); a substance over form approach should be adopted in determining whether governmental or not-for-profit corporations are engaged in trade (SA, [15]); the source of a corporation's revenue will not always reliably reflect its activities (SA, [16]).
4. For the reasons advanced by the Commonwealth, Part 2A of Chapter 11 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (FW(RO) Act) and the *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* do not infringe the implied freedom of political communication: SA, [20]-[23]; Cth, [30]-[50].
5. For the reasons advanced by the Commonwealth, the power conferred by s 323B(1) of the FW(RO) Act does not have a prima facie punitive character: SA, [24]-[33]; Cth, [53]-[59]. The appointment of an administrator has no adverse effect on life, limb or liberty, no direct effect on the proprietary rights of the CFMEU and, even the dissolution of a company, has not historically been recognised as being exclusively judicial: SA, [27]-[31]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 (V20, T98).

Dated: 11 December 2024



MJ Wait SC
Solicitor-General for South Australia



BL Garnaut
Counsel for the Attorney-General (SA)