



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

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and

COMMONWEALTH OF AUSTRALIA

First Defendant

ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Defendant

MARK IRVING KC

Third Defendant

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OUTLINE OF ORAL SUBMISSIONS OF THE PLAINTIFFS

PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The Administration Act, the FWRO Act and the Scheme (PS [15])

1. The power in s 323B(1) is conditioned on satisfaction of the “public interest”; and see FWRO Act ss 5, 19-20 (**V2 T5**). A scheme can be varied or revoked only under s 323D. The scheme, and actions under it, have effect despite anything in the Act: ss 323F, 323G. The administrator takes control of the C&G Division (s 323K), conditioned only by s 323K(5). The CFMEU bears the cost of the administrator’s remuneration and of the administration: ss 323J, 323M. The Scheme declares offices vacant, terminates employment (cl 3(1)) and gives the Administrator complete control (cls 6(1), 9) (**V2 T7**).

No head of power (PS [16]-[24], Reply [10]-[19])

2. The CFMEU is not a trading corporation, having regard to the nature of its activities (industrial advocacy), non-trading activities and its objects. Any trading activities are insufficient to bestow a trading character. Part 2A does not have a sufficient connection with s 51(xx), even if the CFMEU is a trading corporation.

- *Adamson* (1979) 143 CLR 190 at 208, 233-235 (**V15 T64**); Supp SCB 8-11, SCB1 307-318, Supp SCB 12-19, SCB1 327-333; *Williams (No 2)* (2014) 252 CLR 416 at [50]-[51] (**V18 T84**); *Spence* (2019) 268 CLR 355 at [62] (**V16 T71**); *Plaintiff S157* (2003) 211 CLR 476 at [102] (**V15 T62**); *Communist Party Case* (1951) 83 CLR 1 at 263-266 (**V5 T30**); *Brown* (2017) 261 CLR 328 at [468] (**V7 T32**).

The legislative purpose (PS [9]-[13], [28]-[29], Reply [2]-[7])

3. The purpose of a law is to meet the relevant mischief. Its identification will more often than not emerge from an examination of context. There may be multiple purposes.

- *Brown v Tasmania* (2017) 261 CLR 328 at [208]-[209] (**V7 T32**); *Acts Interpretation Act 1901* (Cth), s 15AB (**V3 T8**).

4. The purposes of the Administration Act include placing control of the C&G Division in the hands of a government-selected person because of past actual or alleged unlawfulness and the suppression of political donations and activity by the C&G Division. The legislative history is demonstrative of these purposes.

- 2RS 12/08/24 (SCB3 963-964); 2RS Debate 13/08/24 (SCB3 966-967); 14/08/24 (SCB3 970-971); 15/08/24 (SCB3 974-975, 978-980 (and note SCB3 1273-1274); 982-983, 987-988; 990-996; Letter to Senator Cash (Supp SCB 20); Letter to Minister (SCB3 1279-1280 and see SCB3 1282); see also Senate 19/08/2024 SCB3 1002-1007; House 20/08/24 SCB3 1012-1016.

Implied freedom (PS [25]-[27], [33]-[37]; Reply [20]-[24])

5. Trade unions are well known to our constitutional history and inextricably connected to the political fabric of Australian society. The Commonwealth has not squarely told this Court that permitting political donations would not be *ultra vires* the Act; but it is enough for an effective (indeed, extreme) burden that the Act/Scheme gives the Administrator a veto power over political communication by or for members. It is no answer that the members can engage in political communication otherwise than in association. Because a substantial purpose is illegitimate, the law is invalid. The Act/Scheme are otherwise not reasonably appropriate and adapted to any legitimate purpose.

- 10 • *Williams v Hursey* (1959) 103 CLR 30 at 58-60 (**V18 T85**); see CFMEU Rules, Rules 4, 26 SCB1 248-250, 275; *ACTV* (1992) 177 CLR 106 at 145-146 (**V5 T29**).

Acquisition of property (PS [54]-[67]; Reply [28]-[32])

6. Section 323K(1) confers control over “property ... of the [C&G] Division and its branches” on the administrator. Such property is held in the name of the CFMEU but received by the Division and its branches in accordance with the CFMEU Rules. The administrator acquires an interest in that property from the CFMEU, whose control under its rules is impaired.

- 20 • *Bank Nationalisation Case* (1948) 76 CLR 1 at 348, 349, 351 (**V6 T55**); CFMEU Rules, rules 23, 27 (SCB1 273-274, 277-278); C&G Rules, rules 8, 9, 14, 35, 40, 42 (SCB2 869-879, 883-884, 899-900, 907-915).

7. Empowering the executive to act upon satisfaction as to the public interest is not a necessary or characteristic feature of means which are appropriate and adapted to achieving some objective within power, as revealed by a comparison with bankruptcy (upon which the Commonwealth relies by analogy) and s 323 of the FWRO Act.

- *Mutual Pools* (1994) 179 CLR 155 at 179-180, 186-188 (**V12 T54**); *Emmerson* (2014) 253 CLR 393 at [118]-[121] (**V4 T26**); *Airservices Australia* (2000) 202 CLR 133 at [98]; *Georgiadis* (1994) 179 CLR 297 at 308 (**V9 T42**).

8. While only the CFMEU has a separate legal identity, s 323K purports to apply to property of the C&G Division and its branches. This attaches to CFMEU property allocated under rule 23 of the CFMEU Rules to the Division and its branches. Compensation paid to the CFMEU under s 323S will be allocated to the Division and its branches and s 323K will attach to that compensation once received. Because ss 323K and 323S create a snake eating its own tail, s 323S fails to guarantee just terms.

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9. Section 323M involves an acquisition. It would not be incongruous for the Commonwealth to pay just terms instead of the CFMEU (and its members) when they have not engaged in wrongdoing.

Chapter III and legislative punishment (PS [38]-[53]; Reply [25]-[27])

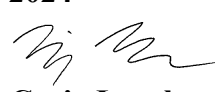
10. In enacting the Administration Act, the Parliament determined that the Division and its branches had ceased to function effectively, being the issue for the Court's determination under s 323. The Parliament also determined that the Division and its branches had engaged in unlawful conduct revealed in media reporting. These determinations are not explicit on the face of the statute but are implicit in it.
- 10 • Revised EM at [8]-[9], [11] (**V22 T116**); 2RS (SCB3 963); *Palmer* (2021) 274 CLR 286 at [14]; *Duncan* (2015) 255 CLR 388 at [43]-[45] (**V9 T39**); *Communist Party Case* (1951) 83 CLR 1 at 172-173, 234-235, 268-269 (**V5 T30**); *Kariapper* [1968] AC 717 (**V21 T101**); *YBFZ* [2024] HCA 40 at [14], [17] (**V20 T98**).
11. Taking control of the property of the Division is a detriment that can be a punishment. The Administration Act requires other detriments to be imposed whenever making a scheme under s 323B: removing people from office, creating obstacles to their future engagement in particular roles, interfering with employment and interfering with voting rights within the union. These are capable of being a punishment.
- 20 • Cf *Roche* (1921) 29 CLR 329 (**V16 T70**); *Adelaide Company of Jehovahs Witnesses Inc* (1943) 67 CLR 116 (**V4 T23**). See *US v Brown*, 381 US 437 at 448 (**V21 T106**); *US v Lovett*, 328 US 303 (1946) (**V21 T107**); *Polyukovich* (1991) 172 CLR 501; *Osborne* [1911] 1 Ch 540 at 554, 567; *Craddock* [1929] St R Qd 328 at 337-338.

Chapter III and executive punishment (PS [38]-[50], [52]-[53]; Reply [25]-[27])

12. Where the Minister makes a determination under s 323B, Part 2A mandates that the scheme shall have certain content and certain consequences: see ss 323B(3), 323K. The detriments are capable of being characterised as punishment.
- *Victorian Chamber of Manufacturers* (1943) 67 CLR 413 at 416-417, 422 (**V17 T81**).
13. Section 323B is not reasonably capable of being seen to be necessary for a non-punitive purpose. The power depends on the public interest and the scheme can include whatever the Minister considers appropriate. Its duration is dependent on the public interest within the five year outer limit, subject to actions having extended effect: s 323G.
- 30 • *YBFZ* [2024] HCA 40 at [68]-[69], [71]-[72], [79] (**V20 T98**).

Dated: 10 December 2024


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Naomi Wootton