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

and

WILLIAM LOWTH
Second Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

and

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Defendant

and

MARK IRVING KC
Third Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

PART I: Internet publication

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

PART II: Propositions to be advanced in oral argument

Implied freedom of political communication

2. Identified in the ordinary way, the purpose of the amendments is to help return the C&G Division swiftly to law-abiding representatives who act in their members' interests, for the ultimate goal of facilitating the operation of the federal workplace relations system: **QS [7]; DS [14]; ExM [11] (vol 22, tab 116, 8745)**.

3. That purpose is weighty as it promotes constitutional values:

a. Returning control to law-abiding representatives coheres with the rule of law underpinning the Constitution: **QS [8]**.

b. Returning control to people who act in the members' interests serves to ensure a more representative association, ultimately promoting free political communication: **QS [9]-[10]**.

4. The plaintiffs say that preventing political donations is not rationally connected to that purpose: **Reply [24]**. However, a rational connection is not hard to discern. Allowing the administrator to prevent political donations during the administration is ancillary to the purpose of returning the C&G Division to law-abiding representatives who act in their members' interests. Until that occurs, doubts would remain as to whether any political donations were being made in the members' interests.

5. The alternative purpose put forward by the plaintiffs—to ban political donations and expenses out of a base partisan desire to limit support for one side of politics—should not be accepted for three reasons: **cf Reply [3]-[5], [24]**.

a. First, the debate in Parliament about political donations did not lead to any relevant changes to the Bill and the Bill as enacted says nothing about banning political donations.

b. Second, it is distinctly implausible that the purpose of the amendments and the Determination was to limit support for one side of politics given that it was that side of politics that initiated the impugned legislation: **cf Reply [24]**.

c. Third, using parliamentary debates—not to inform the meaning of the text, but to uncover an impermissible motivation by individual lawmakers—involves questioning and impeaching proceedings in Parliament.

6. Part 2A of the FWRO Act is very similar to the Canadian law upheld in *Swait v Board of Trustees of Maritime Transportation Unions* (1966) 61 DLR (2d) 317 (**vol 21, tab 105**). It is no answer that following *Swait*, Canadian cases took a narrower and then broader approach to the scope of the freedom of association: **cf Reply [24]**; *Mounted Police Association of Ontario v Canada (Attorney General)* [2015] 1 SCR 3, [30], [46]. *Swait* did not turn on the scope of the freedom. The law in *Swait* was upheld by reference to its purpose of addressing lawlessness in particular unions and protecting their members: 321, 334 (**8220, 8233**).

Chapter III of the Constitution

7. *YBFZ* does not stand for the proposition that deprivation of any civil or political rights is prima facie punitive: **cf Reply [26]**.

   a. The statement of the joint judgment that human life, bodily integrity and liberty were the 'basic rights' of 'present concern' indicates that those were the rights of concern for the constitutional principle under discussion: *YBFZ* [2024] HCA 40, [14] (**vol 20, tab 98, 7802**).

   b. The reference to 'present concern' does not mean that the comments were directed only to the facts of the case, as is evident from the reference to 'human life', which was not a 'basic right' engaged on the facts of *YBFZ*.

8. If, to the contrary, any hardship is potentially prima facie punitive, virtually all laws would potentially require justification—Ch III does not require that: *YBFZ* [2024] HCA 40, [6] (**vol 20, tab 98, 7798**).

9. The proper framework to be applied here is that in *Duncan v NSW* (2015) 255 CLR 388, [43] (**vol 9, tab 39, 3345**) and *Kariapper v Wijesinha* [1968] AC 717, 736 (**vol 21, tab 102, 8138**). The law must both determine guilt and punish for that guilt. This law does neither. Part 2A responds to a state of affairs in which the C&G Division is embroiled in various allegations without determining any of those allegations; and it is protective: *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 379-80 [108]-[109] (**vol 4, tab 25, 1210-11**); *YBFZ* [2024] HCA 40, [137]-[138] (**vol 20, tab 98, 7849-50**).

Dated: 11 December 2024.

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G J D Del Villar **Felicity Nagorcka** **Kent Blore**