HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S113/2024

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

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland (**Queensland**) intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. Queensland adopts the Defendants' written submissions at [7] to [15] and [30] to [62].

5. In addition to the reasons advanced by the Defendants as to why the impugned provisions do not infringe the implied freedom of political communication, Queensland submits:

   (a) The impugned provisions promote constitutional values, including the rule of law. Moreover, any short-term burden on free political communication is for the purpose of achieving long-term gains in free political communication by a more representative association that acts in its members' interests.

   (b) In assessing the proportionality of a burden on free political communication, it is relevant that the political branches of government have already engaged with that question in a statement of compatibility with human rights, and determined that the measure is proportionate to a legitimate aim.

   (c) That conclusion of the political branches of government is also consistent with international case law from Canada.

6. As to Ch III of the Constitution, s 323B(1) of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO Act**) exhibits neither of the features of a bill of pains and penalties necessary to warrant characterising it as a legislative intrusion upon judicial power.

STATEMENT OF ARGUMENT

A. Implied freedom of political communication

The amendments promote constitutional values

7. The purpose of the amendments introducing pt 2A of the FWRO Act and s 177A of the *Fair Work Act 2009* (Cth) is 'to help return the Construction and General [C&G] Division to a position where it is democratically controlled by those who promote and act in accordance with Australian laws, including workplace laws' and 'to operate effectively in the interests of its members'.[1]

8. The first aspect of that purpose—returning control of the C&G Division to law-abiding representatives—helps to promote compliance with the law and therefore the rule of law. As the rule of law is an assumption underpinning the Constitution,[2] this purpose must carry great weight in our constitutional system.[3]

9. The second aspect of the purpose—returning control of the C&G Division to people who act in its members' interests—addresses the 'ever-present risk' that inheres in any system of representation.[4] People form an association to pursue the joint interests of its members. However, the freedom of members to choose their representatives carries with it the risk that those representatives will fail to pursue their member's interests and, moreover, will have a vested interested in undermining the ability of members to remove them for that failure. That is why, in legal systems that recognise a freedom of association as a personal right, the state may be positively required to intervene in the internal affairs of a trade union in order to protect its members from any abuse of the dominant position of the union.[5] Ultimately, the state does so to *promote* the freedom of association.

10. The Plaintiffs assert that pt 2A of the FWRO Act imposes a burden on the implied freedom by impeding the ability of members of the C&G Division to communicate

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1 Explanatory memorandum, Fair Work (Registered Organisations) Amendment (Administration) Bill 2024 (Cth) 4 [11]. See also DS [14].

2 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

3 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 594 [175] (Gordon J). See also *Brown v Tasmania* (2017) 261 CLR 328, 503 [558] (Edelman J).

4 By analogy with the rationale for the implied freedom itself: see *McCloy v New South Wales* (2015) 257 CLR 178, 227 (Gageler J).

5 Eg *Cheall v United Kingdom* (1985) 42 DR 178, 186; *Associated Society of Locomotive Engineers and Firemen v United Kingdom* (2007) 45 EHRR 34, [43].

about political matters through their association and its representatives. However, the C&G Division's governance problems throw doubt on whether its members have freely chosen their representatives by democratic processes.[6] In reality, any burden on free political communication would be at most a short-term burden imposed for the purpose of achieving free political communication through a *more* representative association in the long term. That is, the amendments aim to *promote* free political communication in the long term. This temporal dimension of short-term costs for long-term gains reinforces the proportionality of the measure.

Political branches have assessed the measure as proportionate

11. When assessing the adequacy of the balance struck, it is also relevant that the political branches of government have already turned their attention to the proportionality of the measure. Our Constitution leaves no room for 'deference' in the sense of 'unquestioning adoption of the correctness of [the legislature's] choices'.[7] But the constitutionally prescribed system of government—which the implied freedom secures—provides for policy questions to be resolved by the people through Parliament.[8] That is why, when reviewing Parliament's value judgment about the appropriate balance between competing considerations,[9] attention must be given to '[t]he weight that Parliament has given to the legislative purpose'.[10]

12. In this case, when the impugned amendments were introduced into Parliament, the Minister for Employment and Workplace Relations tabled a statement of compatibility with human rights. The statement set out his assessment of whether the amendments would impose a proportionate burden on international human rights, including the right to freedom of association.[11] While he acknowledged that the freedom of association—including the organisational autonomy of trade unions—would be engaged, he considered that the impact on that human right was outweighed by the

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6 Summarised in DS [5]-[6].

7 *McCloy v New South Wales* (2015) 257 CLR 178, 220 [91] (French CJ, Kiefel, Bell and Keane JJ). See also *Unions NSW v New South Wales* (2019) 264 CLR 595, 617 [51] (Kiefel CJ, Bell and Keane JJ).

8 *Clubb v Edwards* (2019) 267 CLR 171, 343 [495] (Edelman J). See also *McCloy v New South Wales* (2015) 257 CLR 178, 227 [113] (Gageler J); *Palmer v Western Australia* (2021) 272 CLR 505, 601 [276] (Edelman J).

9 *McCloy v New South Wales* (2015) 257 CLR 178, 219 [89] (French CJ, Kiefel, Bell and Keane JJ).

10 *Clubb v Edwards* (2019) 267 CLR 171, 343 [496] (Edelman J). See also: *R (Conway) v Secretary of State for Justice* [2020] QB 1, 89 [193] (Etherton MR, Leveson P and King LJ) ('Weighing the views of Parliament heavily in the balance in a case such as the present one is not the same as a complete abdication of responsibility to consider the merits of the arguments on either side').

11 In accordance with *Human Right (Parliamentary Scrutiny) Act 2011* (Cth) s 8.

need to facilitate the Division's return to democratic control by those who respect the law.[12] With the benefit of that proportionality assessment, the Commonwealth Parliament then enacted the amendments.

13. That assessment of proportionality by the political branches should be treated 'with all seriousness and caution',[13] not least because a measure is less likely to be 'manifestly' disproportionate[14] if the political branches have squarely confronted the issue and concluded that the measure is proportionate.

Consistent with international cases

14. That conclusion of the political branches of government is also consistent with the Canadian experience and case law. International cases must be treated 'with some caution' taking into account the difference in constitutional contexts.[15] Nonetheless, looking overseas reveals that pt 2A of the FWRO Act employs a legislative model that is tried and tested. Canadian Parliaments have responded to similar mischiefs in a strikingly similar way in the past, and those responses have proved effective. Moreover, even in legal systems that protect personal, standalone rights to expression and association, courts and other bodies have upheld those measures as being, in effect, proportionate to a legitimate aim.

15. In Canada in 1963, a report of an industrial inquiry commission found that the officers of particular maritime unions had disrupted the shipping industry in Canada through unlawful picketing, intimidation and violence.[16] The Canadian Parliament responded by passing the *Maritime Transportation Unions Trustees Act 1963*, which placed named unions under the trusteeship of a board of trustees. The Act placed the management and control of the unions in the trustees, who were also given all powers necessary 'for the return of the management and control of each of the maritime unions to duly elected and responsible officers of such unions at the earliest date consistent with the national and public interests of Canada'.[17] The trustees were

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12 Statement of compatibility with human rights, Fair Work (Registered Organisations) Amendment (Administration) Bill 2024 (Cth) 6 [21]-[23], 9 [42].
13 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 397.
14 *Comcare v Banerji* (2019) 267 CLR 373, 402 [38] (Kiefel CJ, Bell, Keane and Nettle JJ).
15 *McCloy v New South Wales* (2015) 257 CLR 178, 229 [120] (Gageler J), quoting *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 125 (Mason CJ, Toohey and Gaudron JJ).
16 *Swait v Board of Trustees of Maritime Transportation Unions* (1966) 61 DLR (2d) 317, 334 (Brossard J).
17 *Maritime Transportation Unions Trustees Act 1963* (Canada) s 7(1).

authorised to remove officers and employees of the union, to recommend changes to its rules, and to deal with the unions' property.[18] The Act was subject to a three-year sunset clause, subject to extension.[19]

16. An officeholder in one of the affected unions commenced a constitutional challenge, arguing, among other things, that the Act was contrary to the freedom of association protected by the *Canadian Bill of Rights 1960*.[20] In *Swait v Board of Trustees of Maritime Transportation Unions*, the Appeal Side of the Quebec Court of Queen's Bench ruled that the Act did not breach the freedom of association as 'Parliament ha[d] sought to manage the Maritime Transportation Unions in the best interests of its members consistent only "with the natural and public interests of Canada".'[21] In fact, rather than violating rights, the Act had 'as its precise object the protection of democratic liberties, which the provisions of the *Canadian Bill of Rights* and the principles of international law also seek to uphold'.[22]

17. Quebec suffered a similar crisis in its construction industry in the 1970s. Following allegations of violence and corruption by union officials,[23] in 1974 and 1975, the Province of Quebec passed legislation modelled on the 1963 federal Act,[24] placing five named unions under trusteeship for a period of three years.[25] The trustees were tasked with returning the unions to a position where their members could 'assume by peaceful means the democratic management and control of their labour organizations'.[26] To that end, the trustees were given powers to control the union's property, remove officials and employees, change the union's rules, and compel

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18 *Maritime Transportation Unions Trustees Act 1963* (Canada) ss 7(2)(b), (d), 11.

19 *Maritime Transportation Unions Trustees Act 1963* (Canada) s 24.

20 Although the *Canadian Bill of Rights* was not entrenched, it was interpreted as rendering inoperative a law that was incompatible with one or more of the rights or freedoms it protected: *R v Drybones* [1970] SCR 282, 293-7 (Ritchie J for the majority).

21 *Swait v Board of Trustees of Maritime Transportation Unions* (1966) 61 DLR (2d) 317, 321 (Hyde J, Pratte J agreeing). See also at 324 (Rinfret J), 327 (Owen J), 334 (Brossard J).

22 *Swait v Board of Trustees of Maritime Transportation Unions* (1966) 61 DLR (2d) 317, 334 (Brossard J).

23 Robert Cliche, *Report of the Commission of Inquiry on the Exercise of Union Freedom in the Construction Industry* (Quebec, 1976, French version published 1975); Jean Sexton, 'Controlling Corruption in the Construction Industry: The Quebec Approach' (1989) 42(4) *Industrial and Labor Relations Review* 524, 526-7.

24 ILO Governing Body Committee on Freedom of Association, *Definitive Report – Report No 158, Case No 818* (November 1976) [192].

25 *An Act respecting the placing of the 'International Union of Elevator Constructors, locals 89 and 101' under trusteeship* (Bill 43, 1974); *An Act respecting the placing of certain labour unions under trusteeship* (Bill 29, 1975).

26 Bill 43, 1974, preamble.

people to assist them.[27] The legislation had a sunset clause of three years or an earlier date determined by the Lieutenant-Governor in Council.[28]

18. The Canadian Labour Congress brought a complaint to the International Labour Organization Governing Body Committee on Freedom of Association. The complaint alleged that Quebec had breached the freedom of association protected by article 3 of the *Freedom of Association and Protection of the Right to Organise Convention* (ILO Convention No 87). The Committee recommended that the government attempt to restore the unions to democratic control of its members and to bring the trusteeships to an end as soon as possible, as well as to consider vesting control of the unions in the judicial authorities.[29] Nonetheless, the Committee found that the special circumstances of the case justified the direct intervention of the government in internal trade union matters in order to re-establish a situation where trade union rights were fully respected.[30] Together with other reforms, the trusteeships were later credited with dramatically reducing violence and corruption in the construction industry.[31]

19. For these additional reasons, even if the impugned amendments or the Determination impose a burden on the implied freedom, that burden is proportionate.

B. Chapter III of the Constitution

20. In support of their argument that s 323B(1) of the FWRO Act infringes Ch III of the Constitution, the Plaintiffs effectively assert that s 323B(1) amounts to a bill of pains and penalties. For the reasons given by the Defendants, that question does not arise.[32] Even if it did arise, s 323B(1) is not a bill of pains and penalties.

21. In the Australian constitutional context,[33] 'an Act that is a bill of pains and penalties is not prohibited merely because it matches that description'.[34] The 'real question' in the Australian context 'is not whether the Act amounts to a bill of attainder [or bill of

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27 Bill 29, 1975, ss 5, 8, 9, 16, 17.
28 Bill 29, 1975, s 20.
29 ILO Governing Body Committee on Freedom of Association, *Definitive Report – Report No 158, Case No 818* (November 1976) [224], [235](b).
30 ILO Governing Body Committee on Freedom of Association, *Definitive Report – Report No 158, Case No 818* (November 1976) [218]-[220].
31 Jean Sexton, 'Controlling Corruption in the Construction Industry: The Quebec Approach' (1989) 42(4) *Industrial and Labor Relations Review* 524, 531-2.
32 DS [52].
33 Cf US Constitution, Art I, s 9, cl 3; Art I, s 10, cl 1.
34 *Haskins v Commonwealth* (2011) 244 CLR 22, 37 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

pains and penalties], but whether it exhibits that characteristic of a bill of attainder which is said to represent a legislative intrusion upon judicial power'.[35]

22. As this Court held in *Duncan v New South Wales*, the two key features of a bill of pains and penalties amounting to 'a legislative intrusion upon judicial power' are (1) a legislative determination of breach by some person of some antecedent standard of conduct; and (2) legislative imposition on that person of punishment consequent on that determination of breach.[36]

23. In *Duncan*, the Court approached the second limb on the basis that a disability imposed for a *protective* purpose will not amount to punishment in the relevant sense.[37] The Court drew support for that approach from the decision of *Kariapper v Wijesinha*,[38] in which the Privy Council upheld a Ceylon law removing named individuals from office who had been found guilty of bribery by a commission of inquiry. The law did not amount to a bill of pains and penalties. It contained no declaration of guilt and the disabilities which it imposed did not have the character of punishment for guilt. Rather, the disabilities were imposed for the purpose of keeping public life clean for the public good.[39]

24. Section 323B(1) exhibits neither feature of a bill of pains and penalties. It contains no determination of a breach of an antecedent standard of conduct by anyone. While the impetus for pt 2A was allegations of widespread criminal conduct, pt 2A does not 'fasten upon' those allegations,[40] or impose any disabilities 'linked' to those allegations.[41] The mere fact that a law was inspired by specific instances of criminal or other objectionable conduct does not make it a legislative determination of guilt.[42]

25. Nor can s 323B(1) be characterised as punitive, especially given that it conditions the

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35 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 649-50 (Dawson J), quoted with approval in *Haskins v Commonwealth* (2011) 244 CLR 22, 37 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

36 (2015) 255 CLR 388, 408 [43] (the Court).

37 Cf *United States v Brown*, 381 US 437, 458-60 (Warren CJ, opinion of the Court) (1965).

38 [1968] AC 717, endorsed in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 537-8 (Mason CJ), *Duncan v New South Wales* (2015) 255 CLR 388, 409-10 [49] (the Court).

39 *Kariapper v Wijesinha* [1968] AC 717, 736 (Sir Douglas Menzies for the Privy Council).

40 *Duncan v New South Wales* (2015) 255 CLR 388, 408 [44] (the Court).

41 *Kariapper v Wijesinha* [1968] AC 717, 736 (Sir Douglas Menzies for the Privy Council).

42 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 235 (Webb J); *Duncan v New South Wales* (2015) 255 CLR 388, 405 [32], 408-9 [45]-[47] (the Court). See similarly in the US: *Collin v Smith*, 447 F Supp 676, 682 n 4 (ND Ill, 1978) ('A law of general applicability is not unconstitutional merely because its enactment was inspired by a specific example of the evil which it seeks to suppress'), affirmed in 578 F 2d 1197 (7th Cir, 1978).

Minister's exercise of power on satisfaction of a public interest test having regard to the objects clause in s 5 of the FWRO Act. The evident purpose of pt 2A as a whole is to enable the C&G Division to be returned swiftly to a state in which it is governed and operates lawfully and effectively in its members interests. That is relevantly indistinguishable from the protective purposes of the laws upheld in *Kariapper* ('to keep public life clean for the public good')[43] and *Duncan* (to 'promot[e] integrity in public administration').[44]

26. The test of characterisation in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* does not lead to any different outcome. On any view, s 323B(1) would meet that test. Section 323B(1) is not prima facie punitive—as it does not impact upon life, liberty or bodily integrity[45]—and even if it were, it is reasonably capable of being seen to be necessary for the legitimate, non-punitive purpose identified above.[46] The question is not whether s 323B(1) is necessary to that end, but whether it is reasonably capable of been seen to be so.[47]

C. Conclusion

27. For these additional reasons, the answers to questions 2, 3 and 4 in the Special Case should be answered 'No'.

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43 *Kariapper v Wijesinha* [1968] AC 717, 736 (Sir Douglas Menzies for the Privy Council).
44 *Duncan v New South Wales* (2015) 255 CLR 388, 409 [47], 410 [50] (the Court).
45 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, [12], [14] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
46 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ). See also [136]-[137] (Edelman J).
47 On the distinction, see, *Richardson v Forestry Commission* (1988) 164 CLR 261, 312 (Deane J). See also *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, [144] (Edelman J), [325] (Beech-Jones J).

PART V: Time estimate

28. It is estimated that 15 minutes will be required for presentation of Queensland's oral argument.

Dated 25 November 2024.

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Annexure 1

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S113/2024

BETWEEN:

MICHAEL RAVBAR
First Plaintiff

ANNEXURE TO SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Statutes and Statutory Instruments referred to in the submissions
Pursuant to *Practice Direction No. 1 of 2019*, Queensland sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions**.**

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	Ch III
	Statutes		
2.	*An Act respecting the placing of the 'International Union of Elevator Constructors, locals 89 and 101' under trusteeship* (Quebec) (Bill 43, 1974)	As enacted	
3.	*An Act respecting the placing of certain labour unions under trusteeship* (Quebec) (Bill 29, 1975)	As enacted	
4.	*Canadian Bill of Rights 1960* (Canada)	Current version, current to 30 October 2024	
5.	*Fair Work Act 2009* (Cth)	Current	177A
6.	*Fair Work (Registered Organisations) Act 2009* (Cth)	Current	Pt 2A
7.	*Judiciary Act 1903* (Cth)	Current	s 78A
8.	*Maritime Transportation Unions Trustees Act 1963* (Canada)	As enacted	