HIGH COURT OF AUSTRALIA

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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

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: BASIS OF INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes in this matter pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: SUBMISSIONS

4. The Plaintiffs impugn the validity of Part 2A of Chapter 11 (**Pt 2A**) of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FW(RO) Act**), s 177A of the *Fair Work Act 2009* (Cth) (**FW Act**), the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) (**Administration Act**) and the *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration)*

Determination (**Determination**) on four bases, giving rise to four issues. South Australia makes submissions on the first, second and third issues, namely the head of power issue, the implied freedom of political communication issue and the Chapter III issue.

5. In summary, South Australia submits that:

5.1. Following this Court's decision in *New South Wales v Commonwealth* (***Work Choices***),[1] it may be accepted that the Administration Act is supported by s 51(xx) of the *Constitution*. However, it is doubtful that the Administration Act can be supported on the alternative basis relied upon by the First and Second Defendants (**Commonwealth**) because, on the material before the Court, it is unclear whether the Construction, Forestry and Maritime Employees Union (**CFMEU**) is a trading corporation for the purposes of s 51(xx).[2]

5.2. Part 2A of the FW(RO) Act does not burden political communication at all, such that it does not offend the implied freedom of political communication. To the extent that the Determination burdens political communication, that burden can be justified.[3] Further to the Commonwealth's submissions, the Plaintiffs' contention that the inability of the Construction and General Division (**C&G Division**) to make political donations itself constitutes a burden on the implied freedom of political communication is contrary to authority and principle.

5.3. Section 323B(1) of the FW(RO) Act does not confer judicial power on the Minister. Further to the Commonwealth's submissions, a power to change who has control of a body corporate does not diminish any fundamental right that underpins the *Lim*[4] principle, nor does it amount to a forfeiture of property that by historical reference is recognised to have a punitive character.[5]

A. HEAD OF POWER

6. In *Work Choices* a majority of this Court held that the Commonwealth could regulate the employment activities of constitutional corporations.[6] In rejecting a challenge to the validity of Schedule 1 to the *Workplace Relations Act 1996* (Cth) (***Workplace***

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1 (2006) 229 CLR 1.
2 Paragraphs [6]-[19] below.
3 Paragraphs [20]-[23] below.
4 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (***Lim***) (1992) 176 CLR 1.
5 Paragraphs [24]-[34] below.
6 *Work Choices Case* (2006) 229 CLR 1.

Relations Act), which provided for the registration of trade unions and employers and the regulation of their internal affairs (including their rules, finances and elections), the majority held that:[7]

> If it be accepted, as it should be for the argument on this branch of the plaintiffs' case, that it is within the corporations power for the Parliament to regulate employer-employee relationships and to set up a framework for this to be achieved, then it also is within power to authorise registered bodies to perform certain functions within that scheme of regulation. It also is within power to require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs.

7. For the reasons advanced by the Commonwealth, applying the reasoning of this Court in *Work Choices*, the Administration Act is supported by s 51(xx) of the *Constitution*.[8]

8. However, South Australia takes issue with the alternative basis upon which the Commonwealth submits that the Administration Act is supported by s 51(xx). South Australia submits that, on the material before the Court, it is unclear that the CFMEU is a trading corporation for the purposes of s 51(xx).

9. The framers of the *Constitution* did not confer a legislative power on the Commonwealth Parliament to make laws with respect to "trading", but rather "trading … corporations".[9] As Justice Mason observed in *Adamson's Case*, "*[n]ot every corporation which is engaged in trading activity is a trading corporation.*"[10] It is necessary, therefore, to determine when a corporation should be characterised as a "trading corporation" for the purposes of s 51(xx).[11] South Australia makes four submissions about the correct approach to the characterisation test.

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7 *Work Choices Case* (2006) 229 CLR 1, 153 [322] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

8 Submissions of the First and Second Defendants dated 18 November 2024 (**DS**), [24]-[29].

9 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 543 (Barwick CJ (in dissent)), 562 (Gibbs J).

10 *R v Federal Court of Australia; Ex parte Western Australian National Football League* (***Adamson's Case***) (1979) 143 CLR 190, 234 (Mason J).

11 The need to determine whether a corporation can be characterised as a trading corporation does not necessitate the search for the "true character" of the corporation, whether by reference to a corporation's "characteristic activity" or otherwise. This approach, which would require that a corporation be assigned a *single* character, has been rejected. Accordingly, it is now established that charitable or municipal corporations may, for example, also be characterised as trading corporations: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (***Queensland Rail***) (2015) 256 CLR 171, 200 [71]-[72], citing *Adamson's Case* (1979) 143 CLR 190, 208 (Barwick CJ), 236-237 (Mason J), 239 (Murphy J); *State Superannuation Board v Trade Practices Commission* (***State Superannuation Board Case***) (1982) 150 CLR 282, 303-304 (Mason, Murphy and Deane JJ); *Commonwealth v Tasmania* (***Tasmanian Dam Case***) (1983) 158 CLR 1, 155-157 (Mason J), 179 (Murphy J), 240 (Brennan J), 292-293 (Deane J). See also Nicholas Gouliaditis, 'The Meaning of "Trading or Financial Corporations": Future Directions' (2008) 19 *Public Law Review* 110, 126.

10. First, the activities undertaken by the corporation are a significant, if not decisive, determinant in many cases.[12] Whilst various different verbal formulae have been employed to describe the proportion of a corporation's trading activity necessary to demonstrate that the corporation is a constitutional corporation for the purposes of the activities test,[13] in the *State Superannuation Board Case* a majority of this Court downplayed the significance of any difference arising from these various formulations, settling on the phrase "*trading activities on a significant scale*".[14]

11. Importantly, however, the question is not whether the trading activities of the corporation in question are significant in an absolute sense, but rather whether the trading activities are significant relative to the corporation's non-trading activities.[15] As Justice Mason explained in *Adamson's Case*:[16]

> "Trading corporation" … is a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation.

12. Some lower court decisions, which have considered the sufficiency of trading activity by reference to revenues measured in gross terms, may have misapplied the test.[17] For instance, in *E v Australian Red Cross Society* the trading activities of a hospital were held to be significant even though the revenue thereby raised was "*dwarfed*" by the government subsidies received.[18] In *United Firefighters Union of Australia v Country Fire Authority* the multi-million dollar trading revenue of a statutory fire authority was said to be significant even though it constituted only 2.7% of total receipts.[19]

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12 *Adamson's Case* (1979) 143 CLR 190, 208 (Barwick CJ), 233 (Mason J), 237 (Jacobs J), 239 (Murphy J); *Fencott v Muller* (1983) 152 CLR 570, 601 (Mason, Murphy, Brennan and Deane JJ).

13 *Adamson's Case* (1979) 143 CLR 190, 208 (Barwick CJ) ("*a substantial corporate activity*"), 233 (Mason J) ("*significant proportion of its overall activities*"), and 239 (Murphy J) ("*not insubstantial*").

14 *State Superannuation Board Case* (1982) 150 CLR 282, 304 (Mason, Murphy and Deane JJ).

15 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 543 (Barwick CJ (in dissent)); *Adamson's Case* (1979) 143 CLR 190, 233 (Mason J), 237 (Jacobs J agreeing), cf 239 (Murphy J); *State Superannuation Board Case* (1982) 150 CLR 282, 304 (Mason, Murphy and Deane JJ); *Tasmanian Dam Case* (1983) 158 CLR 1, 240 (Brennan J), 293 (Deane J).

16 *Adamson's Case* (1979) 143 CLR 190, 233 (Mason J).

17 For a survey of some of various approaches adopted by lower courts, see Christopher Tran, '"Trading or Financial Corporations" under Section 51(xx) of the *Constitution*: A Multifactorial Approach' (2011) 37 *Monash University Law Review* 12, Pt III; Nicholas Gouliaditis, 'The Meaning of "Trading or Financial Corporations": Future Directions' (2010) 19 *Public Law Review* 110, 113-119.

18 (1991) 27 FCR 310, 345 (Wilcox J).

19 (2014) 218 FCR 210, 232 [83] (Murphy J): "*[a]s a proportion of total revenue, that referrable to trading activities accounts for about 2.7%*". See also [100]: "*[a]lthough the $12.93 million of trading income is plainly a substantial amount in absolute terms, it is only a small percentage relative to the CFA's*

13. Second, although purpose is rarely "*the sole or principal criterion*",[20] a company's constitution "*will never be completely irrelevant*".[21] In some circumstances, the purpose of incorporation will assume greater significance than in others. Most obviously, a company's purpose has particular relevance in relation to its character where the company has not yet engaged in any activity. Conversely, purpose will have little, if any, work to do with respect to a company that has no articles.[22]

14. Even in those cases where the activities test predominates, "*purpose and activity might interact*".[23] For instance, purpose may guide identification of those activities that can properly be regarded as incidental. Activities that are only peripheral to a company's core business may appropriately be afforded less weight in applying the activities test.[24] To similar effect, it has been said that:[25]

> It is not clear how it is possible to determine whether trading activities are "significant", "substantial" or "predominant", for example, without consideration of the overall context of the corporation.

15. Third, although the presence of a profit motive is not necessary to conclude that a corporation is engaged in trade, the absence of such a purpose may bear on whether the corporate activity in question can properly be characterised as trade.[26] In other words, whilst governmental and not-for-profit corporations are capable of, and

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total income. Even so, I do not consider it is trivial or minimal in relative terms". This finding was upheld on appeal: *United Firefighters' Union of Australia v Country Fire Authority* (2015) 228 FCR 497, 524-525 [134], 526 [140] (the Court).

20 *State Superannuation Board Case* (1982) 150 CLR 282, 303 (Mason, Murphy and Deane JJ).

21 *Fencott v Muller* (1983) 152 CLR 570, 602 (Mason, Murphy, Brennan and Deane JJ). *State Superannuation Board Case* (1982) 150 CLR 282, 303 (Mason, Murphy and Deane JJ), referring to *Adamson's Case* (1979) 143 CLR 190, 208-211 (Barwick CJ), 233-237 (Mason J, with Jacobs J agreeing) and 239-240 (Murphy J). See also *State Superannuation Board Case* (1982) 150 CLR 282, 304-305 (Mason, Murphy and Deane JJ); *Fencott v Muller* (1983) 152 CLR 570, 601-602 (Mason, Murphy, Brennan and Deane JJ), 611 (Wilson J), 622-624 (Dawson J). In *Queensland Rail* the plurality acknowledged the potential relevance of purpose, without reaching any concluded view about the role that purpose serves: *Queensland Rail* (2015) 256 CLR 171, 189 [41]-[42] (French CJ, Hayne, Kiefel, Bell and Nettle JJ).

22 It is not necessary for a company to state its objects in its constitution: *Corporations Act 2001* (Cth), s 125(2). See also Justice Michelle Gordon AC, 'Corporate Governance: Big Ideas and Debates?' (2024) 47(2) *Melbourne University Law Review* (advance), 20.

23 *Queensland Rail* (2015) 256 CLR 171, 199 [69] (Gageler J).

24 Chief Justice Barwick and Justice Mason acknowledged the potential to discount incidental or peripheral activity in *Adamson's Case* (1979) 143 CLR 190, 208 (Barwick CJ), 234 (Mason J), 237 (Jacobs J, agreeing).

25 Christopher Tran, '"Trading or Financial Corporations" under Section 51(xx) of the *Constitution*: A Multifactorial Approach' (2011) 37 *Monash University Law Review* 12, 30.

26 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 539 (Barwick CJ (in dissent)), 563 (Gibbs J), 569 (Stephen J (in dissent)).

regularly do, trade,[27] the provision of goods or services by such bodies may be so heavily subsidised that the activity does not constitute trade. Similarly, revenue received by such bodies will not infrequently be by way of grant, rather than income derived from trading activity. A substance over form approach should be applied in determining whether the activities of governmental and not-for-profit corporations are engaged in trade.[28]

16. Finally, whilst a corporation's revenue is often analysed as a proxy for corporate activity, consideration of revenue alone may be unreliable.[29] In some cases, a corporation's activity may be more accurately discerned by reference to the board's papers, the duties of senior office holders and a break-down of time spent by employees on trading and non-trading related tasks. It has correctly been observed that:[30]

> [A] body could earn 100% of its income from trading activities and still not be a trading corporation if that income-generating activity was only a small part of what the corporation did.

17. Applying the above principles to the present case, it is unclear, on the material before the Court, that the CFMEU can be characterised as a trading corporation. Whilst it may be accepted that the CFMEU generates substantial revenue from its membership subscriptions, it is unclear whether the revenue so derived (or the expenditure on external service providers for the benefit of members) meaningfully reflects the actual activities of the CFMEU. For instance, the Special Case does not disclose the extent to which the CFMEU's office holders and employees pursue the advocacy of its members' industrial rights (whether individually or collectively) compared to the procurement of bundled membership services. The Full Court of the Federal Court in

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27 For instance, in the *Tasmanian Dam Case* this Court held that the Hydro-Electric Commission was engaged in trading activity, despite the fact that it was a statutory authority established for a public purpose: *Tasmanian Dam Case* (1983) 158 CLR 1.

28 As Gouliaditis has noted, revenue received under contract may properly be characterised as a grant in some circumstances: Nicholas Gouliaditis, 'The Meaning of "Trading or Financial Corporations": Future Directions' (2010) 19 *Public Law Review* 110, 127.

29 Gouliaditis has identified a number of lower court decisions that may have placed too much emphasis on revenue sources: Nicholas Gouliaditis, 'The Meaning of "Trading or Financial Corporations": Future Directions' (2010) 19 *Public Law Review* 110, 127. Examples of decisions that appear to adopt this type of reasoning include: *E v Australian Red Cross Society* (1991) 27 FCR 310, 345 (Wilcox J); *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346, 351 (Marshall J); *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc* (2002) 120 FCR 191, 218 (Weinberg J); *Quickenden v O'Connor* (2001) 109 FCR 243, 272-273 (Carr J).

30 Nicholas Gouliaditis, 'The Meaning of "Trading or Financial Corporations": Future Directions' (2010) 19 *Public Law Review* 110, 127.

Aldi Foods Pty Ltd v Transport Workers' Union of Australia was correct to conclude that "*[t]he advocacy activities of a union cannot be characterised as the supply of a service (advocacy) for reward (membership fees) in a trading or commercial sense because the service (advocacy) lacks a defined content.*"[31]

18. As to the other revenue sources identified by the Commonwealth, such as training services, leasing properties, advertising and sponsorship and merchandise sales, it is unclear whether any activity associated with such revenues should be regarded as peripheral. For example, the leasing of office accommodation for clerical staff may be incidental to the core business of the CFMEU, whereas undertaking work health and safety training by the CFMEU for reward may not be.

19. For these reasons, there is insufficient material before the Court to safely conclude that the trading activity undertaken by the CFMEU is significant when compared to its non-trading activity so as to support the Commonwealth's contention that the CFMEU is a trading corporation.

B. IMPLIED FREEDOM

20. South Australia agrees with the Commonwealth that Pt 2A of the FW(RO) Act does not itself burden political communication and that, accordingly, the challenge to the validity of Pt 2A must fail.[32] South Australia further agrees that in the circumstances of this matter the validity of the Determination is appropriately tested by asking whether that determination would be valid if it had been enacted in the FW(RO), and if it had, it would be.[33]

21. South Australia makes the following further points. An asserted burden on the implied freedom identified by the Plaintiffs is an inability of the C&G Division to make political donations (in the absence of permission of the administrator).[34] The identification of a burden in this manner tends to approach it on the basis the law is impinging on a *right* to make donations. However, the implied freedom of political communication is a restraint on legislative power and not the conferral of a personal right or freedom.[35] For the purposes of the implied freedom, "*the question is not*

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31 (2020) 282 FCR 174, 196-197 (Besanko, Bromberg and O'Bryan JJ).
32 DS, [31]-[35]
33 DS, [36]-[50].
34 Submissions of the Plaintiffs dated 21 October 2024 (**PS**), [27].
35 *Comcare v Banerji* (2019) 267 CLR 373, 394-396 [19]-[20] (Kiefel CJ, Bell, Keane and Nettle JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, 551-552 [30]-[31], 554 [36] (French CJ, Hayne,

whether a person is limited in the way that he or she can express himself or herself".[36] The effect on individuals or individual organisations is relevant only insofar as it informs an assessment of "*the law's effect on political communication* <u>*as a whole*</u>".[37] This aspect of the Plaintiffs' statement of claim and submissions[38] tends to "*blur the distinction*" between these concepts.[39]

22. That distinction is critical insofar as it is suggested that the *act of making* a political donation is protected. As this Court has made clear, the ability to make donations is not part of the implied freedom: "*the act of donation is not itself a political communication*".[40] Instead it is the corollary of a donation, its receipt and then subsequent expenditure, that is relevant to questions of burden. That is so because restrictions on donations to candidates or political parties are apt to limit their potential source of funds and their capacity to meet the costs of political communication with electors.[41]

23. A restriction on donations may thereby indirectly affect political communication. As the extent of any such burden turns on the prospect of a funding shortfall, it will necessarily be affected by the scope of a restriction on donations and the presence of countervailing factors, such as caps on electoral expenditure and the availability of

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Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 202-203 [30] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 360 [90], 373-374 [150] (Kiefel CJ, Bell and Keane JJ), 407 [258], 410 [262] (Nettle J), 430 [313], 475 [465], 476 [469] (Gordon J), 501-504 [557]-[559] (Edelman J); *Clubb v Edwards* (2019) 267 CLR 171, 187 [8], 192-193 [35] (Kiefel CJ, Bell and Keane JJ), 255-256 [247] (Nettle J); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 22 [44] (Kiefel CJ, Keane and Gleeson JJ); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 548 [14] (Kiefel CJ and Keane J), 607-608 [223] (Edelman J), 623 [269] (Steward J), 624 [271] (Gleeson J).

36 *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 574 [119] (Keane J). Or, as Justice Nettle put it in *Brown v Tasmania* (2017) 261 CLR 328, 408-409 [259]: "*the freedom is concerned with the burdens on political communications, not burdens upon communicators*".

37 *Comcare v Banerji* (2019) 267 CLR 373, 395-396 [20] (Kiefel CJ, Bell, Keane and Nettle JJ) (emphasis in original); *Unions NSW v New South Wales* (2013) 252 CLR 530, 553-554 [35]-[36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 574 [119] (Keane J); *Brown v Tasmania* (2017) 261 CLR 328, 360 [90], 373-374 [150] (Kiefel CJ, Bell and Keane JJ).

38 PS, [27], [34]-[35]

39 *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [37] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 202-203 [29]-[30] (French CJ, Kiefel, Bell and Keane JJ).

40 *McCloy v New South Wales* (2015) 257 CLR 178, 201 [25], 202 [28], (French CJ, Kiefel, Bell and Keane JJ), 241 [162]-[164] (Gageler J), 289-291 [343], [346]-[348] (Gordon J); *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [37] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 569-570 [96]-[100], 572 [110]-[112] (Keane J).

41 *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 201 [24] (French CJ, Kiefel, Bell and Keane JJ, 220-221 [93] (French CJ, Kiefel, Bell and Keane JJ), 240 [158]-[159] (Gageler J), 290-291 [346]-[348] (Gordon J); *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, 607-608 [15] (Kiefel CJ, Bell and Keane JJ).

other sources of funds (including public funding). In the present matter, the practical effect of any restriction on political donations that might be introduced during the period of administration bears no comparison with the general and more sweeping restrictions in question in earlier decisions of this Court.[42]

C. CHAPTER III

24. South Australia supports the Commonwealth's contention that s 323B(1) of the FW(RO) Act does not confer power to impose any measure that is prima facie punitive in the relevant sense.[43] For the reasons that follow, as to the alleged detriment in respect of the property of the CFMEU,[44] the power to change who has control of a body corporate (and thereby the body corporate's property) does not diminish any fundamental right that underpins the *Lim* principle, nor does it amount to a forfeiture of property that by historical reference is recognised to have a punitive character. In respect of the other alleged detriments,[45] and further to the Commonwealth's submissions,[46] South Australia addresses the Plaintiffs' reliance on the United States jurisprudence in respect of a "bill of attainder".

25. The power conferred by s 323B(1) of the FW(RO) Act permits the Minister to determine a scheme for the administration of the C&G Division. Once the C&G Division is placed in administration,[47] the administrator has, among other functions and powers, control of the property and affairs of the Division.[48] Significantly, in performing functions and exercising their powers, the administrator must be satisfied that the administrator is acting in the best interests of the members of the Division and have regard to the lawful objects of the CFMEU.[49]

26. For the purpose of Chapter III analysis, the power to determine the administration scheme for the C&G Division is not a power that falls within a recognised class that has a prima facie punitive character by default.[50] Determining the scheme for

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42 *Unions NSW v New South Wales* (2013) 252 CLR 530 (general ban on donations except from persons on the electoral roll); *McCloy v New South Wales* (2015) 257 CLR 178 (general ban on donations from property developers); *Spence v Queensland* (2019) 268 CLR 355 (general ban on donations from property developers).

43 DS, [53].

44 Cf PS, [40]-[41]; DS, [54]-[57].

45 Cf PS, [43]-[45].

46 See DS, [58]-[59].

47 By force of s 323A of the FW(RO) Act.

48 FW(RO) Act, s 323K(1)(a).

49 FW(RO) Act, s 323K(5).

50 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ), [241] (Beech-Jones J).

administration of a body corporate is far removed from either a power to impose involuntary detention in custody or stripping the citizenship of an individual.[51] There is no good reason to characterise the power to determine the administration scheme as prima facie punitive by default.

27. In characterising whether the power to determine the administration scheme is otherwise of a prima facie punitive character, it is significant that the *Lim* principle is part of "*a broader stream of common law and constitutional principle based on the pre-eminent value [of] the law of this country*" that protects human life, limb and liberty.[52] It is possible after a process of characterisation that *"[t]he deprivation of any rights, civil or political, previously enjoyed*"[53] may be concluded to amount to prima facie punishment. However, where there is no adverse effect on life, limb or liberty — as here in respect of the power to determine the administration scheme — the Plaintiffs' task of demonstrating that the impugned power has a prima facie punitive character is more onerous. It is significant in this constitutional context, as it was for this Court in deciding that the privilege against self-incrimination does not apply to corporations,[54] that a body corporate cannot suffer physical punishment to life, limb or liberty. Compounding the difficulty with the Plaintiffs' argument is that the impugned power has little effect on "*the inherent and irreducible status of each human being in the compact between the individual and the state*"[55] as the power to determine the administration scheme primarily operates in respect of a body corporate.

28. A focus of the Plaintiffs' argument is on the use of the "CFMEU's property"[56] in circumstances where the CFMEU as an "organisation" has, by reason of Commonwealth legislation, separate legal personality as a body corporate and the power to own, possess and deal with any real or personal property.[57] Once the power to determine the administration scheme under s 323B(1) of the FW(RO) Act is exercised, there is no direct effect on the property rights of the CFMEU itself as the

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51 Cf *Alexander v Minister for Home Affairs* (2022) 276 CLR 336; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40.

52 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, [12] and [15] (Gageler CJ, Gordon, Gleeson and Jagot JJ). See also, [151] (Edelman J).

53 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, [14] (Gageler CJ, Gordon, Gleeson and Jagot JJ) quoting *United States v Lovett* (1946) 328 US 303, 324.

54 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499-500 (Mason CJ and Toohey J), 512 (Brennan J), 556 (McHugh J).

55 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, [12] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

56 PS, [40].

57 FW(RO) Act, s 27; Special Case Book (**SCB**), 127 [18.3], 129 [21]-[22].

property remains under the ownership or possession of the body corporate. More particularly, a change in who has effective control of the body corporate (or a division of that body), through the imposition of a scheme where the administrator must continue to act in the best interests of its members, is conceptually distinct from an interference with the property rights of that body. Just as the "*termination of a right conferred by statute*" is not exclusively judicial in nature, not is the power to change who is in control of a body corporate, in circumstances where that body's legal existence and powers are dependent upon Commonwealth legislation.[58]

29. A change in control of a body corporate is not akin to historical instances of forfeiture being used as punishment for criminal offending. The Plaintiffs identify no historical precedent similar to an administrator being appointed to a body corporate as punishment for criminal offending.[59] In particular, the reliance on *Attorney-General (NT) v Emmerson*[60] is misplaced. That case concerned fundamentally different Northern Territory legislation that provided in effect for automatic criminal forfeiture of certain property (upheld to be valid under the *Kable*[61] principle).

30. Further, the power to determine the administration scheme in this matter may be contrasted with the legislation considered in the *Communist Party Case* where Dixon J described that legislation as giving rise to a "*forfeiture*".[62] In that case, after a receiver realised the property and discharged the liabilities of the association, the receiver was to pay or transfer the surplus to the Commonwealth. There is no similar effect from the determination of the administration scheme for the C&G Division. The administrator acts in the best interests of members and seeks to return the Division to a state in which it is governed and operates lawfully in a short timeframe; it does not have the effect of winding up the Division for the financial benefit of the Commonwealth.

31. The Plaintiffs also fail to address two earlier decisions of this Court that have considered whether certain powers in respect of body corporates or property rights fall within the exclusive province of a court exercising federal jurisdiction. Whilst these

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58 *Duncan v New South Wales* (2015) 255 CLR 388, 407-408 [41] (the Court).
59 Cf PS, [41] fn 38.
60 (2014) 253 CLR 393.
61 *Kable v Director of Public Prosecutions (NSW)* (***Kable***) (1996) 189 CLR 51.
62 *Australian Community Party v Commonwealth* (***Communist Party Case***) (1951) 83 CLR 1, 181 (Dixon J). See also, 243 (Webb J).

decisions precede *Lim*, they provide support for the contention that the Minister's power to determine the administration scheme in this case is valid:

31.1. In *Roche v Kronheimer*[63] this Court rejected an argument that a particular regulation[64] that empowered a Minister to vest in the Public Trustee property that fell within a certain category was the exercise of judicial power which, because of s 71 of the *Constitution*, could be vested only in a Federal Court. The plurality reasoned that there was "*no reason why property should not be vested or divested by a legislative enactment or by an executive act done under the authority of the Legislature as well as by a judicial act*".[65] In these proceedings, the Plaintiffs have not demonstrated any good reason to depart from this conclusion.

31.2. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*[66] a majority of the Court rejected an argument that the power to dissolve a body corporate, and the forfeiture of that body's property, were the exercise of judicial power.[67] Chief Justice Latham reasoned that "*it is well recognized that a registered company may be dissolved without any judicial proceedings*".[68] If a body corporate can be dissolved without court order, a power pertaining to the administration of a body corporate should not be held to be exclusively judicial.

32. Further, whilst courts currently exercise, and historically have exercised, powers to order the administration, liquidation and/or dissolution of body corporates, such orders are not (as far as has been identified) connected to criminal processes.[69] Within the *Lim* framework pertaining to criminal punishment, there is no proper basis to infer from the existence of such court orders outside of criminal proceedings that the power to determine the administration scheme for the C&G Division should be characterised

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63 (1921) 29 CLR 329.

64 Being regulation 20(5) of the *Treaty of Peace Regulations (Statutory Rules 1920, No 25)*. Regulation 20(5) provided that the Minister may by order vest in the Public Trustee any property, rights and interests charged under regulation 20(1). Regulation 20(1) provided that all property, rights and interests within the Commonwealth belonging to German nationals at the date when the Treaty of Peace comes into force are hereby charged for the payment of certain amounts, subject to certain exceptions.

65 *Roche v Kronheimer* (1921) 29 CLR 329, 337 (Knox CJ, Gavan Duffy, Rich and Starke JJ). See also, 340 (Higgins J).

66 (1943) 67 CLR 116.

67 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 138, 142-143 (Latham CJ), 155-156 (Starke J), 157 (McTiernan J). See also *Australian Community Party v Commonwealth* (1951) 83 CLR 1, 234-235, 242 (Webb J).

68 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 138 (Latham CJ).

69 Cf PS, [42].

as falling within the exclusive judicial power to adjudge and punish criminal guilt. Moreover, there are various examples in the statute books of involuntary administrations or dissolutions of body corporates being the result of the exercise of executive power.[70]

33. Insofar as the Plaintiffs seek to rely upon the United States' jurisprudence in respect of a "bill of attainder" to challenge the effect of the administration scheme on individual officeholders, employees and members, and in particular the consequential statutory restrictions on a "removed person",[71] that reliance does not demonstrate that the impugned provisions amount to prima facie punishment within the Australian constitutional context.[72] Significantly, by reference to the operation and effect of the administration scheme,[73] the detriment imposed on individuals is not "*consequent on*" a determination by the legislature or executive of a breach of an antecedent standard of conduct in an impermissible way.[74] Further, the power to determine the administration scheme is distinct to the powers considered in *Victorian Chamber of Manufacturers v Commonwealth*[75] and the *Communist Party Case* as the statutory provisions in Pt 2A of the FW(RO) Act (as well as s 177A of the FW Act) do not give any textual foundation for a conclusion that the burdens imposed on individuals are derived from Parliament's view that those individuals have engaged in wrongdoing for which they should be punished.[76]

34. In the alternative, South Australia submits that if, contrary to South Australia's submissions,[77] the Court concludes that the power to determine the administration scheme is contrary to Chapter III, because of the consequential effect of s 177A of the

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70 Further to the examples cited in DS, [57] fn 93, see also *Building Societies Act 1886* (Qld), s 37A; *Companies Act 1929* (Eng), s 295; *Companies Act 1936* (NSW), s 323; *Aboriginal Councils and Associations Act 1976* (Cth), s 71; *Associations Incorporation Act 1985* (SA), s 41; *Industrial Relations Act 1996* (NSW), s 290B; *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), s 487; *Associations Incorporation Act 2009* (NSW), s 61A; *Associations Incorporations Reform Act 2012* (Vic), s 130.

71 See s 177A of the FW Act and Division 2, Pt 2A of the FW(RO) Act.

72 Cf PS, [43]-[45].

73 See DS, [8]-[11].

74 *Kariapper v Wijesinha* [1968] AC 717, 736 (Sir D Menzies); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 537-538 (Mason CJ); *Duncan v New South Wales* (2015) 255 CLR 388, 408 [43]-[44], 409-410 [49] (the Court). See also M P Lehmann, 'The Bill of Attainder Doctrine: A Survey of the Decisional Law' (1978) 5 *Hastings Constitutional Law Quarterly* 767, 770 fn 14.

75 (1943) 67 CLR 413.

76 See *Victorian Chamber of Manufacturers v Commonwealth* (1943) 67 CLR 413, 416-17 (Latham CJ), 422 (Starke J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 172-173 (Latham CJ), 335-337 (Webb J), 268-269 (Fullagar J). See also J Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022), 335-338. Cf PS, [50]-[51].

77 And the submissions of the Commonwealth together with the interveners supporting the Commonwealth.

FW Act and Division 2, Pt 2A of the FW(RO) Act on a "removed person" (the **removed person provisions**), then the removed person provisions can be severed from the balance of the impugned provisions of Pt 2A.[78] There has been no displacement of the presumption as to the severability of aspects of the FW(RO) Act in the event constitutional invalidity is found.[79] The purpose of Pt 2A is conveniently summarised in the Commonwealth's submissions, which South Australia adopts.[80] Severance of the removed person provisions, leaving operative the remainder (and substantive aspects) of Pt 2A, best achieves the purpose intended by Parliament, namley to enable the C&G Division swiftly to be returned to a state in which it is governed and operates lawfully and effectively in its members' interests, for the ultimate goal of facilitating the operation of the federal workplace relations system.

Part V: ESTIMATED TIME FOR ORAL ARGUMENT

35. It is estimated that up to 20 minutes will be required for the presentation of South Australia's oral argument.

Dated 25 November 2024

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78 Section 15A of the *Acts Interpretation Act 1901* (Cth) "*reverse[s] the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail*": *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 371 (Dixon J). See also *Clubb v Edwards* (2019) 267 CLR 171, 218 [141], 221 [148] (Gageler J), 290 [339] (Gordon J), 320 [429] (Edelman J).

79 The otherwise unobjectionable provisions in Pt 2A of the FW(RO) Act would continue to operate harmoniously upon the persons, matters or things falling under that Part with the same result according with the legislative purpose: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 371 (Dixon J). There is no positive indication in the enactment that the legislature intended it to have either a full or complete operation or none at all, much less that the operation depended on the effect of being a "*removed person*" being maintained: *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442, 454 (Dixon, Williams, Webb, Fullagar and Kitto JJ); *Knight v Victoria* (2017) 261 CLR 306, 325 [35] (the Court).

80 DS, [14], for the reasons outlined at [12]-[15].

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

ANNEXURE TO THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, South Australia sets out below a list of the particular constitutional provisions and statutes referred to in submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Constitution*	Current	s 51(xx), s 71, Ch III
Statutory provisions			
2.	*Aboriginal Councils and Associations Act 1976* (Cth)	Current	s 71
3.	*Acts Interpretation Act 1901* (Cth)	Current	s 15A
4.	*Associations Incorporation Act 2009* (NSW)	Current	s 61A
5.	*Associations Incorporation Act 1985* (SA)	As made	s 41
6.	*Associations Incorporations Reform Act 2012* (Vic)	As made	s 130
7.	*Building Societies Act 1886* (Qld)	As made	s 37A
8.	*Companies Act 1929* (Eng)	As made	s 295

No.	Description	Version	Provisions
9.	*Companies Act 1936* (NSW)	As made	s 323
10.	*Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)	As made	s 487
11.	*Corporations Act 2001* (Cth)	Current	s 125(2)
12.	*Fair Work Act 2009* (Cth)	Current	s 177A
13.	*Fair Work (Registered Organisations) Act 2009* (Cth)	Current	Pt 2A of Ch 11, s 27, s 323A, s 323B(1), s 323K(1)(a), s 323K(5)
14.	*Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth)	Current	Entirety
15.	*Industrial Relations Act 1996* (NSW)	Current	s 290B
16.	*Workplace Relations Act 1996* (Cth)	As made	Sch 1
Statutory instruments			
17.	Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024 (Cth)	Current	Entirety
18.	Treaty of Peace Regulations (Statutory Rules 1920, No 25)	As made	reg 20(1), reg 20(5)