HIGH COURT OF AUSTRALIA

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Details of Filing

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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

PROPOSED SUBMISSIONS OF MICHAEL HISCOX (AS INTERVENER)

I. CERTIFICATION

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

II. BASIS OF INTERVENTION

2. Michael Hiscox seeks leave to intervene in support of the Plaintiffs.

3. Mr Hiscox is the Divisional Branch Assistant Secretary and acting Divisional Branch Secretary of the Australian Capital Territory Divisional Branch (**ACT Divisional Branch**) of the CFMEU (Construction and General Division) (**C&G Division**). As a result of the appointment of the Administrator under Part 2A of Chapter 11[1] of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO Act**) and the *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* (Cth) (**Determination**), the ACT Divisional Branch is under administration.

[1] Which was inserted by the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) (**Administration Act**).

4. Unlike the Plaintiffs, Mr Hiscox has not been removed from office, but is subject to the direction of the Third Defendant (the **Administrator**). Under the administration, the political communication functions of the ACT Divisional Branch have been restricted. For example, the Administrator has directed that the C&G Division's affiliation to the Australian Labour Party (**ALP**) be immediately suspended, and that there be no party-political donations of any type;[2] as a result, in the period leading up to the ACT election held on 19 October 2024, the ACT Divisional Branch did not engage in the political communication in which it would otherwise have engaged. The Administrator has also directed that the journal to members published regularly by the ACT Divisional Branch was required to be signed off by the Administrator before being finalised. The edition of *The Building Worker* which was planned to be published in August 2024, in time to distribute to members before the ACT election, has consequently not been published.

5. The ACT Divisional Branch is defined as an Administered Divisional Branch by Annexure A of the Determination. Mr Hiscox is listed in Annexure C of the Determination as one of the officeholders of the ACT Divisional Branch whose offices have not been vacated by the Determination. In these submissions, those persons are referred to collectively as the **ACT Officeholders**. None of the offices in the ACT Divisional Branch has been vacated.

6. As one of the ACT Officeholders, Mr Hiscox seeks leave to intervene as a person "whose interests would be affected directly by a decision in [this] proceeding".[3] He proposes to make limited submissions in relation to Questions 2 and 3 of the Special Case to supplement those of the Plaintiffs.

III. REASONS LEAVE TO INTERVENE SHOULD BE GRANTED

7. This Court has an undisputed inherent jurisdiction to allow non-party intervention. In accordance with "the principles of natural justice which control the exercise of curial power", a non-party "whose interests would be affected directly by a decision in the proceeding … must be entitled to intervene to protect the interest liable to be affected".[4]

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2 Affidavit of Michael Hiscox dated 25 October 2024, [29] (**Hiscox Affidavit**).

3 See generally *Levy v Victoria* (1997) 189 CLR 579 at 600-605 (Brennan CJ); *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at 38-39 [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

4 *Levy v Victoria* (1997) 189 CLR 579 at 601 (Brennan CJ).

8. The interests of Mr Hiscox, as one of the ACT Officeholders, would be directly and substantially affected by a decision in the proceeding because, in summary, he is presently performing his roles in the following conditions:

   (a) the powers conferred on him by the CFMEU National Rules[5] and C&G Divisional Rules[6] have been temporarily divested by clause 3(1)(f) of Annexure A to the Determination;

   (b) he is subject to the powers, functions and duties of the Administrator as set out under clauses 6 and 7 of Annexure A (see also FWRO Act, s 323K(1));

   (c) he is liable to committing a criminal offence or breaching a civil penalty provision if he engages in a course of conduct that prevents the Administrator "from effectively administering [the Scheme]" (s 323P(1)(ii)).

9. Specifically, in respect of "[o]ffices that are not vacated by this Scheme", the Administrator has the right to "exercise all the powers and functions afforded to" any persons in the position of the ACT Officeholders "by the rules of the CFMEU, the [Act], and this Scheme".[7] Mr Hiscox, as well as the ACT Officeholders and others who remain in their offices, are now subject to the control of the Administrator "for such time as the Administrator considers appropriate",[8] including in respect of their ability to work, attend CFMEU premises, and hold themselves out as speaking on behalf of the CFMEU's members, and in respect of whether they remain in their positions.

10. The onerous restrictions imposed as part of the administration restrict usual incidents of Mr Hiscox's role, many of which are centrally concerned with political communication. Mr Hiscox's affidavit in support of his proposed intervention sets out in more detail the history and current scope of his role in the ACT Divisional Branch. His current role as acting Divisional Branch Secretary requires him to oversee the Branch's political and electoral strategy, manage the Branch's political campaigns at a federal and Territory level, and to liaise with other political entities such as the ALP and UnionsACT.[9] He was prevented from performing those functions in the period leading up to the recent ACT

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5 SCB1 193.
6 SCB2 864.
7 Determination, Annexure A, cl 7(1); FWRO Act, s 323K.
8 Determination, Annexure A, cl 7(1).
9 Hiscox Affidavit, [17].

election, and he has sought to avoid undertaking any activities that the Administrator might consider to be political.[10]

11. Further, Mr Hiscox seeks leave to intervene on the basis that he can make submissions "which the Court should have to assist it to reach a correct determination" of this proceeding, and which are not already presented fully by the existing parties.[11] In particular, Mr Hiscox is affected by the statute in a different way to the Plaintiffs, as already explained. A focus of his submissions, if granted leave, would be the operation of the scheme and the burden it imposes on the implied freedom in respect of the ACT Divisional Branch.

12. Finally, the proposed intervention of Mr Hiscox is not likely to be productive of disproportionate costs or delay.[12] The expedited timetable for the hearing of the Special Case has not been affected. Mr Hiscox seeks leave to make submissions on only two of the questions posed in the Special Case. Those submissions are directed substantially to the facts that are already contained in the Special Case.[13] Making those submissions by way of an intervention in this existing proceeding is more expedient than commencing a separate proceeding challenging the validity of the impugned laws, as Mr Hiscox and the other ACT Officeholders would have standing to do.[14]

IV. ARGUMENT

A Legislative framework

13. Part 2A of Chapter 11 of the FWRO Act is striking in its mix of specificity and generality.

14. As to specificity, Part 2A is targeted at one division of a particular organisation (and comprehends "each of its branches" (ss 323A(1), 323B(1)); that division is placed under administration by force of the Act, on the occurrence of two events (s 323A(1)); the scheme of administration *must* provide for certain matters, including, for example, "declarations that offices are vacant" (ss 323B(3)); and the scheme may not be revoked

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10 Hiscox Affidavit, [40]-[44].

11 *Roadshow Films* (2011) 248 CLR 37 at 39 [3], [6] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

12 *Roadshow Films* (2011) 248 CLR 37 at 39 [4], [6] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

13 The Hiscox Affidavit is largely relevant to the question of whether he should be given leave to intervene. The directions or notices given by the Administrator are referred to in these submissions as relevant for the Court to have before it on the substantive issues.

14 A similar approach was adopted in *JT International SA v Commonwealth* (2012) 250 CLR 1, where two tobacco company interveners had standing to challenge the impugned laws in their own right, but instead were granted leave to make submissions by way of interventions in existing proceedings: see (2012) 250 CLR 1 at 6, 39 [66] (Gummow J); see also proceedings S399/2011 and M173/2011.

before the third anniversary of the day the administration began unless certain conditions are satisfied (ss 323D(2A), 323E).

15. As to generality, the power reposed in the Minister to determine a scheme of administration is conditioned only on the Minister's satisfaction that, having regard to Parliament's intention in enacting the Act, "it is in the public interest for the Division and its branches to be placed under administration" (s 323B(1)), while the matters for which a scheme must provide are expressly stated in s 323B(2) not to have the effect of limiting s 323B(1). Section 323K(1) confers extremely broad powers upon the Administrator, providing that while the C&G Division is under administration, the Administrator: has control of the property and affairs of the Division and its branches; may manage that property and those affairs; may dispose of that property; and "may perform any function, and exercise any power, that the Division or its branches, or any officers of the Division or its branches, could perform or exercise if it were not under administration".

16. There are only two express constraints on how the Administrator is to exercise his functions or powers. The Administrator must (s 323K(5)):

    (a) be satisfied that he is acting in the best interests of the members of the Construction and General Division and its branches; and

    (b) have regard to the objects of the CFMEU as defined in the rules of the CFMEU at the commencement of s 323A, so far as they are lawful.

17. Persons are liable to criminal and civil penalties if they engage in a course of conduct that, inter alia, prevents the Administrator from effectively administering the determined scheme (s 323P). A person who is involved in a contravention of a civil penalty provision is taken to have contravened that provision (s 323Q).

18. The Determination, among other things:

    (a) stipulates who is to be appointed the administrator (Annexure A, cl 2(1));

    (b) declares that, on that appointment, all of the offices identified in Annexure B[15] are declared vacant for the duration of the administration, a step contemplated

[15] Being all of the offices of the Victoria-Tasmania, NSW, Queensland Northern Territory and South Australia Divisional Branches, and any positions on the C&G Divisional Executive and C&G Divisional Conference held by members of those branches.

expressly albeit in general terms in s 323B(3)(b)-(c) of the FWRO Act (Annexure A, cl 3(1)(a));

(c) provides that the offices in Annexure C[16] are not vacated (Annexure A, cl 3(2));

(d) divests those remaining officeholders of their powers under the Rules (Annexure A, cl 3(1)(f));

(e) prohibits the Divisional Branch Council of each branch and the Divisional Conference from meeting or exercising any powers under the Rules (Annexure A, cl 3(1)(d)-(e));

(f) gives a more precise enumeration of the Administrator's powers (including all of the powers and duties of all offices of the Administered Division (Annexure A, cl 6(1)(c)) and the power to "suspend or [sic] officers or delegates, including persons whose offices were not vacated" (Annexure A, cl 6(1)(f)).

19. Clause 7 of Annexure A provides that the Administrator "may exercise all the powers and functions afforded to" holders of offices not vacated by the Scheme, including to direct those persons to:

(a) take leave;

(b) perform no or different work;

(c) not attend the premises of the Division or any of its branches;

(d) return any property or information of the Division or any of its branches; or

(e) not hold themselves out as acting or speaking for or on behalf of the Division or any of its branches.

20. The effect of the Determination was, in combination with the appointment of the Administrator, to engage s 323A of the FWRO Act and place the entire C&G Division under administration. The Determination enumerated more specifically the powers of the Administrator, imposed specific obligations and prohibitions on the C&G Division and its officers, and, unlike the Act, differentiated between Divisional Branches.

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[16] Being all of the offices of the ACT and Western Australia Divisional Branches, and any positions on the C&G Divisional Executive and C&G Divisional Conference held by members of those branches.

21. The Administrator has issued a series of notices or directions to Mr Hiscox, the ACT Divisional Branch, and the other persons listed in Annexure C to the Determination who remain in their offices. They include directions to:

(a) continue to manage the day-to-day operations of the Branch;[17]

(b) suspend the C&G Division's affiliation to the ALP;[18]

(c) not engage in party politics during the administration;[19]

(d) not make any comment in response to any media calls that come into the C&G Division;[20]

(e) cease party-political donations of any type;[21]

(f) not attend the meeting of Building Industry Group unions called for Wednesday 16 October 2024;[22]

(g) not finalise or print the Branch's journal without sign-off by the Administrator.[23]

B Analytical framework

22. A law will infringe the implied freedom of political communication guaranteed by the Commonwealth *Constitution* if the law effectively burdens the implied freedom in its terms, operation or effect, and either of the following questions are answered in the negative:[24]

(a) Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

(b) If "yes", is the burden justified, in the sense that the law is reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

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17 Hiscox Affidavit, [33]-[34].
18 Hiscox Affidavit, [33]-[34].
19 Hiscox Affidavit, [29]-[30].
20 Hiscox Affidavit, [31]-[32].
21 Hiscox Affidavit, [33]-[34].
22 Hiscox Affidavit, [38]-[39].
23 Hiscox Affidavit, [37].
24 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (the Court); *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2] (French CJ, Kiefel, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171 at 186 [5] (Kiefel CJ, Bell and Keane JJ).

23. That question of justification may be approached by a structured proportionality analysis which asks whether the law is "suitable", "necessary", and "adequate in its balance".[25] The submissions below adopt that tool of analysis.[26]

Appropriate level of analysis

24. As explained above, while the Administration Act was enacted on an apparent assumption the entire C&G Division would be put into administration, the power to determine the scheme and its precise contents was left to the discretion of the Minister. And how the administration would be conducted was very largely left to the discretion of the Administrator. That state of affairs gives rise to a question as to where to locate the burden in this case and, correspondingly, the appropriate level of constitutional analysis. The approach to be adopted in cases where it is an exercise of statutory power that is said to burden the implied freedom has recently been articulated by the Victorian Court of Appeal in *Cotterill v Romanes*.[27]

25. Mr Hiscox's primary submission is that the Act itself imposes an impermissible burden on the implied freedom. In that respect, Mr Hiscox respectfully adopts what the Plaintiffs have said, and makes some additional arguments below in support of the proposition. However, if the view were taken that Part 2A is capable of valid operation, then Mr Hiscox submits that the constitutional issue would in that case be examined "at the level of the particular exercise of power", in summary because the powers given to the Minister and the Administrator by Part 2A are not "hedged with any constitutionally significant qualifications"[28] or "sufficient limitations to be facially compliant" with the implied freedom.[29]

26. The only restriction attached to the Minister's power is that the Minister must be satisfied, having regard to the Act's objects set out in s 5, that "it is in the public interest for the Division and its branches to be placed under administration". Any possible scheme must provide for the matters set out in s 323B(3), but *may* also provide for "any other matters the Minister considers appropriate".

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25 *Clubb* (2019) 267 CLR 171 at 186 [6] (Kiefel CJ, Bell and Keane JJ).

26 See, eg, *Brown v Tasmania* (2017) 261 CLR 328 at 376-379 [158]-[166] (Gageler J); *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 at 690 [172] (Gordon J).

27 *Cotterill v Romanes* (2023) 413 ALR 360 at 373-374 [62]-[65] (Emerton P, McLeish and Kennedy JJA) and the cases cited therein. See, in particular, *Palmer* (2021) 272 CLR 505 at 557 [154] (Gageler J) and 581-582 [227] (Edelman J).

28 *Palmer* (2021) 272 CLR 505 at 557 [154] (Gageler J).

29 *Palmer* (2021) 272 CLR 505 at 581-582 [227] (Edelman J)

27. The breadth and generality of the Minister's power is exacerbated by the fact that:

(a) any scheme determined under s 323B(1) is not subject to parliamentary disallowance pursuant to s 42 of the *Legislation Act 2003* (Cth), by force of s 323B(2); and

(b) the Minister is not required to comply with any obligations of natural justice, by force of s 323B(4).

28. Similarly, the only requirements attached to the Administrator's exercises of power under s 323K(1) are that the Administrator be satisfied that he is acting in the best interests of the members of the C&G Division branches and that he have regard to the objects of the CFMEU (s 323K(5)).

29. This is a case where the range and breadth of possible applications of the permissive provisions of Part 2A of Chapter 11 of the FWRO Act justifies assessing its constitutional validity against the actual exercise of power under the statute, because the Act is not sufficiently constrained in its terms so as to comply with the constitutional limitation on legislative power imposed by the implied freedom.[30] Put differently, the range of actions authorised by the Act is "wider than the *Constitution* can support".[31] The requirement that the Minister consider it in the "public interest" for the Division to be placed under administration and the requirements imposed on the Administrator by s 323K(5) are insufficient to guarantee the constitutional validity of the Act in all its operations.[32] The "public interest" does not necessitate consideration of proportionality in the same way as, for example, the phrase "reasonably considers necessary" considered in *Wotton v Queensland*.[33] Nor is it accompanied by any limitations analogous to those accepted as adequate by the Court in *Hogan v Hinch*, including the need to construe the statutory power in that case in a manner "compatible with the civil and political rights" in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[34] The limitations imposed on the Administrator's exercises of power by s 323K(5) are relevantly the same.[35]

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30 See *Wotton v Queensland* (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Palmer* (2021) 272 CLR 505 at 546-548 [118]-[127] (Gageler J).

31 *Palmer* (2021) 272 CLR 505 at 575 [208] (Gordon J).

32 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614 (Brennan J); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at 88 [216] (Crennan and Kiefel JJ).

33 *Wotton* (2012) 246 CLR 1 at 16 [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

34 (2011) 243 CLR 506 at 548-549 [69]-[71] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

35 See further at paragraph 43 below.

C Impermissible burden on the implied freedom of political communication

Burden

30. Mr Hiscox submits that, whichever level of analysis is adopted, the scheme imposes a direct, discriminatory and substantial burden on the implied freedom of political communication.

The role of trade unions and the CFMEU in political communication

31. It is well established that the freedom of political communication guaranteed by the *Constitution* "is not simply a two-way affair between electors and government or candidates". There are many other persons and entities who are "affected by decisions of government" and "have a legitimate interest in governmental action and the direction of policy".[36] As such, the free flow of political communication must exist "between all persons, groups and other bodies in the community".[37]

32. Trade unions are a paradigmatic example of groups whose participation in free public discussion and other political communication will inform the judgment necessary to the efficacy of representative government.[38] The following five matters support that proposition.

33. *First*, trade unions have long been recognised as political actors in Australia's constitutional democracy. When the implied freedom was recognised by this Court in *Theophanous v Herald and Weekly Times Ltd*, the plurality identified "trade union leaders" as an example of persons "engaged in activities that have become the subject of political debate" whose "political views and public conduct" were therefore legitimately the subject of political discussion.[39] Some decades earlier, Fullagar J surveyed the political history of the trade union movement in *Williams v Hursey* and found that, in both the United Kingdom and Australia, trade unions had long pursued their "ultimate aims" of "better working and living conditions" for employees "not merely by industrial action but by the most active participation in politics".[40] His Honour concluded that the "application of funds for the support of a political party is … a traditionally accepted means of 'furthering or protecting the interests' of members of an association of workers

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36 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551-552 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
37 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 139 (Mason CJ).
38 *Australian Capital Television* (1992) 177 CLR 106 at 139 (Mason CJ).
39 (1994) 182 CLR 104 at 124 (Mason CJ, Toohey and Gaudron JJ).
40 *Williams v Hursey* (1959) 103 CLR 30 at 58-60 (Fullagar J).

or employees".[41] And recent litigation in this Court has confirmed that trade unions have an enduring interest in political communication in the form of donations to political candidates and parties, and expenditure on political campaigns.[42]

34. *Secondly*, political participation is a legitimate and core activity for a trade union such as the CFMEU to undertake, because its officeholders are elected by union members for the purposes of representing and advancing those members' interests in industrial negotiations and political advocacy. Thus, for example, clause 4 of the National Rules specifies the objects of the CFMEU as including:

(a) to assist the Union and its members to "obtain their rights under industrial and social legislation";

(b) to "assist in securing legislation for safety in or in connection with the Industries of the Union and for the general and material well being of members"; and

(c) to "raise political levies, donate to and/or affiliate with political parties".

35. Indeed, one of Parliament's objectives in enacting the FWRO Act was "to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations" (s 5(4)).

36. *Thirdly*, it follows that a trade union such as the CFMEU is an organisation that has, as one of its core functions, participation in political communication. The positions held by its elected officeholders, and the duties of those elected officeholders, require active and continual participation in political debate. Those functions and powers are directed to the advancement and protection of the economic, social and legal interests of the CFMEU's members. In the Australian constitutional setting, which guarantees the free flow of political communication between individual electors as well as groups and entities with a legitimate interest in political affairs,[43] the advancement and protection of the interests of members must invariably (and does in fact here) involve participation in democratic processes and advocacy on political matters that affect those interests.

37. *Fourthly*, the role played by a trade union such as the CFMEU in the free flow of political communication is reinforced by the internal democratic processes of the CFMEU itself.

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41 *Williams v Hursey* (1959) 103 CLR 30 at 68.

42 The three *Unions NSW* cases provide obvious examples: (2013) 252 CLR 530; (2019) 264 CLR 595; (2023) 97 ALJR 150. See also *Spence v Queensland* (2019) 268 CLR 355 at 424 [115] (Nettle J).

43 *Unions NSW [No 1]* (2013) 252 CLR 530 at 551-552 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

The officeholders of the various branches of the C&G Division who have had their offices vacated (in the case of the Plaintiffs) or who have had their powers divested (in the case of the ACT Officeholders) were democratically elected by the members of the relevant branch.[44] The democratic basis of the positions held by CFMEU officeholders underpins their mandate to advance members' interests by engaging in political communication.

38. *Fifthly*, the democratic basis of the positions of officeholders in the C&G Division reflects the freedom of association of its members, which includes the freedom to:[45]

(a) freely organise and manage their union;

(b) draw up their rules, and enforce those rules; and

(c) elect their representatives to advocate for their interests on their behalf.

39. This Court has held that freedom of association is not a freestanding constitutional right.[46] But freedom of association has nevertheless been recognised as an incident of the implied freedom of political communication.[47] It is identifiable as a principle emanating from ss 7 and 24 of the *Constitution* by which, in conjunction with the implied freedom, the people can "build and assert political power".[48] Freedom of association is "part and parcel" of the implied freedom of political communication.[49]

<u>The nature of the burden</u>

40. It follows from the above analysis that a law that gives control of the affairs of the CFMEU to a third party — including specific aspects of those affairs which are immediately recognisable as political — directly burdens communications which are fundamentally political in nature. It will be more difficult for the Commonwealth to justify such a law within the confines of the third *McCloy* question.[50]

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44 See C&G Divisional Rules, r 38 (SCB2 902-907); see also Hiscox Affidavit, [12].

45 See Article 3 of the *Convention on Freedom of Association and the Right to Organise*, which is one of the international labour obligations to which the *Fair Work Act* is intended to give effect: see *Fair Work Act 2009* (Cth), s 3(a).

46 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148] (Gummow and Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [112] (Gummow, Hayne, Crennan and Bell JJ).

47 *Tajjour v New South Wales* (2014) 254 CLR 508 at 578 [142]-[143] (Gageler J), citing *Kruger v Commonwealth* (1997) 190 CLR 1 at 115 (Gaudron J). See also *Mulholland* (2004) 220 CLR 181 at 234 [148] (Gummow and Hayne JJ); *South Australia v Totani* (2010) 242 CLR 1 at 29 [31] (French CJ); *Wainohu* (2011) 243 CLR 181 at 230 [112] (Gummow, Hayne, Crennan and Bell JJ).

48 *Australian Capital Television* (1992) 177 CLR 106 at 139 (Mason CJ), quoting Archibald Cox, *The Court and the Constitution* (1987) 212.

49 *Tajjour* (2014) 254 CLR 508 at 578 [143] (Gageler J).

50 *Wotton* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

41. The burden imposed by the scheme is discriminatory. The impugned laws are not laws of general application that restrict the communications of employers, employees and industrial organisations alike. They impose a burden on the implied freedom solely in relation to the activities and communications of the C&G Division of the CFMEU. The targeted nature of the scheme is even more acute than a law that might have imposed a discriminatory burden on trade unions generally: it discriminates against one specific division of one specific trade union.

42. A discriminatory law is not necessarily inconsistent with the implied freedom. But here, as in *Brown* (where the impugned laws imposed a discriminatory burden in relation to environmental protesters[51]), recognising the law as discriminatory informs the Court's ability to assess "the restrictions imposed by the law upon the ability of those persons to communicate on matters of politics and government"[52] — that is, the nature of the burden — and therefore increases the degree of justification required.

43. Any burden imposed by the scheme on the implied freedom, including the freedom of association of the Division's members, is not offset by the requirement that the Administrator be satisfied he is acting in the best interests of the members of the C&G Division and is having regard to the objects of the CFMEU.[53] Even if the Administrator were to faithfully fulfil those obligations, the vice remains in the deliberate disenfranchisement of the members of the C&G Division and their ability to associate for a common political purpose by removing or rendering powerless the representatives *they elected* to advance their interests.

44. While the starting point in assessing burden is that the Court must consider how the law "affects the freedom generally" in its legal and practical operation,[54] "the burden in a specific case may provide a useful example of a law's practical effect".[55] In this case, the directions given by the Administrator to the ACT Divisional Branch, set out above in paragraph 21, have, among other things, prohibited election campaigning and donations and stifled the ability of its officeholders (including Mr Hiscox) to speak in public on political matters that affect the interests of members.[56] In that connection, the implied

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51 *Brown* (2017) 261 CLR 328 at 361-362 [92]-[95] (Kiefel CJ, Bell and Keane JJ), 389 [198]-[199] (Gageler J).
52 *Brown* (2017) 261 CLR 328 at 361 [95] (Kiefel CJ, Bell and Keane JJ).
53 FWRO Act, s 323K(5).
54 *Farm Transparency* (2022) 96 ALJR 655 at 666 [27] (Kiefel CJ and Keane J).
55 *Farm Transparency* (2022) 96 ALJR 655 at 687 [54] (Gordon J).
56 Hiscox Affidavit, [31]-[32], [40]-[44].

freedom protects "all matters of public affairs and political discussions" at all tiers of government in Australia, including the States and Territories.[57] To the extent that the scheme restricts the ACT Divisional Branch's participation in federal and Territory politics (whether by the endorsement of candidates or the promotion of its members' political interests more generally), the scheme imposes a recognised burden on the implied freedom.

45. Lastly, in order for a law effectively to burden freedom of political communication, it simply needs "to prohibit, or put some limitation on, the making or the content of political communications".[58] At this stage of the enquiry, no assessment is required of the nature of the burden. However, the nature of the burden is relevant to justification, to which these submissions now turn. In Mr Hiscox's submission, having regard to paragraphs 20 to 21 and 31 to 44 above, in addition to being direct and discriminatory, the burden is substantial. The "sufficiency of the justification required for such a [significant] burden should be thought to require some correspondence with the extent of the burden".[59]

Legitimacy of purpose

46. Mr Hiscox seeks to add the following to the Plaintiffs' submissions on purpose.

47. For the reasons given by the Plaintiffs, the Commonwealth cannot rely on a legislative purpose as being to enable the C&G Division to be placed into administration urgently if appropriate (PS [31]). That purpose states what the Administration Act and the Determination do. But it is for the Commonwealth to articulate a purpose underpinning the administration of the C&G Division "other than its achievement".[60]

48. The Commonwealth cannot do so by relying on the general purposes of the FWRO Act — for example, to ensure that registered organisations function lawfully and effectively. The Act's express statements of purpose, which are reflected in its structure and operative provisions, are set out in s 5. But, as was the case in *Unions NSW [No 1]*,[61] reliance on

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57 See *Australian Capital Television* (1992) 177 CLR 106 at 142 (Mason CJ); *Lange* (1997) 189 CLR 520 at 571-572; *Unions NSW* (2013) 252 CLR 530 at 548-551 [17]-[26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

58 *Monis v The Queen* (2013) 249 CLR 92 at 142 [108] (Hayne J); *Unions NSW [No 1]* (2013) 252 CLR 530 at 574 [119] (Keane J); *McCloy v New South Wales* (2015) 257 CLR 178 at 230-231 [126] (Gageler J).

59 *Brown* (2017) 261 CLR 328 at 367 [118] (Kiefel CJ, Bell and Keane JJ); see also *LibertyWorks* (2021) 274 CLR 1 at 28 [63] (Kiefel CJ, Keane and Gleeson JJ), 37 [94] (Gageler J), 53-54 [136] (Gordon J); *Banerji* (2019) 267 CLR 373 at 402-403 [38] (Kiefel CJ, Bell, Keane and Nettle JJ), 440 [161] (Gordon J).

60 *Unions NSW [No 1]* (2013) 252 CLR 530 at 557 [51] (French CJ, Hayne Crennan, Kiefel and Bell JJ).

61 (2013) 252 CLR 530.

the Act's broader purposes does not, without more, justify the legitimacy of the provisions of Part 2A or the Determination.

49. In *Unions NSW [No 1]*, the plaintiffs conceded the legitimacy of the general integrity and anti-corruption purposes of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). But they contended that the impugned provisions, which placed a blanket prohibition on political donations from any corporations, other entities, or individuals not enrolled as electors, "d[id] nothing calculated to promote the achievement of those legitimate purposes".[62] The Court accepted those submissions, and held that the impugned provisions simply imposed "a burden on the freedom without a justifying purpose".[63] The defendant was unable to "attribute a purpose to s 96D that [was] connected to, and in furtherance of, the anti-corruption purposes of the EFED Act".[64]

50. That analysis applies with equal force here. Its terms "do not reveal any purpose"[65] other than that the Minister should have the power to determine a scheme for the administration of the C&G Division if he considers it in the public interest to do so. That purpose does not rationally further the purposes of the FWRO Act as a whole, in circumstances where nothing in Part 2A of Chapter 11 depends on the Minister's assessment of the "efficient management", "standards of accountability" or "democratic functioning and control" of the C&G Division.[66] "In contrast to the general, practical provisions" for dealing with organisations that have ceased to exist or function effectively that are already present in s 323 of the Act, Part 2A "is selective" in its "wide-ranging prohibition" on the activities of the C&G Division.[67] And "it is not evident, even by a process approaching speculation",[68] what the scheme seeks to achieve by placing the *entirety* of the C&G Division into administration. As will be explained further below under the suitability limb of the proportionality analysis, there is no rational connection between any potential purpose of the scheme directed at addressing allegations of serious misconduct within pockets of the C&G Division, and the blanket operation of those laws without reference to those specifically affected pockets of the Division.

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62 (2013) 252 CLR 530 at 557 [51].
63 (2013) 252 CLR 530 at 557 [51].
64 (2013) 252 CLR 530 at 560 [60].
65 (2013) 252 CLR 530 at 557-558 [52].
66 FWRO Act, s 5.
67 (2013) 252 CLR 530 at 558 [53].
68 (2013) 252 CLR 530 at 559 [56].

Justification

51. If, contrary to those submissions, the Court were to find that the purpose of the scheme is legitimate, Mr Hiscox makes the following brief submissions as to why the scheme is not reasonably appropriate and adapted to any legitimate purpose, noting that the onus is on the Commonwealth to justify the burden.[69] So as to avoid covering ground dealt with by the Plaintiffs, he will draw out the lack of proportionality by reference primarily to the terms, operation and effect of the scheme in relation to the ACT Divisional Branch.

Suitability – rational connection between the law and its legitimate purpose

52. Noting the absence of any express statements of purpose in the Administration Act, its Revised Explanatory Memorandum (**Revised EM**) stated that those provisions are responsive to "allegations of corruption, criminal conduct and other serious misconduct including bullying and harassment and general disregard for workplace laws" raised about the conduct of "*some* officials and associates of the CFMEU's Construction and General Division".[70]

53. More specifically, the Revised EM stated that the proposed administration "would address governance issues within elements of the Division and would target only those affected areas of the organisation".[71] The Revised EM also stated that the impetus for a legislative response was required after the General Manager had already applied under s 323 of the FWRO Act for declarations in relation to the C&G Division.[72] That application by the General Manager was on the basis that "the *majority* of branches of the Division were no longer able to function effectively, including in the interests of members, and that there were no effective means under the relevant rules to address the situation".[73]

54. The branches that were the subject of the General Manager's application *did not include the ACT Divisional Branch* (or the WA Divisional Branch) of the C&G Division. None of the allegations of misconduct in the relevant media reports concerned the conduct of any officers or members of the ACT Divisional Branch.[74] There was also no suggestion that that Branch required reconstitution under s 323 or any other form of administration.

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69 *Unions NSW [No 2]* (2019) 264 CLR 595 at 616 [45] (Kiefel CJ, Bell and Keane JJ), 631 [93] (Gageler J), 640-641 [117]-[118] (Gordon J), 650 [151]-[152] (Edelman J).
70 Revised EM, [7] (emphasis added).
71 Revised EM, [23].
72 Revised EM, [9]-[11].
73 Revised EM, [8] (emphasis added).
74 SC [104]-[109] (SCB1 153-155).

The only material in the Special Case pertaining to unlawful conduct by officers of the ACT Divisional Branch is the reference to the case of *ABCC v CFMMEU* [2020] FCA 1070, in which two officeholders of the ACT Divisional Branch were found to have contravened s 47 of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) in 2018.[75] Plainly, two contraventions of industrial law six years ago cannot rationally give rise to any apprehension that the ACT Divisional Branch has ceased to function lawfully or effectively.

55. It follows that there is no rational connection between the scheme, in its operation and effect, and any legislative purpose that may be relied upon by the Commonwealth. The entire C&G Division is placed into administration, in circumstances where no allegations of "corruption, criminal conduct [or] other serious misconduct" are made against large sections of the Division, including the ACT Divisional Branch. Put differently, there is no rational connection between a legislative intention to root out "corruption, criminal conduct and other serious misconduct" in certain branches of the C&G Division and a legislative response that indiscriminately places that entire Division into administration.

Necessity

56. The necessity limb of structured proportionality analysis "looks to whether there is an alternative measure available" which is: "obvious and compelling"; "equally practicable when regard is had to the purpose pursued"; and "less restrictive of the freedom than the impugned provision".[76]

57. As the Plaintiffs have submitted, there is no apparent reason why the draconian measures involved in the scheme were reasonably necessary in view of the existing mechanism provided by s 323 of the FWRO Act (PS [34]). Still less is it apparent how it could be said to be reasonably necessary to place the *entire* C&G Division into absolute administration. If the Parliament intended to address allegations of serious misconduct in the Division, then the administration of specific branches on the basis of reasonably substantiated allegations or findings of serious misconduct would have been an obvious and compelling alternative that would have imposed a lesser burden on the implied

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75 SC [97] (SCB1 150-151); SCB3 1032.
76 *Farm Transparency* (2022) 96 ALJR 655 at 669-670 [46] (Kiefel CJ and Keane J).

freedom (and is exactly what was contemplated by the General Manager's application to the Fair Work Commission and by the Revised EM, as explained above).[77]

58. Further, even assuming it were reasonably necessary for the Commonwealth to seek to impose administrative control over the entire C&G Division, the extraordinary measures involved in that administration are not. For example, it is not apparent how it could be said to be reasonably necessary as part of the administration of the ACT Divisional Branch to divest its officeholders of all their powers and subject them to the complete discretionary control of the Administrator. An obvious and compelling alternative to the total control imposed over the ACT Divisional Branch, which would have been equally practicable and imposed a lesser burden on the implied freedom, would have been to:

    (a) subject the ACT Divisional Branch to additional reporting or accounting obligations; or

    (b) divest the ACT Officeholders of specific enumerated powers under the Divisional Rules that have a connection to a legitimate objective of the scheme.

59. None of the drastic measures that were enacted can be justified as reasonably necessary given the significant burden they impose on the implied freedom.

Adequacy in the balance

60. If the scheme is suitable and necessary, it will be "regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom".[78] For the reasons already given in relation to the suitability and necessity limbs, the direct and discriminatory burden imposed by the scheme on the implied freedom (as outlined above at paragraphs 30 to 45) manifestly outweighs any benefit sought to be achieved by the scheme. This may be illustrated by reference to its application to the ACT Officeholders. There is no apparent benefit to be gained from placing the ACT Divisional Branch into administration, in circumstances where none of the allegations to which the regime was apparently responsive concerned the ACT Divisional Branch.[79] The specific manifestations of the control afforded to the Administrator with respect to the ACT Divisional Branch (highlighted at paragraph 21

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77 The distinct organisational structure of each of the Divisional Branches is addressed in the C&G Divisional Rules, rr 18, 19, 28-69 (SCB2 884-886, 890-937); those rules, and the Determination itself, recognise that it is entirely practicable to deal with the Divisional Branches separately.

78 *Banerji* (2019) 267 CLR 373 at 402-403 [38] (Kiefel CJ, Bell, Keane and Nettle JJ).

79 See also paragraph 54 above as to the material in the Special Case.

above) illustrate the burden, which manifestly outweighs any benefit sought to be achieved.

61. It follows that, if the third step of the structured proportionality analysis is reached, the scheme is not adequate in its balance between any legitimate purpose it might pursue and the adverse effect it has on the implied freedom.

D Conclusion

62. For those reasons, Mr Hiscox submits that Question 2 should be answered "Yes". In the alternative, Question 3 should be answered "Yes".

V. ESTIMATE OF TIME

63. If granted leave to intervene, Mr Hiscox would seek to make brief oral submissions, with an estimate of up to 20 minutes.

Dated: 25 October 2024

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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

ANNEXURE TO THE PROPOSED INTERVENER'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the proposed intervener (Michael Hiscox) sets out below a list of the particular statutes referred to in these submissions.

No.	Description	Version	Provision(s)
1.	Commonwealth Constitution	Current	ss 7, 24
2.	*Fair Work Act 2009* (Cth)	Current	s 3
3.	*Fair Work (Registered Organisations) Act 2009* (Cth)	Current	s 5; Ch 11 Pt 2A
4.	*Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth)	Current	Entirety