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

PLAINTIFFS' REPLY

PART I CERTIFICATION

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

PART II REPLY TO ARGUMENTS OF DEFENDANTS AND INTERVENORS

A. THE PURPOSES OF PART 2A

2. **Cth [7]-[15]** proceeds as if Part 2A and the Administration Act as a whole have a single purpose, yet "[it] need hardly be said that a particular Act may have many purposes".[1] To point to the "best" statement of a purpose (cf **Cth [14]**) does not engage with the plaintiffs' case that there is (at least also) an impermissible purpose. The presence of such a purpose is invalidating whether or not the Parliament had other purposes.[2] The Commonwealth is notably silent on that issue. Section 5 of the FWRO Act does not fully (if at all) state the purposes of Part 2A and it cannot be treated as if it were a statement of the purposes of the Administration Act itself: cf **Cth [9]-[10]**. That a statute must be read as a whole with any amendments to it does not mean that a pre-existing statement of purposes in an Act can be parlayed into a shield against scrutiny of the purposes of an amendment Act. No authority (and not those cited in **Cth fn 11**) supports the Commonwealth's argument, which tends to disregard the status of the Administration Act as a standalone statute.[3] A general statement of the purposes of an Act may incompletely state the purposes of a provision enacted at the same time as that statement, let alone a provision inserted years later.

3. The Commonwealth accuses the plaintiffs of "conjur[ing]" up a "constitutionally impermissible purpose" from "speeches made by opposition politicians" and statements by the Administrator: **Cth [10]**. But no magic wand is needed to read the following words of Minister Watt about the Bill in Parliament (SCB1 149, SCB3 994):

> We've already agreed to Senator Cash that the scheme of administration that would be applied under this legislation would ban donations to any political party for the period of the administration. We've already agreed to that. It's in a letter to Senator Cash saying it will be in the scheme of administration, which is part of the legislation. …

4. There is in no reason to preference Government politicians over Opposition politicians, not least because both debated and voted in favour of the Bill. Even s 15AB(2)(h) of the *Acts*

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1 *Saraswati v R* (1991) 172 CLR 1 at 21; *Unions NSW v NSW* (2019) 264 CLR 595 at [168]; *Unions NSW v NSW* (2013) 252 CLR 530 at [48].

2 See generally John Hart Ely, "Motivation in Constitutional Law" (1970) 79 *Yale Law Journal* 1205 at 1266-1267, 1275-1279; John Hart Ely, "The Centrality and Limits of Motivation Analysis" (1978) 15 *San Diego Law Review* 1155; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) at 136-148; Paul Brest, *"Palmer v Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive" [1971] *Supreme Court Review* 95 at 104,116-124, 130-131.

3 See *FCT v Clyne* (1958) 100 CLR 246 at 268; *Mineralogy Pty Ltd v WA* (2021) 274 CLR 219 at [5].

Interpretation Act 1901 (Cth) would treat such statements alike. Nor is there any reason to confine attention to statements made in Parliament; law reform reports, for example, are a classic source of information to identify purposes for legislation. The question is whether the material is rationally probative of a purpose of the impugned legislation.

5. The material on which the plaintiffs rely is probative of a purpose to ensure that the C&G Division did not engage in political donations and expenditure. It cannot be dismissed as hyperbole or as merely "motivated by forensic and political factors": **Cth fn 13**. The plaintiffs' argument does not involve attempting to divine what parliamentarians "had in mind" in enacting legislation,[4] because it does not involve plumbing the inner workings of parliamentarians' minds. The plaintiffs point to these public statements (including in Parliament) to identify what the Parliament was seeking to achieve in fact, or in other words an understanding of the way in which the perceived mischief(s) should be addressed.[5]

6. The Commonwealth asserts that the plaintiffs are attempting to "attribute malevolent designs to the Minister or to other persons who promoted or supported the legislation" (**Cth [10] and fn 14**), but it is instructive to consider the context in which this was said in *H A Bachrach Pty Ltd v Queensland*.[6] It was alleged that the "introduction and enactment of the Bill was 'designed' … to demonstrate that the State of Queensland does not respect the authority of the courts".[7] That had no footing in what was actually said in Parliament. Here, the Court has express statements which demonstrate, inescapably, that Parliament only passed the Bill because the Administrator indicated he would not permit the C&G Division to make party-political donations, fund party-political campaigns or make political donations, which was the course the Parliament approved. That result is one of the things which the law was "designed to achieve in fact".[8]

7. This Court made clear in *Bachrach* that it is engaged in the "proper characterisation" of the statute "as a matter of substance and not merely of form" (and that an "adequate appreciation" of those matters will require consideration of the context).[9] That is why the maxim "you cannot do indirectly what you are forbidden to do directly" is "an important

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4 See, eg, *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25].
5 See generally *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.
6 (1998) 195 CLR 547.
7 (1998) 195 CLR 547 at [12] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) (***Bachrach***).
8 *Spence v Queensland* (2019) 268 CLR 355 at [60] (Kiefel CJ, Bell, Gageler and Keane JJ).
9 (1998) 195 CLR 547 at [12] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

guide to construction".[10] This Court has never shied from reproving "circuitous device[s]"[11] or "concealed design"[12] by Parliament to evade limits on its legislative power.[13] The Commonwealth invites this Court to shut its eyes to the Parliament's (stated) design here.

8. Turning finally to the Commonwealth's nominated purpose for Part 2A, as inserted by the Administration Act, in **Cth [14]**, that singular purpose uses different language from that which is in **PS [31]** (which quoted particulars provided by the Commonwealth to the plaintiffs), but is no different in substance from what the plaintiffs criticised there. It is simply a statement of what Part 2A does. All the Commonwealth has added is a hollow gesture to the "ultimate goal of facilitating the operation of the federal workplace relations system", which is so ambiguous and general as to be of no assistance.

9. Construing Part 2A with s 5 does not lead to the purpose asserted in **Cth [14]**. The way Parliament's intention in sub-s (1) will be enhanced is if associations are required "to meet the standards set out in this Act" (sub-s (2)), the ends of which are described in sub-s (3). Part 2A does not set standards to obtain the rights and privileges of registration.[14] Rather, the Administration Act enables executive control of what was formerly a voluntary association of employees. That does not "assist … employees" to promote their economic and social interests (s 5(4)), but instead decides for those employees what those interests are and how they will be promoted. It is not enough that the administrator must "have regard to" the objects of the rules as at the time s 323A commenced: s 323K(5): cf **Cth [13]**. Having regard to something does not dictate any particular outcome, particularly in the context of the open-textured nature of those objects. Moreover, the rules can be altered to amend or eliminate those pre-existing objects under s 323B(3)(g), and anything done under the scheme will take precedence even over Part 2A itself: see s 323F.

B. HEAD OF POWER

The CFMEU is not a trading corporation

10. **Cth [21]** points to membership dues received by the CFMEU and the benefits which members receive in return to contend that the CFMEU engages in substantial trading

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10 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305.
11 *Bank Nationalisation Case* (1948) 76 CLR 1 at 349; *Hornsby Shire Council v Commonwealth* (2023) 97 ALJR 534 at [43].
12 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 78.
13 *Bank Nationalisation Case* (1948) 76 CLR 1 at 349-350; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371. See also *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522-523.
14 Indeed the long title makes clear "it is an Act to make provision in relation to a scheme for the administration of the [C&G] Division of the [CFMEU] and its branches".

activities. Advancing the industrial interests of members in return for dues does not constitute trading activity nor is it "referable" to such activity. *ALDI Foods Pty Ltd v Transport Workers' Union of Australia* is against the Commonwealth, and this Court should endorse that conclusion for the reasons the Full Court gave[15] (see also **SA [17**]).

11. That a membership fee is reported in the financial accounts as "contracts with customers" could not alter their substantive nature (cf **Cth [21.1]**). Nor is there any evidence that the conferring of "benefits" on members in the form of the provision of insurance cover and legal services is done pursuant to any contractual obligation to do so as between the CFMEU and its members (cf **Cth [21.1]**). That the CFMEU enters into contracts with third parties is accurate (**Cth [21.2]**) but insufficient to render it a "trading corporation"; the contracts in question are either not even quantified or are proportionally insignificant in the context of the CFMEU's revenue and other activities: see SCB1 299-302.

12. **Cth [22]** points to other activities which the Commonwealth asserts "are of a trading character". Annexures 5-10 to the Special Case (SCB1 303-333) demonstrates the nature of these activities as incidental or supportive of the CFMEU's characteristic activity of industrial advocacy, and proportionally insignificant to compel characterisation as a trading corporation, compared to its substantial revenue (>$78m in FY23, for example) generated from its membership fees (SCB1 130-134, 334-336).

13. That the CFMEU has some trading activities does not render it a trading corporation, because those activities are not by any measure its core or characteristic activities, nor are those activities dominant as a proportion of the activities of the CFMEU as a whole. The CFMEU is a trade union; its characteristic activity is industrial advocacy and the kinds of trading activities it conducts are either supportive of that core activity, or so insubstantial as to be insignificant. It is not a "trading corporation".

14. That conclusion is not contrary to any authority: **cf Cth [20]**. No decision of this Court holds trading activities are "substantial" simply if they cross a certain absolute numerical threshold without regard to whatever else the corporation does, which is the principle which underpins **Cth [22]**. Such an approach would be irreconcilable with the statement of Mason J in *Adamson* that "trading corporation" is "a description or label given to a corporation when its trading activities form **a sufficiently significant proportion of its overall**

[15] (2020) 282 FCR 174 at [62]-[65] (Besanko, Bromberg and O'Bryan JJ). See also *National Roads and Motorists' Association Limited v CFMMEU* (2019) 291 IR 28 at [135] (Griffiths J).

activities as to merit its description as a trading corporation".[16] As **SA [11]** correctly observes, that is, in terms, a "relative test".[17] And any trading activities in **Cth [22]** are dwarfed by the non-trading activities in **Cth [21]**.

15. Previous authorities cannot, in any event, be taken to have resolved the meaning of a "trading corporation" having regard to what was said in *Williams v Commonwealth* about "larger questions left open in the Work Choices Case about the meaning of 'trading or financial corporations formed within the limits of the Commonwealth'",[18] which questions have not been resolved by this Court since.

Section 51(xx) and Part 2A on the basis that the CFMEU is not a "trading corporation"

16. *Work Choices* is authority for the proposition that the predecessor to the FWRO Act, being Sch 1 to the *Workplace Relations Act 1996* (Cth), is supported by s 51(xx). It follows that s 323 of then Sch 1 was also within power. That section is the equivalent of current s 323 of the FWRO Act. A comparison of the two provisions assists in showing why s 323A has an insufficient connection to a head of power. Section 323A operates very differently from s 323. The following matters are important. *First*, s 323 is expressly conditioned upon the union not functioning effectively. Section 3232B(1) is not so conditioned, and (for the reasons given above) the oblique reference to "having regard to" s 5 of the FWRO Act brings the power no closer to the s 323 model. *Second*, the orders which the Court may make under s 323 must be (relevantly) to enable the union to function effectively. The contents of the scheme under s 323B(1), (3) and (4A) are not so limited. *Third*, any order made by the Court under s 323 cannot do a substantial injustice to the union or any member: s 323(4). There is no equivalent confinement of the power in s 323B. *Fourth*, an administration ends under s 323B when the Minister decides it is in the public interest to do so or after five years, whereas under s 323, by implication an administration would end upon the union functioning effectively.

17. What this comparison shows is that Part 2A cannot be characterised as simply "another component to that part of the FWRO Act that requires registered organisations to 'meet requirements of efficient and democratic conduct'": **Cth [25]**. Part 2A is not expressly or impliedly limited to considerations of efficient and democratic conduct, and the scope of the scheme that can be implemented is not limited to respect democratic norms within the

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16 (1979) 143 CLR 190 at 233 (emphasis added); *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 304; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 293.
17 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 294.
18 (2014) 252 CLR 416 at [51] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

union. In truth, the power in Part 2A takes away democratic control from members if the Minister considers it in the "public interest" to do so and leaves it to the Minister to decide, in the "public interest", whether to return that control. That is very different from the regime in s 323. If a court order under s 323(2) led to such a result, it could only be because it would be confined to the purpose and time needed for the union to function effectively (and caused no member substantial injustice). Properly understood, Part 2A does not "prescribe norms regulating the relationship between the kinds of corporation described in s 51(xx) and their employees", nor does it prescribe "the means by which such corporations and their employees are to conduct their industrial relations".[19]

18. The Commonwealth submission that Part 2A "ensures that the C&G Division can be swiftly returned to a state" of lawful and effective functioning (**Cth [25]**, **[29]**) is about the asserted purpose of Part 2A supplying a sufficient connection to the head of power. The Commonwealth resorts to purpose, because the actual operation of Part 2A has an insufficient connection to constitutional corporations. Yet the purpose which the Commonwealth propounds is insufficient to supply a sufficient connection to the head of power because that purpose is insufficiently tethered to the statutory text. Any connection to constitutional corporations is swamped by Part 2A's impact on other matters.

19. Authorities concerning earlier industrial relations schemes do not assist the Commonwealth because the registration (and cancellation of such registration) of employee associations in the system of conciliation and arbitration operates directly on the subject-matter of s 51(xxxv).[20]

C. IMPLIED FREEDOM

20. The contention in **Cth [35]** that Part 2A should be "construed as not authorising the imposition of unjustified burdens on political communication", and on that basis is valid in all its operations, assumes that it can be read down, severed or disapplied so as never to impose an unjustified burden. Such a reading down, severance or disapplication is not possible without this Court engaging in an act of legislating having regard to the breadth of Part 2A and the extrinsic materials. Further, in so far as a vice in Part 2A lies in the Administration Act having had an unconstitutional purpose, no process of reading down, severance or disapplication can assist in preserving its validity.

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19 *Spence v Queensland* (2019) 268 CLR 355 at [58].

20 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 94 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

21. There is no sound factual foundation for **Cth [40]**. The only proved "governance problems" involve findings of civil penalty contraventions. Those have a sufficiently long history that there is no basis to find that members have elected their representatives unaware of them. "Governance problems" provide no reason to doubt whether representatives represent the members, especially when the members had mechanisms available to them to remove their representatives. It would be a large step to treat as a "small" burden the Commonwealth removing an elected representative of an association of people because it has a "doubt" about whether they really meant to elect them.

22. **Cth [41]** is unrealistic. That people can engage in political communication in other capacities does not materially reduce the burden imposed by taking away the property that could have been employed to amplify their views and the power to make decisions and adopt positions *as* the C&G Division. It is absurd to suggest that a deposed leadership suffer no real burden because they can operate as a leadership in exile.

23. As to **Cth [42]**, the Administrator could not use the property of the C&G Division to make political donations because that would be *ultra vires* Part 2A. Given the legislative history, if the Commonwealth actually contends to this Court that the Administrator can do so it should do so squarely. If the Administrator could do so notwithstanding that history, there would remain a substantial burden because the decision whether to do so would rest solely with the Administrator.

24. To suggest that the Determination does not target a particular political viewpoint (**Cth [43]**) ignores the close alignment between the C&G Division and the Labor Party specifically (SCB1 167-168, 170-182). The facts demonstrating the extensive nature of the C&G Division's political activities and donations are relevant and demonstrate the unjustified burden on political communication "as a whole"[21] (cf **SA [21]-[22]**). One problem with **Qld [7]-[10]** is that Queensland cannot explain how prohibiting political donations and expenditure is rationally related to the alleged purpose.[22] **Tas [14]** proceeds as if such donations and expenditure could or would be permitted on a case by case basis; that is contrary to Part 2A interpreted in light of its legislative history. **Qld [11]-[13]** highlights a real problem with the process that occurred in this case; the Parliament can certainly be said to have intended to stymie political communication by the C&G Division and to this extent "squarely confronted the issue"; but nowhere is there any explanation for the justification

[21] *Comcare v Banerji* (2019) 267 CLR 373 at [20] (Kiefel CJ, Bell, Keane and Nettle JJ).
[22] See also *Unions NSW v NSW* (2013) 252 CLR 530 at [51].

of this burden, leaving a base partisan desire to limit C&G Division support for one side of politics as the only explanation. **Qld [14]-[19]** points to Canadian experience that is of no assistance. The reasoning of the Quebec Court of Queen's Bench in *Swait v Board of Trustees of Maritime Transportation Unions* is cursory, and it predates the Supreme Court of Canada's modern and more robust understanding of freedom of association.[23]

D. CHAPTER III

25. There is no "immediate difficulty" with challenging s 323B alone: **cf Cth [52], [62]**. The plaintiffs' challenge concerns the punitive nature of that power, read in the context of the other provisions identified at **PS [40]-[53]**: see **PS [39]**. The net effect of that scheme is to enact a series of detriments, applicable only in respect of the C&G Division, the imposition of which is expressly authorised *by the statute.* There is a dispute between the parties as to the proper identification and legitimacy of the *statutory purposes* said to justify the imposition of those detriments (see **PS [47]-[49], [52]** and cf **Cth [61]**), and whether the *statutory means* adopted go too far in pursuit of them (see **PS [53]** and cf **Cth [62]**). It follows that the issue between the parties is whether the power is "insufficiently constrained"[24] across the range of its (essentially binary) potential outcomes. And that involves questions to be answered at the level of the statute.

26. *YBFZ* is not authority that the only legislation that is prima facie punitive is that which impacts upon "life, liberty or bodily integrity" (cf **Qld [26], Cth [54]**). Those were simply the "basic rights" that were "of present concern" in that case.[25] The practical and legal operation of the Amendment Act is to impose a *range* of detriments which *together* attract the characterisation of punishment, especially having regard to the disproportionate means adopted by the Parliament to achieving any non-punitive end. As to those detriments, **Cth [56]** cannot be accepted, because a forfeiture could otherwise never be punitive. **Cth [57]** ignores that in no other context is the executive permitted to put another legal entity into administration upon the executive's bare assessment of the "public interest". The legislation in **Cth fn 93** is distinguishable. As to **Cth [58]**, the Rules of the CFMEU create a contract between members[26] (cf **Cth fn 96**), and they confer "enforceable proprietary and social

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23 See, eg, *Dunmore v Ontario (A-G)* [2001] 3 SCR 1016; *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia* [2007] 2 SCR 391; *Mounted Police Association of Ontario v Canada (A-G)* [2015] 1 SCR 3.

24 *Palmer v Western Australia* (2021) 272 CLR 505 at [127] (Gageler J).

25 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [14].

26 *CFMMEU v Quirk* (2023) 300 FCR 171 at [161]; *Koc v Diamond (No 2)* [2022] FCA 640 at [28].

rights and obligations on the members of the union".[27] Impairing the ability to associate and to work involves more than a mere nullification of contractual rights. As to **Cth [59]**, the ability to vote for representatives is impaired to the extent that elections may not even be held: **Cth fn 99**. An inability to vote for representatives of a union to advance the membership's industrial interests is not precisely the same as not being able to vote in an election but it is analogous, and equally punitive.

27. These detriments *are* linked to the adjudgment and punishment of criminal guilt, being the adjudged misconduct of members of the C&G Division (cf **Cth [56]**). It was important in *Duncan* that the statute did not "fasten upon" findings made by ICAC about the corrupt conduct of individuals nor impose "any legal burden on those individuals".[28] Here, s 323B is premised on the legislative determination of breaches of antecedent standards of conduct by the C&G Division, namely the alleged criminal and other unlawful conduct identified at EM [10], and the findings of contraventions of workplace laws identified at EM [9].[29]

E. JUST TERMS

28. What the Commonwealth contemplates at **Cth [63]-[64]** is this. Prior to Part 2A, the CFMEU owned property (because the C&G Division has no separate legal personality) that would be used for the sole benefit or for the purposes of that Division. Control over that property would be taken from the CFMEU and the people managing the C&G Division and vested in the administrator. Section 323S would then return compensation to the CFMEU. Apparently, those who lost their property have thus received just compensation.

29. Not so. *First*, those who lost property interests include the people who otherwise had control of the C&G Division.[30] They receive no compensation on the Commonwealth's analysis. *Second*, the compensation which the CFMEU receives must be made available to benefit the C&G Division. The CFMEU Rules provide that each Division has autonomy in relation to the use of its funds and property, which are under the control of that Division (CFMEU Rules, Rule 23(vi), 49(v)). The Divisional Executive exercises control over the funds and property of the Division (C&G Rules, Rule 9(15)), subject to review by the Divisional Conference. Any compensation received by the CFMEU could only lawfully be placed back under the control of the C&G Division, and therefore the Administrator (cf **Cth [63]**). Section 323K(1) and (6) could not be interpreted to mean that only pre-administration

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27 *O'Connor v Setka* [2020] FCAFC 195 at [118].
28 *Duncan v New South Wales* (2015) 255 CLR 388.
29 Cf *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at [33], [41], [90].
30 *Bank Nationalisation Case* (1948) 76 CLR 1 at 348-349 (Dixon J).

property used for the sole benefit or for the purposes of the C&G Division comes within s 323K. If that were so, then post-administration membership dues would likewise be outside the Administrator's control.

30. **Cth [66]** fails to distinguish the *Bank Nationalisation Case*. The scope for the administrator to act as they consider appropriate compared with how the C&G Division prior to administration would consider appropriate is made plain once it is recalled that the administrator need only "have regard to" the pre-existing objects in the rules. That is not a strong discipline. Section 323B and 323H allow for substantial alteration of the rules. And what is conferred upon the administrator, and taken away from the previous controllers of the C&G Division and the membership, is the power to choose between different objects and the extent to which and how to pursue them.

31. There is no close analogy to bankruptcy: cf **Cth [67]**. Bankruptcy is an express head of legislative power, and prior to federation each colony had its own bankruptcy statutes. It is obvious that the provision of just terms would be incongruous with some acquisitions taking place under laws made under that power. Further, involuntary bankruptcy is pursuant to a court-made sequestration order and requires an act of bankruptcy, which would make it incongruous to provide the bankrupt person just terms. That is not analogous to administration upon a determination of the public interest.

32. **Cth [68]** assumes that s 323B is conditioned upon something other than the Minister's assessment of the "public interest". But the provision is not confined to a situation where, because of past conduct, an administration has been put in place to deal with that past conduct. Part 2A is far broader. Once that is appreciated, there is no incongruity in requiring the Commonwealth to pay just terms if the Minister considers it in the public interest to have someone take control of a union. There would be nothing antithetical to Part 2A for the Commonwealth government to be required to remunerate its own administrator, to pay for the services he is rendering to achieve the *Commonwealth's* goals of the administration of the CFMEU. Indeed, that is the way one would ordinarily expect a Commonwealth appointee to be paid. Under s 17 of the *Maritime Transportation Unions Trustees Act 1963* upon which Queensland relies (**Qld [15]-[16]**), the Board of Trustees was paid from moneys appropriated for the Department of Labour.

Dated: 2 December 2024

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