



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 10 Dec 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S113/2024
File Title: Ravbar & Anor v. Commonwealth of Australia & Ors
Registry: Sydney
Document filed: D1, D2 (Cth parties) - Outline of oral argument
Filing party: Defendants
Date filed: 10 Dec 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**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

OUTLINE OF ORAL SUBMISSIONS OF THE FIRST AND SECOND DEFENDANTS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The purpose of Part 2A

2 Over the past five years, the CFMEU and its officers have breached industrial laws on a scale far exceeding that of any other union. Further, in July to August 2024, the media reported credible allegations that organised crime figures had been appointed to CFMEU positions on construction sites and that CFMEU officials had engaged in corruption, criminal conduct and other serious misconduct. These matters led the CFMEU’s federal regulator to bring proceedings seeking declarations that the C&G Division and four of its
10 branches had ceased to function effectively: **Cth [4]-[6], [15]**.

- SCB 149-151 [96]-[98], 152 [99.6], [101], [103], 153 [104], 155 [105.2], [107]-[108], 156 [110], 157 [116], 158 [120]; SC Annexure 23 (SCB 1038);
- SC Annexure 46 (SCB 1203) at [2], [5], [8], [10], [14], [19], [24], [28]-[29], [46].

3 Understood against that background, the purpose of Pt 2A is to enable the C&G Division swiftly to be returned to a state in which 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: **Cth [7]-[15]**; cf **PS [28]-[29], [47]-[48], [61]**; **Reply [2]-[6]**.

- Revised Explanatory Memorandum at [5], [7]-[11], [22]-[23] (**JBA 22, Tab 116**);
- 20 • FW(RO) Act, ss 5, 323A, 323B, 323D, 323HA, 323K, 323M, 323MA, 323MB, 323T (**JBA 1-2, Tab 5**); FW Act, s 177A (**JBA 1, Tab 4**).

Question 1: Part 2A is sufficiently connected to s 51(xx)

4 **Trading corporation:** The CFMEU is a trading corporation because it engages in substantial trading activities: **Cth [18]-[23]**. It is not relevant to inquire as to whether those activities are “core or characteristic” activities of the CFMEU or to compare the proportion of the CFMEU’s trading activities to its non-trading activities: cf **Reply [13]-[14]**; **SA [11]**.

- *Adamson* (1979) 143 CLR 190 at 208, 233-236, 239 (**JBA 15, Tab 64**);
- *State Superannuation Board* (1982) 140 CLR 282 at 303-305 (**JBA 16, Tab 72**);
- *Queensland Rail* (2015) 256 CLR 171 at [39]-[40], [42], [68]-[72] (**JBA 8, Tab 37**).

30 5 The CFMEU has substantial trading activities even excluding its revenue from membership subscriptions. However, if the Court finds it necessary to consider this issue, those subscriptions should also be characterised as trading activity.

- Commonwealth’s Aide Memoire;
- *ALDI* (2020) 282 FCR 174 at [62]-[65] (**JBA 19, Tab 88**);

- SCB 133-134 [36]-[37]; SC Annexure 11 (SCB 334) at [1]; SC Annexure 12 (SCB 334) at 452, 461, 475.

6 If the CFMEU is a trading corporation, Part 2A (except Div 2) is supported by s 51(xx) because it regulates the CFMEU, imposes obligations on it, and regulates the conduct of those through whom it acts: **Cth [17]**.

- *Work Choices* (2006) 229 CLR 1 at [178], [181], [198] (**JBA 14, Tab 56**);
- *Spence* (2019) 268 CLR 355 at [58] (**JBA 16, Tab 71**).

7 Further, Pt 2A is supported on the same basis as the FW(RO) Act generally: **Cth [24]-[29]**.

- *Work Choices* (2006) 229 CLR 1 at [1], [8], [36]-[37], [309]-[322].

10 **Question 2: Part 2A does not infringe the implied freedom of political communication**

8 Sections 323B can and must be construed so as not to authorise any exercise of power that would impose an unjustified burden on political communication: **Cth [31]-[35]**. That rule of construction is also relevant to s 323K, if the Court finds that s 323K is not valid in all its operations by reason of s 5(3)-(4) and s 323K(1), (5)(a), (5)(b).

- *Miller* (1986) 161 CLR 556 at 613-614 (**JBA 11, Tab 49**);
- *Palmer* (2021) 272 CLR 505 at [122], [124], [227] (**JBA 15, Tab 58**).

Question 3: The Determination and the implied freedom of political communication

9 The Determination would have complied with the implied freedom had it been legislated. It therefore is not ultra vires s 323B by reason of the implied freedom: **Cth [33]-[35], [37]**.

20 10 **Burden:** The plaintiffs' argument lacks precision as to *who* they say is burdened by the Determination and precisely *how* that burden is alleged to arise: see **PS [27], [35]-[36]; Reply [22]**. Regardless of how the argument is put, any burden is limited, incidental and non-discriminatory. Such a burden is more readily justified: **Cth [38]-[43]**.

11 **Justification:** Any burden imposed by the Determination is justified because:

11.1. it rationally advances Pt 2A's legitimate purpose, by taking control of the Division away from those who have failed to ensure its lawful, effective operation, and temporarily giving it to an Administrator charged with rectifying that in members' interests: **Cth [44]-[45]**;

30 11.2. no obvious and compelling alternative has been identified that would achieve the legitimate purpose of the Determination (**Cth [46]**). Placing only some divisional branches under administration would have failed to deal with the pervasive nature of the problem (**Cth [47]**; cf **HS [54]-[55]**), and s 323 did not constitute a timely and legally safe alternative to s 323B (**Cth [48]**; cf **PS [34]**);

11.3. it is adequate in its balance (cf **PS [36]**).

Question 4: Section 323B does not infringe Ch III

12 The plaintiffs' case is confined to the validity of s 323B(1): **PS [39]**. That law imposes no detriment absent a determination by the Minister. The breadth of the Minister's structured discretion as to what to include in a scheme must be construed subject to Ch III: **Cth [52]**.

13 In any event, ss 323B/323K are not even prima facie punitive (by default or otherwise): **Cth [53]-[59]**. In particular, these provisions are not akin to a bill of pains and penalties. They do not manifest a legislative determination that any person has breached an antecedent standard of conduct; nor do they impose detriment in the nature of punishment.

- *Duncan* (2015) 255 CLR 388 at 391, [25], [41]-[50] (**JBA 9, Tab 39**);
- Sections 323HA, 323K(2A).

Questions 5 and 6: Pt 2A does not infringe limitation in s 51(xxxi)

14 **Section 323M (administrator's remuneration)**: Section 323S ensures just terms for any acquisition, and is therefore a complete answer the plaintiffs' challenge: **Cth [63]-[64]**.

15 In any event, s 323M is not a law with respect to the acquisition of property, as: (a) it would be incongruous to require just terms to the CFMEU for the administrator's work in cleaning up the C&G Division (**Cth [68]**); (b) alternatively, s 323M adjusts the rights of persons in a particular relationship (i.e., the CFMEU and the administrator), and is subservient and incidental to or consequential upon the purpose sought to be achieved by Pt 2A: *Mutual Pools* (1994) 179 CLR 155 at 171 (**JBA 12, Tab 54**).

16 **Section 323K (property in control of administrator)**: Section 323S also answers the plaintiffs' challenge to s 323K.

- CFMEU Rules, rr 15(iv), 23(vi) (SCB 262, 273-274).

17 In any event, s 323K:

17.1. does not effect any acquisition of property (**Cth [65]-[66]**); and

- cf. *Banking Act 1947* (Cth), ss 3, 13, 19 (**JBA 3, Tab 9**), at issue in *Bank Nationalisation Case* (1948) 76 CLR 1 at 343-344, 348-350 (**JBA 6, Tab 31**).

17.2. further, in any event, is not a law with respect to acquisition of property (**Cth [67]**).

- *Mutual Pools* (1994) 179 CLR 155 at 170, 178, 188 (**JBA 12, Tab 54**)

30



Stephen Donaghue

Nick Wood**Celia Winnett****Thomas Wood****Madeleine Salinger**