HIGH COURT OF AUSTRALIA

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File Number:	S113/2024
File Title:	Ravbar & Anor v. Commonwealth of Australia & Ors
Registry:	Sydney
Document filed:	Form 27C - Intervener's submissions (AG-Tas)
Filing party:	Interveners
Date filed:	26 Nov 2024

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S113 of 2023

BETWEEN:

MICHAEL RAVBAR
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 TASMANIA (INTERVENING)

PART I: CERTIFICATION

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

PART II & III: BASIS OF INTERVENTION

2. The Attorney-General for the State of Tasmania (**Tasmania**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the the First and Second Defendants (**Commonwealth**).

PART IV: ARGUMENT

3. Tasmania makes submissions in relation to the second, third and fourth questions of law stated for the opinion of the Full Court concerning the challenges based upon the implied freedom and Chapter III.

A. IMPLIED FREEDOM

4. The Plaintiffs argue for the invalidity of Part 2A of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO Act**), s 177A of the *Fair Work Act 2009* (Cth) (**FW Act**) and/or *the Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) (**Administration Act**) on the basis that they impermissibly burden the implied freedom of political communication.

5. The Plaintiffs also argue that the *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* (Cth) (**Determination**) is invalid because it is not authorised by Part 2A of the FWRO Act by reason of the implied freedom of political communication.

Level of Analysis

6. Question Two in the Stated Case is answered in simple terms on the basis that the impugned provisions do nothing to burden the implied freedom (**CS [31]**). Their mere existence alone does not restrict the capacity of anyone to engage in political communication. The provisions simply confer a discretionary power upon the Minister to establish a scheme. There is no "effective burden" as the effect of the provisions is not to "prohibit, or put some limitation on, the making or content of political

communications".[1] More precisely, the impugned provisions do not impose burdens in the nature described by the Plaintiffs (**PS [27]**): they do not remove officers; they do not require the authority of an Administrator for members of the Construction and General (**C&G Division**) to engage in political activity; nor do they prevent the use of property of the C&G Division for the purposes of engaging in political communication, making donations or incurring expenditure without the permission of an Administrator. No such limitations are contained in the impugned provisions.

7. Question Three in the Stated Case is answered by reference to the approach taken in *Wotton v Queensland*[2] and the hypothetical question which arises upon the merger of the "statutory question" with the "constitutional question": whether the exercise of power would have been valid if enacted as legislation.[3]

8. In that regard, s 323B of the FWRO Act may be considered to confer a broad discretionary power upon the Minister to determine a scheme, including the matters that it *may* provide for (in addition to those matters for which it *must* provide in s 323B(3)). That power must be exercised in accordance with any applicable law, including the Constitution[4] and the freedom of political communication which is implied from its provisions. If there is a need to read down the provisions or partially disapply them in order to preserve their validity by reference to constitutional constraints, the "constitutional question" merges with the "statutory question" as to whether the exercise of power is beyond power.

9. The question is thus whether the Determination would be constitutionally valid if it had been enacted as legislation. Tasmania submits that the answer is yes.

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1 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [154] (Gordon J); *Monis v The Queen* (2013) 249 CLR 92 at [108] (Hayne J).

2 (2012) 246 CLR 1 at [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

3 *Palmer v Western Australia* (2021) 272 CLR 505 at [122]-[124] (Gageler J); *Cotterill v Romanes* (2023) 413 ALR 360 at [65] (Emerton P, McLeish and Kennedy JJA).

4 *Comcare v Banerji* (2019) 267 CLR 373 at [44], [96], [209]-[210]; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614.

The staged inquiry

10. Determining whether a law infringes the implied freedom of political communication is assessed by reference to a staged inquiry:[5]

(a) Does it effectively burden the implied freedom, in its terms, operation or effect?

(b) If so, is the purpose of the law legitimate, in the sense of being compatible with the constitutionally prescribed system of representative government?[6]

(c) If it is compatible, is it proportionate in the sense that it is reasonably appropriate and adapted to advance that legitimate purpose in a manner which is compatible with the maintenance of the prescribed system of representative government? That question is now assessed by reference to whether the law is suitable, necessary and adequate in its balance.[7]

Burden

11. The Plaintiffs asserts that the "Act" effectively burdens the implied freedom in several ways (**PS [27]**). Those asserted burdens are directed not to the Act but to the Scheme created by the Determination made pursuant to s 323B of the FWRO Act.

12. It is asserted that by removing officers of the C&G Division, that members are not represented by their chosen or appointed representatives. It is therefore contended that engagement in political communication by the C&G Division is less representative of the members. The contention concedes that the Division remains capable of engaging in political communication. To argue that there is a burden simply on the basis that certain

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5 *Cotterill v Romanes* (2023) 413 ALR 360 at [95] (Emerton P, McLeish and Kennedy JJA).

6 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [29] (Kiefel CJ and Keane J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567 (the Court); *McCloy v New South Wales* (2015) 257 CLR 178 at 203 [31] (French CJ, Kiefel, Bell and Keane JJ); *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at [45] (Kiefel CJ, Keane and Gleeson JJ).

7 *McCloy v New South Wales* (2015) 257 CLR 178; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at [46] (Kiefel CJ, Keane and Gleeson JJ); *Brown v Tasmania* (2017) 261 CLR 328 at [123] (Kiefel CJ, Bell and Keane JJ); [278] (Nettle J); *Clubb v Edwards* (2019) 267 CLR 171 at [70]-[74] (Kiefel CJ, Bell and Keane JJ), [266] (Nettle J), [408], [463] (Edelman J); *Comcare v Banerji* (2019) 267 CLR 373 at [32] (Kiefel CJ, Bell, Keane and Nettle JJ).

officers are not driving that communication tends to suggest that there is a personal right to freedom of political communication. Any such suggestion is contrary to authority.[8]

13. It is then asserted that members are not free to engage in political activity in association unless the Administrator permits it (**PS [27]**). There is nothing in the Scheme to support the assertion. No such burden arises by reference to the Determination.

14. The final asserted burden is that the C&G Division is unable to use its property to engage in political communication or to make political donations without the permission of the Administrator. Again, the Determination itself does not impose any such restriction. Ultimately, the manner in which such matters are handled will fall to the exercise of discretionary powers by the Administrator under the Rules.[9] Permission to make donations will be granted by the Administrator on a case-by-case basis. Accordingly, even if the Determination does effectively burden the implied freedom, it does not do so in any direct sense, nor does it do so in a sense which discriminates against any particular point of view. Any burden might be said to be modest.

Legitimate purpose

15. The purpose of the Scheme is not directed to restrictions upon political communication but to addressing significant concerns with the management and operation of the C&G Division in an effort to restore compliance with appropriate processes. Tasmania adopts the summary of the purpose as stated by the Commonwealth (**CS [14]**): "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".

16. In reference to and in conformity with the broad overarching objects of the FWRO Act as described in s 5 (including the pursuit of standards which seek to ensure that registered organisations are able to operate effectively, encourage efficient management of organisations and provide for their democratic functioning and control), the Explanatory

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8 *McCloy v New South Wales* (2015) 257 CLR 178 at [29]-[30] (French CJ, Kiefel, Bell and Keane JJ), [119] (Gageler J), [317] and [348] (Gordon J); *Brown v Tasmania*; (2017) 261 CLR 328 at [90] (Edelman J); *Clubb v Edwards* (2019) 267 CLR 171 at [35] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks Inc v Commonwealth of Australia* (2021) 274 CLR 1 at [44] (Kiefel CJ, Keane and Gleeson JJ).

9 Construction and General Division Rules, cl 15(m) and cl 42(s) (**SCB 878**, **918**).

Memorandum to the Fair Work (Registered Organisations) Amendment (Administration) Bill 2024 makes it plain that:

(a) "serious allegations have been raised about the conduct of some officials and associates of the CFMEU's Construction and General Division", including "allegations of corruption, criminal conduct and other serious misconduct including bullying and harassment and general disregard for workplace laws";[10]

(b) "The General Manager [of the Fair Work Commission] formed the view that the majority of branches … were no longer able to function effectively", citing various allegations of criminal and unlawful conduct raised through media reporting;[11]

(c) The legislative amendments: "seek to protect the interests of members of the Construction and General Division, and if a scheme is determined, would seek to help return the Construction and General Division to a position where it is democratically controlled by those who promote and act in accordance with Australian law"; and are "necessary to end ongoing dysfunction within the Division and to ensure it is able to operate effectively in the interests of its members".[12]

17. The purpose of the Scheme, having regard to those matters, is not at all concerned with matters of political communication, despite the assertion of the Plaintiffs that it is a substantial purpose of the Administration Act "to suppress certain sources of political communication" (**PS [28]**). The Plaintiffs' asserted purpose by reference to statements of the Administrator that political donations would not be permitted is not supported by the legislative scheme or permissible extrinsic materials.[13] Rather, the Determination presents an example of a law which "pursue[s] objects unrelated to the system of representative and responsible government".[14] Any effect upon the implied freedom is incidental to the pursuit of legitimate aims. Seeking to alleviate entrenched and significant problems with the management and operation of the C&G Division through

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10 Paragraph [7].
11 Paragraphs [8], [10].
12 Paragraph [11].
13 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ).
14 *Brown v Tasmania* (2017) 261 CLR 328 at [321] (Edelman J).

the establishment of a Scheme does not "impinge upon the functionality of the system of representative government"[15] and is not incompatible with the maintenance of that system. It is therefore a legitimate purpose.

Proportionality – suitable, necessary and adequate in its balance

18. ***Suitable***: The Determination and the Scheme it establishes are rationally connected to the purpose which they seek to achieve. The means employed are capable of advancing that purpose through the insertion of independent control mechanisms. The impugned provisions do not operate to preclude the C&G Division from participating in political communication (**PS [32]**). As the Commonwealth points out, members, identifying themselves as the CFMEU, have engaged in political communication (**CS [41]**).

19. ***Necessary***: As Kiefel CJ and Keane J wrote in *Farm Transparency*:[16]

> The test of reasonable necessity looks to whether there is an alternative measure available which is equally practicable when regard is had to the purpose pursued, and which is less restrictive of the freedom than the impugned provision. The alternative measure must be obvious and compelling. The mere existence of another measure capable of achieving the same purpose will not be sufficient for a conclusion of lack of justification. The other measure must be equally practicable. To be equally practicable as the impugned provision, the alternative must achieve the same legislative purpose to the same degree, which is to say it must be possible to conclude that the alternative legislative measure is equally as effective. Where there is a measure which has these qualities, the impugned legislative provision cannot be said to be necessary, in the sense that its choice is rational and therefore justified.

20. There is no obvious and compelling alternative measure which achieves the same purpose to the same degree and is therefore equally effective as the Determination. The mechanism available under s 323 of the FWRO Act is less specific and uncertain. It cannot be judged to be an equally effective means, particularly having regard to the uncertainty as to outcome.

21. Tasmania otherwise adopts the Commonwealth's analysis regarding the absence of an obvious or compelling alternative which is equally practicable to the impugned provisions (**CS [46]-[48]**).

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15 *McCloy v New South Wales* (2015) 257 CLR 178 at [67] (French CJ, Kiefel, Bell and Keane JJ).

16 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [46] (footnotes omitted).

22. ***Adequate in its balance***: If a law is suitable and necessary, it will be 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.[17]

23. The important purpose of seeking to restore the governance and lawful operations of the C&G Division and to protect the interests of its members cannot be said to be outweighed by any incidental burden on the implied freedom which may arise under the Determination.

C. CHAPTER III

24. In relation to the fourth question stated for the opinion of the Court, the Plaintiffs assert, in summary, that:

    (a) The impugned law infringes Chapter III of the Constitution because it impermissibly confers the judicial power of the Commonwealth upon the Minister because the Minister is given a power which is punitive in nature (**PS [38]-[51]**); and

    (b) Even if the law serves a non-punitive purpose, it is still invalid because that purpose is not "legitimate" (**PS [52]**), or it is not "reasonably necessary" to achieve the non-punitive purpose (**PS [53]**).

25. In response, Tasmania submits:

    (a) The power is not punitive in nature and is not judicial power; and

    (b) Tests of justification (whether a purpose is "legitimate" or whether a law is "reasonably necessary") should not be extended to assessing the validity of a law which does not affect personal liberty or guaranteed rights or freedoms.

26. It is accepted that some functions or powers (such as the determination of criminal guilt) are exclusively judicial in nature, some are exclusively non-judicial, while others may take their character from the body or tribunal upon which they are conferred.

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[17] *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [55] (Kiefel CJ and Keane J); *Comcare v Banerji* (2019) 267 CLR 373 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ); *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at [85] (Kiefel CJ, Keane and Gleeson JJ).

27. The fact that legislation, or a power conferred by legislation, may impact upon rights is not determinative of it being an exercise of judicial power.[18] Here, the power in question is not concerned with determining guilt or imposing punishment.

28. The power to determine a scheme for the administration of the C&G Division is only to be exercised if the Minister is satisfied, having regard to Parliament's intention in enacting the FWRO Act (s 5), that doing so is in the public interest (s 323B(1)).

29. The requirement to consider the public interest in light of Parliament's intention in enacting the FWRO Act requires the Minister to focus on the goal of enhancing relations within workplaces through the meeting of standards set out in the Act. The Minister needs to be satisfied that placing the C&G Division into administration is in the public interest, having regard to that legislative goal. That question necessarily focusses attention not only on an existing state of affairs but also future relations within workplaces and the future capacity of the C&G Division to meet the standards set out in the Act. Importantly, the requirement to consider Parliament's intention in enacting the FWRO Act means that the Minister cannot determine that it is in the public interest to place the C&G Division into administration without considering factors within that Parliamentary intention which weigh against such a step, such as:

    (a) Parliament's recognition and respect for the role of employee organisations (s 5(5));

    (b) the desire to encourage members to participate in the affairs of the organisation to which they belong (s 5(3)(b)); and

    (c) the desire to provide for the democratic functioning and control of organisations (s 5(3)(d)).

30. While past events assume relevance, the exercise of considering the public interest in light of Parliament's intention in enacting the FWRO Act allows no scope for the Minister in exercising power under s 323B to be concerned with questions of guilt or the desirability of punishment of the C&G Division or any of its officers or members.

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[18] *Australian Building Construction Employees and Builders Labourers Federations v The Commonwealth* (1986) 161 CLR 88 at 96 (Gibbs CJ, Mason, Brennan Deane and Dawson JJ).

31. The Plaintiffs contend that the power in s 323B "as a whole, is punitive in nature" (**PS [39]**) by reference to eleven points (**PS [40]-[53]**). None are claimed to be decisive.

32. The *first* to *sixth* points are focussed on the consequences of the making of a determination, asserting that these have a punitive effect. However, not all hardship or distress constitutes punishment[19] and here the effects are unsurprising in the context of an imposed administration. Tasmania supports the submissions of the Commonwealth as to the asserted detriments not being punitive (**CS [53]-[59]**). Overall, there is nothing to signal that Parliament intended the power to be exercised in a punitive manner or as a means of punishment. Section 323B is not punitive in form or substance.[20] In further response to the eleven points raised by the Plaintiffs, Tasmania submits the following.

33. *First*, to the extent that the exercise of the power in s 323B interferes with property of the CFMEU, that interference is very limited – it is temporary and constrained. In any event, it is well recognised that, having regard to the principle of legality, vested property interests may be interfered with if there is clear legislative intent to do so.[21]

34. *Second*, any interference with property falls far short of a "deprivation of property" or forfeiture (**PS [41]**). The property remains vested in the CFMEU.

35. *Third*, it is plainly common for an administrator to be appointed by a non-judicial process, and there is nothing in the nature of appointing an administrator which makes it unsusceptible to legislative or administrative determination.[22]

36. *Fourth*, the designation of a removed officer as a "removed person" by s 177A of the FW Act is very limited – it only restricts a person from being a bargaining representative, and can potentially be relieved upon application to the Fair Work Commission (s 177A(7)). While disqualification is sometimes used as punishment (**PS [43]**), it is also well-recognised that its use may be non-punitive (and non-judicial). For example, in *Visnic v ASIC* the power of ASIC to disqualify persons from managing corporations was

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19 *Re Woolley; Ex Parte Applicants M276/2003* (2004) 225 CLR 1 at [17] (Gleeson CJ); *Duncan v New South Wales* (2015) 255 CLR 388 at [41].

20 *Duncan v New South Wales* (2015) 255 CLR 388 at [43] (the Court).

21 *R & R Fazzolari Pty Ltd v Paramatta City Council* (2009) 237 CLR 603 at [42] (French CJ).

22 This submission draws from the statement in *Australian Building Construction Employees and Builders Labourers Federations v The Commonwealth* (1986) 161 CLR 88 at 95 (Gibbs CJ Mason, Brennan Deane and Dawson JJ): "Nor is there anything in the nature of deregistration which makes it unsusceptible to legislative determination."

held not be judicial; it was a power to be exercised for the purpose of maintaining professional standards in the public interest.[23]

37. To the *fifth* and *sixth* points, any interference with contractual rights, limitation upon future employment, or disenfranchisement is minimal and a direct and natural consequence of external administration. Again, nothing suggests that such consequences are employed for the purpose of punishment.

38. The *seventh* point is that s 323B is concerned only with the C&G Division (**PS [46]**). This is not novel in the making of legislation[24] and does not evince a motive of punishment (rather, it simply reflects the nature of the mischief which the legislation sought to address).

39. The *eighth* point makes assertions about the considerations or motivations of Parliament, including concern about criminal conduct. Regardless of whether that is so, it can readily be observed that events which motivate the passing of legislation do not necessarily throw light on the purpose of legislation, nor the purposes which will guide the exercise of a power granted by the legislation.

40. Put another way, control of the exercise of the power will be guided by the words of the FWRO Act, considered in context and by reference to objects of the FWRO Act. The "subjectively held purposes of any or all of the members of Parliament that passed the law" are of no relevance.[25]

41. The *ninth* point asserts "the authorities support characterisation of this power as punitive" (**PS [50]**) and goes on to refer to two cases. Tasmania submits neither case provides such support. In *Victorian Chamber of Manufactures v Commonwealth*,[26] although Latham CJ stated that the regulation in question *appeared* to involve a vesting

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23 (2007) 231 CLR 381 at [11] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); *Visnic* was heard with *Albarran v Companies Auditors and Liquidators Disciplinary Board*; *Gould v Magarey* (2007) 231 CLR 350.

24 For example see *Australian Building Construction Employees and Builders Labourers Federations v The Commonwealth* (1986) 161 CLR 88, and noting the statement at 96-97 (Gibbs CJ Mason, Brennan Deane and Dawson JJ) as to the irrelevance of the motive of Parliament in enacting the statute to circumvent court proceedings.

25 *Unions NSW v New South Wales* (2019) 264 CLR 595 at [169] (Edelman J).

26 (1943) 67 CLR 413.

of judicial power in a Minister, he did not decide the case on that ground,[27] and said nothing about punishment. Further, the power in question was exercisable upon the Minister being of the opinion that the regulations had been contravened. That is in sharp distinction to the power presently being considered, which relies on no opinion of guilt. As for the Plaintiffs' discussion of the *Communist Party Case*, it advances no clear argument or proposition to support their assertion that "the authorities support characterisation of this power as punitive."

42. The *tenth* and *final* points (**PS [52]-[53]**) attempt to invoke principles from cases concerning executive or administrative powers which infringe upon Ch III because they punish criminal guilt or involve deprivation of liberty by non-judicial means. It seems to be asserted that even if the impugned law serves a non-punitive purpose, it should be held to be invalid because that purpose is not "legitimate" (being too general, broad, vague or high-level). Alternately, that even if the purpose is legitimate, the law is nevertheless not "reasonably necessary" to achieve such purpose. Both assertions draw on authorities concerned with the fundamental right to liberty.

43. In this case, there is no suggestion (nor could there be) that the impugned laws effect punishment by way of any deprivation of liberty. The principles from those authorities should not be extended to apply to the assessment of the validity of a law which involves no deprivation of liberty. Legislative and executive action frequently affects property interests and other rights. Where such action has a non-punitive purpose, it would be unreasonable and impracticable that it must also pass two further tests (that its purpose must be specific in nature; and that it achieves that purpose only by means which are reasonably necessary).

44. In other words, principles from cases concerning executive or administrative powers which infringe upon Ch III because they punish criminal guilt or deprive liberty by executive or administrative action should not be applied to consideration of the claim that the impugned law is invalid because it inflicts consequences in the nature of interferences with property or removal or disqualification from office.

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[27] Rather, he held the law to be invalid on the basis of the lack of real connection to the defence power, at 418 (as did the other judges of the Court); and similarly Starke J only said (at 422) that reg. 7 "should be noticed".

45. If that is not accepted, and this Court does employ tests of legitimacy or reasonable necessity to assess the non-punitive purpose of the law, then it is submitted that the legislation meets those tests for the reasons expressed by the Commonwealth (**CS [60]-62]**)

PART V: ESTIMATE OF TIME

46. It is estimated that Tasmania will require up 10 minutes for the presentation of oral argument.

Dated: 26 November 2024

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ANNEXURE TO THE ATTORNEY-GENERAL

OF TASMANIA'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, Tasmania sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in its submissions.

No.	Description	Version	Provisions
Commonwealth			
1.	Commonwealth Constitution	Current	Ch III
2.	*Fair Work Act 2009 (Cth)*	Current	s 177A
3.	*Fair Work (Registered Organisations) Act 2009 (Cth)*	Current	s 5, s 323, Part 2A
4.	*Fair Work (Registered Organisations) Amendment (Administration) Act 2024 (Cth)*	Current	All
5.	*Judiciary Act 1903 (Cth)*	Current	s 78A