HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

BETWEEN:

LIBERTYWORKS INC
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

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SUBMISSIONS ON BEHALF OF ATTORNEY GENERAL FOR NEW SOUTH WALES INTERVENING

PART I: PUBLICATION

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

PARTS II AND III: BASIS OF INTERVENTION

2. The Attorney General for New South Wales (**NSW AG**) intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the Defendant.

PART IV: ARGUMENT

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3. NSW adopts generally the Defendant's submissions dated 21 October 2020 ("**DS**") subject to the submissions made below (which are mostly by way of amplification and supplementation of the arguments advanced in the Defendant's submissions).

There is no doctrine of "strict scrutiny" in Australian constitutional law. In any event, there is no occasion for "strict scrutiny" of the FITS Act

4. The Court should reject the Plaintiff's suggestion (in its written submissions dated 22 September 2020 ("**PS**") at [8(b)]) that there is a class of laws that, under prevailing doctrines of Australian constitutional law, "automatically" attract "stricter scrutiny". No majority support for such a proposition is disclosed in the authorities cited by the Plaintiff (in PS at [8(b)]) (even though some of those authorities refer to the

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"strict scrutiny" standard of review recognised in United States constitutional jurisprudence).

5. The foregoing is not to deny that particular kinds of laws may be more difficult to justify under prevailing constitutional law doctrines that require justification as a precondition to constitutional validity. For example, as Deane and Toohey JJ observed in Australian Capital Television v Commonwealth (1992) 177 CLR 106 ("**ACTV**") at 169 (in a passage quoted by Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ in Hogan v Hinch (2011) 243 CLR 506 at 555-556 [95]):

> … a law whose character is that of a law with respect to the prohibition or restriction of [political] communications … will be much more difficult to justify ... than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications.

6. But that is not because some kinds of a laws are subjected to "stricter scrutiny" than others. Rather, it is because particular kinds of laws are more difficult to justify under the singular test (and standard of review) that applies when determining whether an impugned law is unconstitutional because it offends the implied freedom of communication on political and governmental matters ("**implied freedom**").

7. In any event, as the Defendant correctly observes (in DS at [18]), the impugned provisions of the Foreign Influence Transparency Scheme Act 2018 (Cth) ("**FITS Act**") do not amount to a purported "in terms" regulation of political communication: cf PS at [8(b)]. Indeed, the impugned provisions do not purport to regulate communication at all.

8. Instead, the FITS Act imposes an obligation on certain persons to apply for registration (s 16) and, following registration, to comply with certain obligations in relation to reporting (ss 34-37), registration renewals (s 39) and record keeping (s 40). The impugned provisions of the FITS Act do not criminalise any form of communication. Instead, they criminalise knowing or reckless failures to comply with an obligation to register or to renew a registration (s 57), failures to fulfil the responsibilities attendant upon registration (ss 58(1), 58(3)) and failures to comply with notices requiring a person to give information to the Secretary of the Commonwealth Attorney-General's Department when required to do so (s 59).

9. Thus, the minor premise of the Plaintiff's "stricter scrutiny" submission (that the present case is an "example of *in terms* regulation of political communication" and therefore should be subjected to "stricter scrutiny": PS at [8(b)] (emphasis added)) is erroneous. The asserted conclusion based on that premise therefore cannot follow.

There is no occasion for the Court to develop a new test in relation to the intercourse limb

10. The Plaintiff is wrong to submit (as it does, in effect, in PS at [23], [26]) that there is an absence of authority on the application of the intercourse limb of s 92 of the Commonwealth Constitution ("**intercourse limb**") other than at "the two 'poles' at either end of the scale of the extent of burden on interstate intercourse".

11. That submission misapprehends the import of the authorities that deal with the test to be applied in determining whether an impugned law offends the intercourse limb.

12. In both AMS v AIF (1999) 199 CLR 160 ("**AMS**") and APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 332 ("**APLA**"), a majority of this Court applied a two-part test for determining whether the laws challenged in those cases offended the intercourse limb. That test involved, in substance, the following two questions:

    (a) first, does the impugned law have the "object" of impeding interstate intercourse? (or does the impugned law "in terms" apply to impose a burden or restriction upon movement across state borders?);

    (b) secondly, is the impediment on interstate intercourse imposed by the impugned law "greater than that reasonably required" to achieve the objects of that law?

    (See AMS at 179 [45] per Gleeson CJ, McHugh and Gummow JJ (with whom Hayne J agreed at 233 [221]); APLA at 353 [38] per Gleeson CJ and Heydon J, 393 [177] per Gummow J, 461 [420] per Hayne J).

13. It is apparent from the majority reasoning in AMS and APLA that the second part of this two-part test is reached whenever the first question is addressed and answered in the negative (and not just when an impugned law is at one "end of the scale of the extent of burden on interstate intercourse": cf PS at [23], [26]). That that is the settled approach appears most clearly from paragraph 38 of Gleeson CJ and Heydon J's reasons in APLA which relevantly reads as follows (emphasis added):

> The object of the [impugned] regulations is not to impede interstate intercourse. The test to be applied **therefore** is whether the impediment to such intercourse imposed by the regulations is greater than is reasonably required to achieve the object of the regulations.

14. Similarly, paragraph 45 of Gleeson CJ, McHugh and Gummow JJ's reasons in AMS (which Gummow and Hayne JJ opined in APLA should be accepted as the applicable doctrine: see APLA at 394 [177] per Gummow J and 461 [420] per Hayne J) applies a "greater than that reasonably required" test after observing that the law impugned in that case "did not in terms apply to impose a burden or restriction upon movement across the borders of Western Australia" and without first concluding that that the law impugned in that case fell at the lower "end of the scale of the extent of burden on interstate intercourse.

15. Thus, the Plaintiff is wrong to submit that there is no authority of this Court dealing with a law that does not "in terms" apply to impose a burden or restriction upon cross-border intercourse unless that law falls at the opposite "end of the scale of the extent of burden on interstate intercourse": cf PS at [26]. The established doctrine of this Court is that, in such a case, constitutional validity in relation to a impugned law that imposes an impediment on interstate intercourse turns on consideration of whether the impediment to interstate intercourse imposed by the impugned law is "greater than reasonably required to achieve the object" of the impugned law. While there is room for debate and further judicial development as to how that test is to be applied (and when the test arises for application), this case does not require this Court to develop a new test to deal with what the Plaintiff describes as "intermediate case[s]" that fall within "the two 'poles' at either end of the scale of the extent of burden on interstate intercourse": cf PS at [26].

16. Nor is there any reason in principle why this Court would now limit the "greater than that reasonably required" test approved in AMS and APLA to cases at one "end of the scale of the extent of burden on interstate intercourse" and fill the gap in the "scale" thereby created with a new test.

17. If the foregoing is accepted, what remains to be considered is how the "greater than that reasonably required" test that should be applied in the circumstances of the particular case (it, correctly, being common ground between the parties that the impugned provisions of the FITS Act do not fail the first part of the two-part test for invalidity under the intercourse limb: see PS at [25(a)], DS at [42]).

18. On that issue, the Court should accept the Defendant's submission (DS at [37]) that coherence of constitutional doctrine requires that the intercourse limb not have any greater invaliding effect than the implied freedom in cases where a law is alleged to offend

both the implied freedom and the intercourse limb in the way that it incidentally burdens interstate communication on political or governmental matters.

19. As the Defendant correctly observes (in DS at [38]), if it were otherwise, the implied freedom would largely be rendered irrelevant in political communication cases other than where (unusually) the political communication burdened by a particular law occurs wholly within a State. That position would undermine the important role that the implied freedom plays in constitutional doctrine and, as the Defendant correctly points out (in DS at [40]), would be inconsistent with the result in previous cases in which it was argued that a particular law offends both the implied freedom and the intercourse limb.

10 20. In light of the foregoing and in any event, the "greater than that reasonably required" test affirmed in AMS and APLA is properly understood as requiring a form of proportionality testing as opposed to some more stringent test that would render the implied freedom mostly redundant: see, eg, Hayne J's reasons in APLA (at 461 [421]) which contemplated that the "greater than reasonably required" test required "consideration of what is necessary or appropriate and adapted to fulfilment of the purposes of the *law* in question" (emphasis original).

21. The impugned provisions of the FITS Act easily pass such a test (assuming that such a test arises for consideration in the present case – in order to resolve the present matter it is unnecessary for the Court to resolve the question of whether the two-part test in AMS
20 and APLA applies to all impediments on interstate intercourse or whether it only applies in relation to laws of a particular kind such as laws that discriminate against interstate intercourse: see APLA at [463] per Callinan J).

22. The impediment imposed on interstate intercourse by the impugned provisions of the FITS Act is very slight and, for the reasons addressed by the Defendant in the context of the implied freedom (DS at [31]-[34]), reasonably necessary to achieve the (legitimate) objects of the FITS Act.

23. In the circumstances, the Court should be comfortably satisfied that the impugned provisions of the FITS Act are no "greater than reasonably required" to achieve the objects of those provisions and therefore reject the constitutional challenge to those
30 provisions on the ground that they offend the intercourse limb.

The impugned provisions of the FITS Act do not offend the implied freedom

24. The Court should accept the Defendant's submissions (in DS at [15]-[35]) as to why the impugned provisions of the FITS Act do not offend the implied freedom. To those submissions, the NSW AG adds the following.

25. The Plaintiff is wrong to suggest (as it appears to in PS at [31]) that the extent of the effective burden that is imposed by an impugned law is "irrelevant" to the application of the three-question ("**McCloy Questions**") test articulated in McCloy v New South Wales (2015) 257 CLR 178 ("**McCloy**") at 193-194 [2] and refined in Brown v Tasmania (2017) 261 CLR 328 ("**Brown**") at 364 [104] (see PS at [29]) provided that the burden is "real".

26. While it is true that the first McCloy question is to be answered "yes" whenever a law imposes any effective burden on political communication (see Brown at 369 [127] per Kiefel CJ, Bell and Keane JJ, 382 [180] per Gageler J), the extent of any such burden is relevant to the application of the McCloy Questions in at least two ways:

    (a) first, as the Defendant correctly observes (in PS at [18]), it is necessary to identify the nature and extent of any effective burden on political communication imposed by an impugned law because such a law need only be justified insofar as the law imposes such a burden;

    (b) relatedly, the extent of any burden imposed by an impugned law is of critical importance to the third McCloy question (proportionality testing). As the plurality observed in Brown (at 369 [128] per Kiefel CJ, Bell and Keane JJ):

> It is possible that a slight burden on the freedom might require a commensurate justification. Certainly a heavy burden would ordinary require a significant justification.

27. The impugned provisions of the FITS Act impose, at most, a modest burden on political communication. They do not purport to prohibit, or even restrict, political communication: see DS at [18]). Nor do they not operate to distort public debate by prohibiting or regulating the expression of particular points of view (cf PS at [32(c)]; cf, eg, Brown at 390 [203] per Gageler J). Rather, the impugned provisions seek to:

> … enhance government and public knowledge of the level and extent to which foreign sources may have impact over the conduct of Australia's elections, government and parliamentary decision-making, and the creation and implementation of laws and policies.

(Revised Explanatory Memorandum, Foreign Influence Transparency Scheme Bill 2017 (Cth) 6 [10])

28. That object of transparency could not fairly be described as one of only "relatively mild" importance: cf PS at [39]. On the contrary, that purpose is a significant one (see Comcare v Banerji (2019) 93 ALJR 900 at [31], [35] per Kiefel CJ, Bell, Keane and Nettle JJ) that is apt to enhance the constitutionally prescribed system of representative and responsible government (see DS at [26]) including by reducing the risk of improper influence being brought to bear on political or governmental processes in a manner unbeknownst to electors and other participants in the political process (see, eg, DS at [22]).

29. The risks associated with undisclosed attempts to influence political and governmental processes are ones that are recognised by a number of pieces of legislation on both a State and federal level: see DS at fn 21.

30. For example, in New South Wales, the Lobbying of Government Officials Act 2011 (NSW) ("**LOGO Act**") imposes a duty on all "third-party lobbyists" to be registered in a publicly available "Lobbyists Register" maintained by the NSW Electoral Commission: LOGO Act ss 8 and 9(1). That register is required to include, inter alia, the names of the individuals engaged to lobby Government officials for each registered third-party lobbyist, the names of each registered third-party lobbyist's clients and, in the case of a registered third-party lobbyist whose business includes lobbying for "foreign principals", the name of the "foreign country" corresponding with each of the "foreign principals" who has retained the lobbyist to provide lobbying services: LOGO Act s 10(1); Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014 (NSW) ("**LOGO Reg**") cl 4B. Under the LOGO Reg, "foreign country" and "foreign principal" have the same meaning as in the FITS Act: LOGO Reg cl 4B(2).

31. Under the LOGO Act, persons who communicate with a NSW government official for the purpose of representing the interests of others in relation to an official function are (generally speaking) also required to comply with a code of conduct: see LOGO Act ss 5-7; LOGO Reg, Sch 1 ("**Lobbyists Code**").

32. The Lobbyists Code prohibits third-party lobbyists from meeting or otherwise communicating with NSW government officials for the purpose of lobbying unless they have complied with their registration obligations (cl 9) and have disclosed to the NSW government officials that they lobby the name of the individual or body whose interests the lobbyist is representing (cl 10(1)(c)).

33. In addition, if the individual or body whose interests the lobbyist is representing is a "foreign principal" (within the meaning of the FITS Act), a third-party lobbyist is obliged to disclose to NSW government official they lobby (cl 10(1)(d)):

(a) that their client is a foreign principal; and

(b) the foreign country in respect of which the client is a foreign principal.

34. The provisions of the LOGO Act, Logo Reg and Lobbyist Code just discussed as well as the impugned provisions of the FITS Act can regarded as being directed to a common goal – reducing the risk of improper influence being exerted upon the integrity of political or governmental processes: see DS at [5.1], [22]. Few other legislative objects could be regarded as more significant and compelling than that. Laws that are reasonably appropriate and adapted to advancing that legitimate object – such as the FITS Act and the LOGO Act – do not offend the implied freedom.

Answers to questions referred

35. The Court should answer the substantive questions referred for consideration by the Full Court by order made on 20 August 2020 (see SCB 4/1547) as follows:

> 1: Is the *Foreign Influence Transparency Scheme Act 2018* (Cth) invalid, either in whole or in part (and if in part, to what extent), on the ground that it infringes the implied freedom of political communication?
>
> Answer: No.
>
> 2. Is the *Foreign Influence Transparency Scheme Act 2018* (Cth) invalid, either in whole of in part (and if in part, to what extent), on the ground that it is contrary to the freedom of interstate intercourse referred to in s 92 of the Constitution?
>
> Answer: No.
>
> 3. In light of the answers to questions 1 to 2, what relief, if any, should issue?
>
> Answer: None.

PART V: TIME ESTIMATE

36. NSW anticipates that it will require no longer than fifteen minutes for the presentation of oral argument.

Dated: 4 November 2020

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BETWEEN: **LIBERTYWORKS INC**
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Defendant

10 **ANNEXURE TO SUBMISSIONS ON BEHALF OF ATTORNEY GENERAL FOR NEW SOUTH WALES INTERVENING**

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Attorney General for New South Wales sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in his submissions.

No.	Description	Version	Provision(s)
Commonwealth provisions			
1.	*Constitution* (Cth)	Current	s 92
2.	*Foreign Influence Transparency Scheme Act 2018* (Cth)	Current	ss 16, 34-37, 39, 40, 57, 58, 59
New South Wales provisions			
3.	*Lobbying of Government Officials Act 2011* (NSW)	Current	Entire Act
4.	*Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* (NSW)	Current	Entire Regulation