HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

LIBERTYWORKS INC
Plaintiff

10 and

COMMONWEALTH OF AUSTRALIA
Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

20 **Part I: PUBLICATION OF SUBMISSIONS**

1. This submission is in a form suitable for publication on the internet.

Part II: INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: SUBMISSIONS

4. South Australia confines its submissions to matters of legal principle raised by the issues of validity in the present case.

30 5. The Plaintiff impugns the validity of specified provisions of the *Foreign Influence Transparency Scheme Act 2018* (Cth) (**FITS Act**)[1] on the basis they impermissibly infringe the implied freedom of political communication and are contrary to the freedom of interstate intercourse provided for in s 92 of the *Constitution*.

[1] Plaintiff's Submissions (**PS**) [18].

6. South Australia makes the following submissions:

   a. The validity of any measure that imposes an effective burden on interstate intercourse can only be discerned after assessing whether that burden is imposed in the proportionate pursuit of a legitimate object.

   b. The test to undertake such an assessment does not differ materially from the test for assessing whether a measure that burdens the implied freedom of political communication is reasonably appropriate and adapted to a legitimate end.

   c. Nevertheless, the application of the test must remain attuned to the nature and
10 extent of the burden on the relevant constitutionally protected activity.

Reasonable necessity testing is applicable to all burdens on interstate intercourse

7. The Plaintiff's submissions invite the Court to recognise three distinct categories of burdens on interstate intercourse, each attracting different tests of validity. Two of those categories are said to be supported by "clear authority" and represent "'poles' at either end of the scale of the extent of the burden on interstate intercourse".[2] At one end, "legislation that is 'aimed at' or 'directed at' cross-border intercourse with the effect of burdening it" is said to be invalid "regardless of legislative purpose"[3] (the 'in terms' test). At the other end, "legislation that only incidentally burdens interstate intercourse" is said to be invalid unless the burden is no "greater than that reasonably
20 required [or reasonably necessary] to achieve the objects of the legislation in question"[4] (the 'incidental' test). The impugned provisions of the FITS Act are said to fall into an "intermediate" category that exists between these two "poles", necessitating the identification of a new test[5] (the 'intermediate' test). For the reasons that follow, those submissions should be rejected.

No 'in terms' threshold test

8. The Plaintiff's submissions proceed from the premise that the earlier authorities of this Court establish the 'in terms' threshold test of validity that renders invalid some laws that burden interstate intercourse *in their terms* irrespective of the purpose they pursue. Such a threshold test, if it were to exist, would necessarily be formalistic. Because the

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2 PS [23]-[26].
3 PS [23(a)].
4 PS [24].
5 PS [21(a)], [26(a)].

test would not have regard to the purpose the law pursues, it would look only to the *form* of the law to draw a conclusion that the law is 'directed at' or 'aimed at' interstate intercourse and therefore invalid, rather than also looking to the *substance* of the law to assess whether the burden is instead 'incidental' to the proportionate pursuit of some other legislative object and therefore valid.

9. South Australia submits that the authorities do not embrace the 'in terms' threshold test and are better understood as establishing a single test for assessing the validity of any effective burden on interstate intercourse. That test is one that adopts proportionality-style reasoning, which in s 92 jurisprudence is referred to as a test of
10 'reasonable necessity'.[6] That test acknowledges that the validity of any measure that burdens interstate intercourse can only be discerned after assessing whether that burden is justified by the measure's pursuit of a legitimate object.

10. The Plaintiff relies upon *R v Smithers; Ex parte Benson*,[7] *Gratwick v Johnson*,[8] *Cole v Whitfield*[9] and *Australian Capital Television Pty Ltd v Commonwealth*[10] to support the existence of the 'in terms' threshold test. While some of those authorities contain statements that may be said to support the existence of such a test,[11] none of those statements have ever commanded majority support in this Court. Rather, the weight of authority favours a test that engages proportionality-style reasoning.[12]

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[6] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 477 [102]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ). The earlier intercourse cases tend to use the similar language of "reasonably required": *AMS v AIF* (1999) 199 CLR 160, 179 [45] (Gleeson CJ, McHugh and Gummow JJ); *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 393-394 [177] (Gummow J).

[7] (1912) 16 CLR 99.

[8] (1945) 70 CLR 1.

[9] (1988) 165 CLR 360.

[10] (1992) 177 CLR 106, 192-195 (Dawson J).

[11] Most notable are the statements of Isaacs J in *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 117 and Starke J in *Gratwick v Johnson* (1945) 70 CLR 1, 17, upon whom the Plaintiff relies. See also *Cunliffe v Commonwealth* (1994) 182 CLR 272, 308 (Mason CJ).

[12] *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 109 (Griffith CJ), 110 (Barton J); *Ex parte Nelson [No 1]* (1928) 42 CLR 209, 218 (Knox CJ, Gavan Duffy and Starke JJ); *Tasmania v Victoria* (1935) 52 CLR 157, 168-169 (Gavan Duffy CJ, Evatt and McTiernan JJ), 173 (Rich J); *James v Cowan* (1932) 47 CLR 386, 396-397 (Lord Atkin on behalf of the Privy Council); *Gratwick v Johnson* (1945) 70 CLR 1, 14, 15 (Latham CJ); 16 (Rich J); 19 (Dixon J); *Commonwealth v Bank of NSW* (1949) 79 CLR 497, 639, 641 (Lord Porter on behalf of the Privy Council); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 567 (Gibbs CJ), 590-592 (Wilson J), 628 (Dawson J); *Cole v Whitfield* (1988) 165 CLR 360, 393, 406-407 (the Court); *Cunliffe v Commonwealth* 1994) 182 CLR 272, 324-325 (Brennan J), 366-367 (Dawson J), 384 (Toohey J), 395-397 (McHugh J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 195 (Dawson J). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 57-58 where Brennan J engages proportionality-style reasoning within the, admittedly, narrower ambit of an exception to a more general rule.

11. The Plaintiff then relies on *AMS v AIF* (***AMS***)[13] and *APLA Ltd v Legal Services Commissioner of New South Wales* (***APLA***)[14] to support the existence of the 'incidental' test. In *AMS*, the Court considered whether a parental order made under the *Family Court Act 1975* (WA) which had the *practical effect* of restricting the freedom of movement of one of the parents the subject of the order infringed s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth). In assessing the validity of the order, Gleeson CJ, McHugh and Gummow JJ (with whom Hayne J agreed on this issue) asked whether the burden on interstate intercourse was "reasonably required" to achieve the objects of the Act.[15]

10 12. Then in *APLA*, the Court considered whether regulations made under the *Legal Profession Act 1987* (NSW), which in its *legal operation* prohibited the advertising of certain legal services including advertising that occurred by way of interstate communications, infringed s 92 of the *Constitution*.[16] Consistent with *AMS*, the Court determined the validity of the regulations by asking "whether the impediment to such intercourse imposed by the regulations is greater than is reasonably required to achieve the object of the regulations".[17] Justice Gummow, with whom Hayne J agreed, said "[t]his approach should be accepted as the doctrine of the Court."[18]

13. The decisions in *AMS* and *APLA* concerned the validity of measures that burdened interstate intercourse in their legal operation or practical effect, but neither measure

20 imposed that burden by their terms selecting as a criterion of operation passage across a State border. Nevertheless, these decisions must be understood against the background of the earlier decisions in which proportionality-style reasoning was engaged. In the absence of binding authority to support a formalistic threshold test for measures that burden interstate intercourse in their terms, the general statements of principle in *AMS* and *APLA* should be regarded as endorsing a test of 'reasonably

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[13] (1999) 199 CLR 160.
[14] (2005) 224 CLR 322.
[15] *AMS v AIF* (1999) 199 CLR 160, 179 [45] (Gleeson CJ, McHugh and Gummow JJ), 233 [221] Hayne J.
[16] *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 353 [36] (Gleeson CJ and Heydon J).
[17] *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), citing *AMS v AIF* (1999) 199 CLR 160 at 178-180 [41]-[48] (Gleeson CJ, McHugh and Gummow JJ), 232-233 [221] (Hayne J).
[18] *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 393-394 [177] (Gummow J), 461 [420] (Hayne J).

required' (or, to use the language of the most recent s 92 jurisprudence, 'reasonably necessary'[19]) with respect to all burdens on interstate intercourse.

14. The application of a single test of 'reasonable necessity' for assessing the validity of measures that burden interstate intercourse not only accords with authority, it is also favoured by considerations of principle. It is consistent with this Court's emphasis on substance over mere form in the context of discerning the validity of measures concerning constitutional guarantees and limitations.[20] And it avoids the notorious shortcomings of a formalistic threshold test which, because of its dependency on the legal criteria by which a measure operates, tends to be both under-inclusive and
10 over-inclusive.[21]

15. A single test of 'reasonable necessity' also avoids the internal incongruity inherent in a formalistic threshold test, which would adopt a method for discerning legislative intention that is qualitatively different from that engaged in the residual test.[22] It enables questions of 'legitimacy' or 'compatibility' of means to be answered through the comprehensive "graduated inquiry" demanded by proportionality testing.[23] That in turn ensures consistency with this Court's approach to the implied freedom of political communication where a threshold test of 'legitimacy' or 'compatibility' of means has been explicitly rejected.[24]

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[19] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 477 [102]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 295 [136] (Kiefel J).

[20] *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 368 [85] (McHugh J), quoting *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559, 624 (Jacobs J); *AMS v AIF* (1999) 199 CLR 160, 175 [34] (Gleeson, McHugh and Gummow JJ); *Bachrach (HA) Pty Ltd v Queensland* (1998) 195 CLR 547, 561 [12] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ), 320 (Toohey J), 328 (McHugh J); *Austin v Commonwealth* (2003) 215 CLR 185, 249 [124], 257-258 [143], 265 [168] (Gaudron, Gummow and Hayne JJ).

[21] For example, under-inclusiveness can lead to adoption of "circuitous devices" which can be difficult to identify: *Cole v Whitfield* (1988) 165 CLR 360, 401 (the Court); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 575-576 (Mason J). Over-inclusiveness, on the other hand, creates a lacuna in legislative power to meet the exigencies of even the most extreme national crisis (see *Cole v Whitfield* (1988) 165 CLR 360, 406-407 (the Court)), thereby necessitating the creation of discrete exceptions to the general rule and leading to difficulties in identifying and monitoring the boundaries of those exceptions.

[22] Applying the threshold test, the 'true purpose' of a measure that burdens interstate intercourse *in its terms* by selecting as a criterion of operation the crossing of State borders would be discerned exclusively by reference to that formal legal operation. Applying the residual test, on the other hand, the 'true purpose' of a measure that does not burden interstate intercourse in its terms would only be discerned after assessing whether the burden is imposed in the proportionate pursuit of a legitimate object.

[23] *Brown v Tasmania* (2017) 261 CLR 328, 478 [480]-[481] (Gordon J).

[24] *Brown v Tasmania* (2017) 261 CLR 328, 363-364 [104] (Kiefel CJ, Bell and Keane JJ), 373-376 [156] (Gageler J), 478 [480]-[481] (Gordon J).

16. Further, a single test of 'reasonable necessity' ensures consonance with the test for assessing the validity of measures that burden interstate trade and commerce. In that context, validity does not depend on formal legal operation; rather, it is necessary to determine the character or 'true purpose' of an impugned measure as a matter of substance.[25] Laws that impose a discriminatory burden on interstate trade and commerce with protectionist effect are invalid unless the burden is 'reasonably necessary' for some other legitimate end.[26] The adoption of a single test of 'reasonable necessity' in the intercourse context would mean that the distinction between the protection afforded trade and commerce, on the one hand, and intercourse, on the
10 other, then resides in the *nature of the burden* from which those activities are protected, and not by the imposition of a wholly different test for validity, which sits uncomfortably with the undifferentiated language of s 92. In the case of both limbs of s 92, it is only if a measure that imposes a relevant burden on interstate trade, commerce or intercourse is not justified by reference to a legitimate object, that the measure can be seen *objectively*, and as a matter of *substance*, to possess the proscribed 'purpose' or 'warrant' ascription of the proscribed character.[27]

No 'intermediate' test

17. For the reasons above, there is no 'in terms' threshold test. Accordingly, the premise relied on by the Plaintiff to invoke an 'intermediate test' is flawed. In any event, even
20 if, contrary to the above submission, there is an 'in terms' threshold test for measures that burden interstate intercourse in their terms, the present case does not represent an 'intermediate' case that necessitates the establishment of a new test.

18. The Plaintiff's submission to that effect proceeds from the premise that political communication "is intrinsically interstate communication".[28] That premise is, with respect, incorrect. Although the authorities recognise that the discussion of matters at a State, Territory or local level might bear upon the choice that the people have to make in federal elections and in voting to amend the *Constitution*, and upon their

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[25] *Cole v Whitfield* (1988) 165 CLR 360, 400-403, 406-408 (the Court).
[26] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 477 [102]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 295 [136] (Kiefel J).
[27] *Cole v Whitfield* (1988) 165 CLR 360, 408 (the Court). See also *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 471-474 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
[28] PS [25(b)].

evaluation of the performance of federal Ministers and departments,[29] that does not amount to a recognition that such discussion is necessarily interstate communication. Much communication on those matters will be had within the confines of a single State.

19. The FITS Act burdens interstate intercourse, but like the impugned measures in *AMS* and *APLA*, it does not in its terms select as a criterion of its operation passage across a State border. Far from representing an "intermediate" case in respect of which there is no clear authority, the test for assessing the validity of the impugned provisions is established by *AMS* and *APLA*. That test assesses the validity of the impugned provisions of the FITS Act by asking whether the burden they impose on interstate intercourse is 'reasonably necessary' for the pursuit of a legitimate object.

The 'reasonable necessity' test is not materially different from the 'reasonably appropriate and adapted' test developed in implied freedom jurisprudence

20. The Plaintiff submits that "as a matter of logic" the test of 'reasonable necessity' for assessing whether a measure contravenes the *express* freedom of interstate intercourse in s 92 of the *Constitution* is not the same as, and indeed is "stricter" than, the test for assessing whether a measure contravenes the *implied* freedom of political communication.[30] The differences in the test are said to manifest in two ways. First, the range of permitted legislative purposes by which a burden on interstate intercourse can be justified is said to be narrower: only a *compelling* purpose is capable of justifying a burden on interstate intercourse. Second, the test of justification for a burden on interstate intercourse is said to be stricter: a burden is reasonably necessary to achieve a compelling statutory purpose if it is the *only* means by which the compelling purpose might *reasonably* be achieved.

21. The Plaintiff's reliance on the reasons of Gaudron J in *AMS* to support that proposition is, with respect, misplaced. While Gaudron J did urge a "more stringent" test with respect to the express guarantee contained in s 92 on account of the implied freedom needing to be read in the context of those provisions of the *Constitution* which contemplate legislation impacting on it in a way that the express guarantee did not, her

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[29] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571-572 (the Court); *Unions New South Wales v New South Wales* (2013) 252 CLR 530, 550 [25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[30] PS [26].

Honour explained the sense in which her Honour proposed that "more stringent" test as follows:[31]

> Thus I adhere to the view I expressed in *Cunliffe v The Commonwealth* that the test of infringement of the freedom of intercourse guaranteed by s 92 is as stated by Deane J in that case, namely, that 'a law which incidentally and non-discriminately affects interstate intercourse in the course of regulating some general activity, such as the carrying on of a profession, business or commercial activity, will not contravene s 92 if its incidental effect on interstate intercourse does not go beyond what is necessary or appropriate and adapted for the preservation of an ordered society or the protection or vindication of the legitimate claims of individuals in such a society.'

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22. It is evident that her Honour considered that the test for measures burdening interstate intercourse was "more stringent" in the sense that only measures furthering "the preservation of an ordered society" would be valid (if they could be demonstrated to be justified). Of course, a limitation of legislative objects that are 'legitimate' by reference to "the preservation of an ordered society" was rejected by a majority of this Court in *APLA*.[32] The adoption of a similar limitation of legitimate legislative objects only to those that are "compelling" is not supported by authority and should likewise be rejected.[33] Save for that distinction, it is plain that in addressing proportionality testing, her Honour did not advocate a difference in the intensity of the scrutiny with which that task is to be performed. Indeed, on the contrary, her Honour refers to necessity and appropriate and adapted testing interchangeably.

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23. The Plaintiff's posited stricter test is unaided by the result in *Betfair Pty Ltd v Western Australia* (***Betfair***).[34] There the majority held that a method of countering the relevant threat to the integrity of the racing industry "which is an alternative to that offered by prohibition of betting exchanges, must be effective but non-discriminatory regulation".[35] The majority went on to find that "the prohibitory State law is not proportionate: it is not appropriate and adapted to the propounded legislative object".[36] As such, "it cannot be found in this case that prohibition was *necessary in the stated*

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[31] *AMS v AIF* (1999) 199 CLR 160, 193 [101] (Gaudron J).

[32] *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 393-394 [177] (Gummow J), 461 [420] (Hayne J).

[33] In any event, on either the Plaintiff's (PS [34]) or the Commonwealth's (Commonwealth's Submissions (**CS**) [22]) description of the object of the FITS Act, the object would clearly qualify as a "compelling" purpose and be legitimate in the relevant sense.

[34] (2008) 234 CLR 418.

[35] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[36] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 480 [112] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

sense for the protection or preservation of the integrity of the racing industry".[37] The finding in *Betfair* simply recognises that, at an evidentiary level, there was no established need for prohibition, not that the test applicable to burdens on the express freedom is stricter.

24. Not only does the Plaintiff's contention find no authoritative support, the submission that the express limitation attracts a stricter test also runs counter to several important constitutional principles.

25. First, the implied freedom of political communication is an implication drawn from the structure of the *Constitution*. Once it is acknowledged that structural implications may only be drawn where "logically or practically necessary for the preservation of the integrity of that structure",[38] there is no room for supposing that the implied limitation necessarily supplies some lesser grade of constraint than the express limitation. So much was recognised by Hayne J in *Monis v The Queen* who observed that the fact the implied freedom of political communication is "rooted in implication" does not "make it some lesser or secondary form of principle".[39]

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26. Second, neither freedom is unqualified: both permit some burdens on the constitutionally protected activity.[40] The qualification to the express freedom of interstate intercourse exists because interstate intercourse is absolutely free from burdens that have the character or "true purpose" of burdening interstate intercourse.[41] It is only if a burden on interstate intercourse is not justified by reference to a legitimate object that a measure can be seen objectively, and as a matter of substance, to possess the proscribed purpose and to "warrant" ascription of the proscribed character.[42] The qualification to the implied freedom of political communication exists because the implication is limited to that which is necessary for the effective operation of the system of representative and responsible government provided for by the *Constitution*. The effective operation of that system entails not only informed electors choosing their representatives, but also the chosen representatives enacting laws to satisfy other legitimate ends.[43] Consequently, laws enacted to satisfy other legitimate ends may

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[37] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 480 [112] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) (emphasis added).

[38] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ).

[39] (2013) 249 CLR 92, 141 [104].

[40] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 (the Court).

[41] *Cole v Whitfield* (1988) 165 CLR 360, 408 (the Court); *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 471-472 Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[42] *Cole v Whitfield* (1988) 165 CLR 360, 408 (the Court). See also *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 471-474 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[43] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 (the Court).

burden political communication so long as the burden is justified by reference to such ends.[44] Put another way, the protection afforded political communication "is against an effective burden that is 'undue', meaning 'unjustified'".[45]

27. While the foundation for the qualification to the freedoms is different, the nature of the qualification is not. In both contexts, the qualification admits of burdens on the relevant constitutionally protected activity that are justified as a proportionate pursuit of some legitimate legislative end. It follows that in both contexts, the test for contravention of the freedom is functionally equivalent. Whatever label may be attributed to the tests, they should have an analogous analytical framework.

10 28. Finally, positing a stricter test than the "reasonably appropriate and adapted" test applied in the implied freedom context fails to recognise that the latter test accommodates the respective roles of Chapter III courts and the Parliament under the separation of powers effected by the *Constitution*. As Gleeson CJ explained in *Mulholland v Australian Electoral Commission*, "[f]or a court to describe a law as reasonably appropriate and adapted to a legitimate end is to use a formula which is intended, among other things, to express the limits between legitimate judicial scrutiny, and illegitimate judicial encroachment upon an area of legislative power."[46] Adapted to the Australian constitutional context, the "tools"[47] of suitability, necessity and adequacy of balance are apt to inform the Court's task by employing an assessment
20 of rationality to gauge the proportionality of the impugned measure in a manner consistent with the Court's supervisory role.[48] Given the test and tools applied in the implied freedom context follow the contours of the Court's supervisory function, no stricter test should be embraced without accommodating the limits of that function.

Application of the test needs to be attuned to the nature and extent of the burden on the relevant constitutionally protected activity

29. The adoption of the same method of testing does not deny that the application of the test needs to be attuned to the nature and extent of the burden on the relevant

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[44] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 (the Court).

[45] *Tajjour v New South Wales* (2014) 254 CLR 508, 580 [150] (Gageler J), citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 568-569, 575 (the Court).

[46] (2004) 220 CLR 181, 197 [33].

[47] *McCloy v New South Wales* (2015) 257 CLR 178, 213 [68] and 215 [72] (French CJ, Kiefel, Bell and Keane JJ).

[48] *McCloy v New South Wales* (2015) 257 CLR 178, 220 [91] (French CJ, Kiefel, Bell and Keane JJ). For examples of this being applied see: *Clubb v Edwards* (2019) 93 ALJR 448, 470 [70] (Kiefel CJ, Bell and Keane JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 213 [68] (French CJ, Kiefel, Bell and Keane JJ).

constitutionally protected activity. That is so because proportionality testing assesses whether the interference with the relevant constitutionally protected activity is rationally explicable in the face of its constitutional protection.[49]

30. The need to be attuned to the nature and extent of the burden on the relevant constitutionally protected activity is particularly evident in the tools of 'necessity' and 'adequacy of balance'. The former is a tool for assessing whether the means implemented by the measure includes aspects that impose a burden on the relevant constitutionally protected activity, with no countervailing benefit. It is concerned with identifying obvious and compelling reasonably practicable alternative means that
10 would advance the measure's purposes to the same extent but by imposing a lesser burden on the relevant constitutionally protected activity. The latter is a tool for assessing whether the balance struck by the measure is so "grossly disproportionate"[50] or "manifestly excessive"[51] by reference to the demands of the legislative purpose that it "manifest[s] irrationality".[52] It is concerned to identify whether the burden on the relevant constitutionally protected activity represents an irrational attempt to balance the constitutional freedom with the relevant legislative purpose.

31. The attention due to the nature and extent of the burden on the relevant constitutionally protected activity is not diminished simply because an impugned law burdens two constitutionally protected activities. The freedom of interstate intercourse is concerned
20 with the burden on communications insofar as they are interstate communications, whereas the implied freedom of political communication is concerned with the burden on communications insofar as they are of a political or governmental nature. It follows that the nature and extent of the burdens on the two different constitutionally protected activities is not necessarily co-extensive. In assessing the validity of a measure against a particular freedom the distinction in the burdens must be maintained.

32. In the present case, the burden on one constitutionally protected activity (interstate intercourse) is a function of the burden on another constitutionally protected activity (political communication). If, for the reasons given by the Commonwealth, the burden on political communication effected by the FITS Act is modest,[53] the burden on

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49 *Clubb v Edwards* (2019) 93 ALJR 448, 470 [70] (Kiefel CJ, Bell and Keane JJ).

50 *Brown v Tasmania* (2017) 261 CLR 328, 423 [290], 425 [295] (Nettle J); *Clubb v Edwards* (2019) 93 ALJR 448, 506-507 [266], 508-509 [272], 513 [292] (Nettle J).

51 *Clubb v Edwards* (2019) 93 ALJR 448, 470 [69] (Kiefel CJ, Bell and Keane JJ), 508 [270], 508-509 [272] (Nettle J); see also 552 [497] (Edelman J).

52 *Clubb v Edwards* (2019) 93 ALJR 448, 470 [66] (Kiefel CJ, Bell and Keane JJ).

53 CS [18]-[20].

interstate intercourse is even more so. For the reasons given at para 18 above, only a subset of the burdened communications will be interstate communications and accordingly the impugned provisions of the FITS Act burden interstate intercourse to a lesser extent than they burden political communication. The burden on interstate intercourse is also less direct in nature given the impugned provisions do not discriminate against cross-border communications vis-à-vis intra-state communications.

33. In such circumstances, there may be little utility in undertaking a separate analysis of the validity of the impugned provisions under the intercourse limb of s 92. As the authorities bear out, it would be a rare case that such a law would permissibly burden political communication yet impermissibly burden interstate intercourse.[54]

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Part V: TIME ESTIMATE

34. It is estimated that 20 minutes will be required for the presentation of South Australia's oral argument.

Dated 4 November 2020

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[54] See CS [40] and the authorities cited therein.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

LIBERTYWORKS INC
Plaintiff

10 and

COMMONWEALTH OF AUSTRALIA
Defendant

ANNEXURE
PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
20 **(INTERVENING)**

Number	**Description**	**Date in Force**	**Provision**
Constitutional Provisions			
1	*Commonwealth Constitution*		S 92
Statutes			
2	*Family Court Act 1975* (WA)	1 December 1975	
3	*Foreign Influence Transparency Scheme Act 2018* Cth)	Current	
4	*Judiciary Act 1903* (Cth)	25 August 1903	S 78A
5	*Northern Territory (Self-Government) Act 1978* (Cth)	22 June 1978	