



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S10/2020
File Title: LibertyWorks Inc v. Commonwealth of Australia
Registry: Sydney
Document filed: Form 27F - Outline of oral argument
Filing party: Defendant
Date filed: 02 Mar 2021

Important Information

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

LIBERTYWORKS INC

Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA

Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANT

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

I. Outline of the FITS Act (CS [8]-[14])

2. The *Foreign Influence Transparency Scheme Act 2018* (**Act**) was enacted as part of a package of laws directed to one overarching purpose: to “counter the threat of foreign states exerting improper influence over our system of government and our political landscape” (**SCB V2, 896.2**). That threat was discerned from intelligence assessments and is consistent with international experience. The other laws in the legislative package are the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) and the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth). Those laws reflect a calibrated approach to different manifestations of the identified threat.
3. The Act provides a scheme for the registration of persons who undertake certain activities on behalf of foreign principals (**V1, T1**): ss 10-13A, 16-18, 21 (registration obligations). It does not criminalise political communication, but knowing or reckless failure to register when required to do so (s 57).

II. Scope of the plaintiff’s challenge (PS [18]; CS [4], [14])

4. The plaintiff’s Further Amended Statement of Claim has abandoned the s 92 and head of power challenges. It has also confined the implied freedom challenge to “communications activities”, which we understand to be a challenge to the registration obligations under ss 16 and 18 insofar as they arise from s 21 (Item 3 of the Table). In those circumstances, the Court need not address other kinds of registrable activities. Nor is there any challenge to s 38 (**PS [18]**, cf. **PS [12]**).
5. It is common ground that the Act, if valid, imposes registration obligations on the plaintiff, which undertakes communications activities on behalf of the ACU, a foreign political organisation: **SCB V1, 51 [9]**; **PS [19]**.
6. In light of the above, substantial parts of the Special Case are not relevant to any live dispute between the parties: see **SCB V1, 51 [10]**, **52 [12]**, **56-57 [22]-[24]**, **62-63 [47]-[57]**.

III. The Implied Freedom of Political Communication (CS [15]-[35])

Effective burden (CS [16]-[20])

7. The Act effectively burdens political communication. However, that burden is modest. There is no burden on Australians or foreign principals communicating solely on their own behalf. Further, even when foreign principals communicate through an intermediary, the Act does not purport to prohibit or restrict that communication, but only imposes registration requirements that are not onerous.
8. Contrary to **PS [32(b)-(c)]**, the Act does not discriminate against particular *viewpoints* – it regulates a particular *mode* of communication, regardless of *content* or *viewpoint*. There is therefore no foundation for the submission that “stricter scrutiny” is required (**PS [8(b)]**), and no occasion to consider when (if ever) that is a useful concept in Australian law.
9. Even if the Act does involve differential treatment based on the *source* of the communication, it legitimately preferences participants in the Australian system of representative and responsible government over those who do not have a share in Australia’s political sovereignty (*McCloy* (2015) 257 CLR 178 at [45] (**V5, T19**); note also *Bluman v F.E.C.*, 800 F Supp 2d 281 at 288 [4, 5] (**V7, T28**)). It therefore is not “discriminatory”, there being a justification for any differential treatment.

Legitimate purpose (CS [21]-[28])

10. The purpose of the Act is to minimise the risk of foreign principals exerting improper influence upon the integrity of Australia’s political or election processes, as has occurred in other countries: **SCB V1, 53-55 [15]-[19]** (and **SCB V2, 613-620 (US); 690-699, 747-752 (UK); 837-840, 843-845, 855-857 (NZ)**); Second Reading Speech (**SCB V2, 896, 898-899**); Revised Explanatory Memorandum at [3]-[5], [10], [15]-[16], [23] (**V8, T37**). That purpose is achieved through the use of mechanisms that are intended to promote transparency, but transparency in and of itself is not the purpose of the Act (cf. **PS [34], [36]; PR [8]**).
11. The identified purpose is not only compatible with representative and responsible government, but protects that system from exogenous threat: *McCloy* (2015) 257 CLR 178 at [84] (**V5, T19**).

Justification and proportionality testing (CS [29]-[35])

12. The Court is not required to assess the justification of the law by reference to the particular circumstances of the plaintiff: *Unions NSW* (2013) 252 CLR 530 at [36] (**V6, T27**); cf. **PS [42]-[44]**; **PR [7]**.
13. **Suitability:** The plaintiff does not appear to contest that there is a rational connection between the purpose of the Act and the means chosen to achieve that purpose (**PR [3]**). By its requirements to register certain relationships involving foreign principals, and its imposition of certain responsibilities on registered persons, the Act minimises the risk of improper influence being exerted by foreign principals upon the integrity of Australia's political or election processes: *Banerji* (2019) 93 ALJR 900 at [33] (**V7, T31**).
14. **Necessity:** None of the purported alternatives identified by the plaintiff is an "obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom": *Banerji* (2019) 93 ALJR 900 at [35] (**V7, T31**). In contrast to the Act's public register, the first and second purported alternatives, which focus on source disclosure (**PS [46], [50]**; **PR [4(b)(i)]**), would not render the influence transparent to anyone other than the recipient of the communication. Only if the Act's register made no contribution to achieving its purpose could it be said that these purported alternatives achieve the Act's purpose to the same extent. The third purported alternative is irremediably vague, operates by reference to a criterion of presumptive harm (**PS [50]**), and thus envisions an entirely different legislative scheme. The fourth (**PS [51]**) would not achieve the purpose of preventing influence from becoming interference, and again envisions a different scheme. The plaintiff's arguments are like those advanced and rejected in *McCloy* (2015) 257 CLR 178 at [59], [61]-[62], [331], [361] (**V5, T19**); see also *Tajjour* (2014) 254 CLR 508 at [115] (**V6, T26**).
15. **Adequacy in its balance:** The plaintiff's submissions balance the wrong thing: **PS [55]**. The Act is adequate in its balance, because the purpose it seeks to achieve is not "manifestly outweighed by its adverse effect on the implied freedom" (*Banerji* (2019) 93 ALJR 900 at [38] (**V7, T31**)). To the contrary, the purpose is of significant importance, and the burden on the implied freedom is modest.

Date: 2 March 2021



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