



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 01 Mar 2021 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: S10/2020
File Title: LibertyWorks Inc v. Commonwealth of Australia
Registry: Sydney
Document filed: Form 27F - Outline of oral argument
Filing party: Interveners
Date filed: 01 Mar 2021

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 OFFICE OF THE REGISTRY

BETWEEN:

LIBERTYWORKS INC
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

**OUTLINE OF ORAL ARGUMENT 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.

PART II:

2. The challenged provisions of the Foreign Influence Transparency Scheme Act 2018 (Cth) (“**FITS Act**”) do not contravene the implied freedom. The provisions in question do not purport to regulate communication at all with the result that the extent of the effective burden imposed is slight, a factor that is relevant to the application of the 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 Written Submissions (“**WS**”) at [7] and [25]-[27].
3. The relevance of the extent of the burden in question was noted by the plurality 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.

4. The purpose of the FITS Act is to address the risks associated with undisclosed influence on political and governmental processes. The critical importance of that purpose is reflected in complementary State legislation, including in New South Wales, the Lobbying of Government Officials Act 2011 (NSW) (“**LOGO Act**”). The LOGO Act creates a Lobbyists Register (ss 8 and 9) and requires that third-party lobbyists comply with a code of conduct and obligations of disclosure contained in regulations made under the LOGO Act: Sch 1 of the Government officials (Lobbyists Code of Conduct) Regulation 2014 (NSW). See WS [28]-[33]. The important purpose served by legislation such as the FITS Act and the LOGO Act, considered against the slight restrictions the legislation imposes, supports the conclusion that the FITS Act is “adequate in its balance ... between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom”: McCloy at 195 [2] per French CJ, Kiefel, Bell and Keane JJ.

Dated: 2 March 2021



M G Sexton SC SG
Ph: (02) 8688 5502
Michael.Sexton@justice.nsw.gov.au

Scott Robertson
Ph: (02) 8227 4400
chambers@scottrobertson.com.au