HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S10 of 2020

BETWEEN:

LibertyWorks Inc
Plaintiff

and

The Commonwealth of Australia
Defendant

PLAINTIFF'S REPLY SUBMISSIONS

PART I: CERTIFICATION

1. The plaintiff certifies that this reply is in a form suitable for publication on the internet.

PART II: ARGUMENT

2. In the US and across Australian jurisdictions, there are statutes regulating foreign influence on domestic political lobbying and/or political donations.[1] It is common ground that the legislative purpose of regulating such conduct is legitimate and serious. The FITS Act also regulates such conduct.[2] Unlike those other statutes, however, the FITS Act goes further, and regulates foreign influence on political speech.[3] It is common ground that the additional legislative purpose of regulating such further conduct is (also) legitimate.[4] Alternatively put, it is compatible with the Constitution.[5]

[1] See PS[3]a) at footnote 3 for the US statutory analogue, and items 10 to 13 in the Schedule of the defendant's submissions (page 21) for a list of other Australian statutes.

[2] See, for example, sections 10 and 21 of the FITS Act.

[3] See, for example, the fourth paragraph of section 4 of the FITS Act. For this reason, references to those other statutory regimes are irrelevant to this case: see DS[18] and footnote 21, and, say, NSW[29]-[34]

[4] The references in DS[28] at footnote 45 to US constitutional cases ignores the fact that the US's analogue statute does not include the Commonwealth's innovation of a requirement to register 'communication activities' (PS[3], footnote 3) – it follows that references to the US cases therein cited are irrelevant to this case. The Canadian case cited in that same footnote, not being about *foreign influenced* political communication, is also irrelevant to this case.

[5] For this reason, reference at D[28] to s 44 of the Constitution is irrelevant to this case.

Filed on behalf of the Plaintiff
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Date: 11 November 2020

3. What is not common ground is (primarily) whether the means adopted in the FITS Act to achieve that additional purpose can be considered necessary (the second McCloy limb) or strictly proportionate (the third McCloy limb).

4. There are two means adopted in the FITS Act to achieve that additional purpose:

   a) The first means involves using that means preferred in all jurisdictions for regulating foreign influence on lobbying and donations; namely, a public register. The FITS Act grafts 'communication activities' onto registration obligations:[6] PS[6]-[7]

   b) The second means involves mandating source-revelation at the time of communication: PS[12]. The second means is consistent with a long constitutionally-accepted, statutory tradition in Australia: PS[40], [46]

      i) Intuitively, and given absent contrary evidence from the defendant, the second means would appear *ex facie* to be a more efficient way of achieving the FITS Act's purpose, with considerably less detriment to the freedom. Note the assertion: the second means is both more effective and less detrimental.[7] That is the definition of a 'compelling' alternative, and it is found in the FITS Act itself.[8]

      ii) The onus is on the defendant to justify the greater effectiveness of the registration requirement in relation to communication activities (something it has not done). For example, there is no affidavit evidence on the 'page views' of the public website that defendant places such importance on,[9]

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[6] It is mere word-games to state, as the defendant does at DS[11] (or at, say, NSW [7]-[8]), that the FITS Act does not regulate, or does not criminalise, or does not regulate 'in terms', political communication, when by its very terms (and hence legal operation) it pre-conditions the exercise of the freedom on mandatory registration (and on continuing registration), backed by criminal sanction. Regardless, it plainly effects in practice such 'regulation'.

[7] This is so for both measures (effective and detrimental) in the sense given in the description cited at DS[31] ("quantitatively, qualitatively, and probability-wise")

[8] The defendant's observation at DS[32] (regarding the Rules) by-passes or seeks to obfuscate the fact that this case concerns a challenge to the FITS Act's operation in relation to 'communication activities', not in relation to the FITS Act's operation on any other of the 'certain activities' (to take up the language of s 3 of the FITS Act), such as lobbying or making donations.

[9] See DS[32] ("[t]he proposal ignores important work that the Act does in rendering foreign influence transparent to those who are *not themselves recipients* of the communication") [original emphasis]. Not only does that statement ignore the FITS Act's stated main purpose for updating information (see, for example, the third paragraph of ss 4 ("ensuring that the Secretary . . . ") and s 43 ("may") of the FITS

including evidence on the percentage of such views that are not either government or registrants, and expert comparative evidence of pageview popularity.[10]

iii) At P[50] the plaintiff suggested, as a compelling alternative, inclusion of compliance with the source-disclosure regime in s 38 of the FITS Act in the list of exemptions contained in ss 24-30 of the FITS Act. At DS[32] the defendant dismisses that suggestion, despite having previously described at DS[10.4] the primary purpose of the exemptions as being one where transparency is already achieved ("overt", "apparent", "disclosed").

5. Contrary to NSW[28], the additional purpose of regulating foreign influence on political speech was characterised as 'relatively mild' in PS[39], not from the perspective of the uncontested issue of compatibility (although it was raised in a section containing that heading), but from the perspective of the contested issue of strict proportionality – 'mild' was there used in a sense 'relative' to the purpose of ensuring transparency of foreign influence on political lobbying and donations.

6. It was also used in a sense 'relative' to the constitutional value of freedom of political communication - as indicated by the use of the word 'chilling' in PS[39].[11] Strict proportionality requires the Court to balance statutory purpose against the extent of the burden (a proxy for the constitutionally protected value): PS[54]; *Banerji* at [38]. The latter value is definitionally important – that is why that value is enshrined in the Constitution.

a) The reference to *Brown* at [128], when provided in full ("[n]o general rule should be prescribed"), makes the contrary point to that sought to be made in DS[18] and NSW[26]-[27] concerning the extent of the burden in strict proportionality.

b) The fact that a statutory purpose is 'mild' when compared to other statutory purposes (in relation to alternative means contained in the same statue) is

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Act), that entire paragraph elides the distinction – which the FITS Act itself maintains - between 'lobbying activity' and 'communication activity'.

[10] Footnote 55 at DS[32] concerning which party has the burden is plainly incorrect, both as a proposition of law and as a paraphrase or description of Nettle J's statement therein cited.

[11] Frederick Schauer, 'Fear, Risk and the First Amendment: Unravelling the "Chilling Effect"' (1978) 58 *Boston University Law Review* 685

unavoidably relevant to the evaluative exercise involved in strict proportionality or 'balancing'.

7. The defendant's invitation to the Court at DS[30] to disregard the FITS Act in its specific application to the plaintiff would be contrary to judicial method.[12] The plaintiff's circumstances are in evidence before the Court.[13] Those circumstances do not determine, yet can inform the Court's assessment of the 'balance' achieved by the FITS Act in regulating communication activities.

   a) Contra DS[35] or NSW[27], for a political non-profit organisation like the plaintiff, dedicated to small-state libertarianism, a mandating of state registration may well be prohibitory.[14]

   b) The plaintiff's financial position and minimal, unpaid staffing levels are in evidence before the Court, yet the defendant (DS[35]) and interveners (say, NSW[27]) state that the registration and post-registration requirements imposed by the FITS Act are 'modest'.[15]

8. The FITS Act itself states what its purpose is. The words of the statute are the starting point in determining purpose. While some generality might be permitted in the exercise of characterising purpose (depending on the statute under consideration), the defendants proffer at DS[22] a purported purpose unmoored from the express language chosen by the legislature itself. While the text of the statute is not determinative, neither can it be by-passed, especially in a case such as this where the secondary materials are in accord with FITS Act's own stated objective. The recitation of *in terrorum* quotations from security agency reports at DS[24] does not assist, given that the terms and structure of the FITS Act reveal the legislature's chosen compromise after having access to such reports. Similarly, the Prime Minister's statement cited in DS[25] does not assist, as it is confined to an objective of transparency

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[12] A submission to be contrasted with the defendant's earlier submission at DS[14] that a challenge to over-reaching 'definitions' in the FITS Act *must* be confined to the plaintiff's circumstances, a misconceived proposition owing to a mis-reading of cases cited therein in support (in footnote [14]).

[13] At DS[4] the defendant attempts to create contention between the parties where in fact there is admitted and accepted common ground.

[14] It is a 'modest' burden in the same broad sense as would be a mandating of a pacifist to join the army (conscription), or an environmentalist to buy shares in a coal mining company (compulsory superannuation).

[15] See also footnote 12 in the defendant's submissions, detailing the monetary size of fines in the FITS Act.

("disclosure").[16] Indeed, the examples given in DS[25]-[27] rather more support the plaintiff's interpretation of the purpose of the FITS Act, than the defendant's purported purpose.[17]

Intercourse limb

9. The defendant's 'primary submission' at DS[37] & [41] (see also NSW[18]) of 'coherence' is an invitation to ignore differing purposes and constitutional textual contexts. The issue perhaps arises because the test in *McCloy* is, on one view, seen to be more 'stringent' (for a plaintiff) than the test in *APLA* or *Betfair No 1* ("reasonably required").[18] Since the implied freedom and the intercourse limb have merely overlapping - not coterminous - operation,[19] it may be that, if the tests are indeed different, both tests apply to the same facts.[20] A little case law, and some academic literature, perhaps support the application of different tests.[21] Regardless, as the plaintiff's primary submissions posited,[22] the impugned provisions fail to satisfy the (possibly) more stringent *McCloy* test for validity, and so would also fail to satisfy the *APLA*/*Betfair No 1* test of validity.

Date: 11 November 2020

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[16] That statement was in support of the EFI Bill, not the FITS Bill (one example of the defendant in its submissions conflating the purposes of different Bills simultaneously introduced into Parliament).

[17] See the repetition of words in the quotations referenced in those paragraphs, words like 'open', 'concealment', 'sunlight', 'undisclosed', 'concealed', 'transparency', and so on.

[18] See Kiefel CJ's observations at lines 5950-5952 in *Palmer & Anor v The State of Western Australia & Anor* [2020] HCATrans 179

[19] DS[38] (quoting Mason J: 's 92 was "not intended to deal exhaustively with the right of Australians to communicate with each other"')

[20] Contra DS[38], this Court has previously dealt with overlapping operations which possibly render a provision redundant: *New South Wales v Commonwealth* [2006] HCA 52; 229 CLR 1at [183]ff

[21] There exists both in the case law and in the academic literature some support for different tests: Gaudron J in *AMS* at [121]; Chapters 6-7 of Shipra, *Proportionality in Australian Constitutional Law* (2019) The Federation Press.

[22] See PS[46]