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

and

THE COMMONWEALTH OF AUSTRALIA

Defendant

DEFENDANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: CONCISE STATEMENT OF ISSUES

2. The issues are reflected in the questions of law stated by the parties (SCB 63-64 [60]).

PART III: SECTION 78B NOTICES AND INTERVENTION

10 3. The plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth). The defendant does not consider that any further notice is required.

PART IV: MATERIAL FACTS

4. The material facts are agreed and set out in the special case (SCB 50-64). The plaintiff's submissions (**PS**) impermissibly attempt to supplement or qualify the agreed facts, by seeking to downplay the extent of the plaintiff's relationship with the American
20 Conservative Union (**ACU**), apparently for the purpose of contending that the *Foreign Influence Transparency Scheme Act 2018* (Cth) (**the Act**) is overbroad in its coverage because there is a "total disconnect" between the criterion of acting "on behalf of a foreign principal" and "the true connotation" of the plaintiff's activities (PS [9]):

4.1. That attempt should be rejected. The parties have agreed (and, indeed, the plaintiff pleaded: SCB 30 [11]) that the plaintiff has registration obligations under the Act. Those obligations exist because the plaintiff undertakes registrable activities on
30 behalf of the ACU, a foreign principal, in the form of holding annual CPAC Australia conferences (SCB 51 [9]; PS [19(b)]).

4.2. The ACU was established "for the purpose of influencing politics and politicians in the United States of America … from a conservative/classical liberal perspective", and it "exists primarily to pursue political objectives" (SCB 55-56 [20]). The ACU hosts a multi-day political conference in the USA each year called
40 the Conservative Political Action Conference (**CPAC**) (SCB 57 [26]). CPAC is "the largest and most influential gathering of conservatives in the world", and frequently features US Presidents, Vice Presidents and other politicians (SCB 58 [28] and [30]).

4.3. The plaintiff now seeks to characterise its relationship with the ACU in terms that the ACU "supported and attended the Australian conference" (PS [17(a)]). However, the facts agreed between the parties go significantly further:

4.3.1. The plaintiff and the ACU reached an oral agreement as to the conduct of CPAC Australia, by which, amongst other things, the ACU would put the plaintiff in contact with ACU-affiliated speakers who would be willing to speak at the event and support the plaintiff (which the ACU in fact did), and the ACU would assist the plaintiff to "get the event up and running and make it a success" (SCB 59-61 [35.2]-[35.3] and [45]).

4.3.2. The ACU was advertised as the "Think Tank Host Partners" of the CPAC Australia event (SCB 61 [41]). The Chairman and the Executive Director of the ACU attended the CPAC Australia event and were described in the conference speaker schedule as "hosts" (SCB 57 [25] and 61 [42]).

4.3.3. Even if there was little or no "financial aspect of the arrangement between the ACU and the plaintiff" (PS [43]), that is immaterial, for the Act provides that consideration is irrelevant to the meaning of "on behalf of" (s 11(2)). In any case, the special case is not so categorical as to any financial contribution of the ACU, for it states only that payment of the overseas-based speakers' costs "is not within the knowledge of the parties" (SCB 61-62 [46]).

PARTS V AND VI: ARGUMENT

A. Summary

5. The plaintiff contends that the Act is partially invalid,[1] either because it is contrary to the freedom of interstate intercourse referred to in s 92 of the Constitution or because it infringes the implied freedom of political communication. Those submissions are most conveniently addressed in the opposite order to that in which the plaintiff seeks to present them, and should be rejected for the following reasons:

[1] The first and second questions of law stated for the opinion of the Full Court ask whether the Act is "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 or is contrary to the freedom of interstate intercourse (SCB 63-64 [60(1)-(2)]). However, the plaintiff now seeks to challenge only particular provisions of the Act: PS [18], as addressed further in [14] below.

5.1. As to the implied freedom, the Act applies only to a limited subset of communication and, even when it does apply, it does not purport to prohibit, or even restrict, such communication. It therefore imposes at most a modest burden on political communication. It does so in order to minimise the risk of foreign principals exerting improper influence upon the integrity of Australia's political or election processes. That purpose is not only compatible with the system of representative and responsible government, it serves to enhance it. As the burden on political communication is reasonably appropriate and adapted to that legitimate purpose, the Act does not infringe the implied freedom of political communication.

5.2. It is not necessary to consider the operation of the intercourse limb of s 92, which can have no greater invalidating effect than the implied freedom in cases where their operation overlaps. Alternatively, the Act only incidentally burdens interstate intercourse, and that burden is no greater than is reasonably required to achieve the purpose of the Act, with the result that the Act is consistent with s 92.

B. Overview of the Act and Scope of the Plaintiff's Challenge

6. In December 2017, the government introduced three Bills into Parliament which were together intended to "counter the threat of foreign states exerting improper influence over our system of government and our political landscape".[2] The Bills enacted a Counter Foreign Interference Strategy (**Strategy**) built on "the four pillars of sunlight, enforcement, deterrence and capability".[3] The first Bill was the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (Cth), which, amongst other things, "restrict[ed] foreign influence on Australian political actors, including campaigners, through restrictions on foreign donations".[4] The second Bill was the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (Cth) (**EFI Bill**), which introduced new foreign interference and espionage offences, and strengthened some existing offences against the government.[5] The third Bill was the *Foreign Influence Transparency Scheme Bill 2017* (Cth) (**FITS Bill**). That

2 Hansard, Commonwealth, House of Representatives, 7 December 2017 at 13145 (Annexure SC-13, SCB 896).
3 Hansard, Commonwealth, House of Representatives, 7 December 2017 at 13145 (Annexure SC-13, SCB 896).
4 Hansard, Commonwealth, Senate, 7 December 2017 at 10102.
5 Hansard, Commonwealth, House of Representatives, 7 December 2017 at 13148 (Annexure SC-13, SCB 899); Hansard, Commonwealth, House of Representatives, 26 June 2018 at 6351.

Bill focused upon the "sunlight" aspect of the Strategy, by requiring that a person or entity engaging "with the Australian political landscape on behalf of a foreign state or principal … register accordingly", so as to "give the Australian public and decision-makers proper visibility when foreign states or individuals may be seeking to influence Australia's political processes and public debates".[6]

7. Both the EFI Bill and the FITS Bill were amended in the House in June 2018 following consideration by the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**).[7] Those amendments did not relevantly alter the purpose of the FITS Bill.

8. As enacted, the Act provides "a scheme for the registration of persons who undertake certain activities on behalf of foreign governments and other foreign principals" (s 3; PS [5]) and imposes certain responsibilities on registered persons.

9. Section 18 of the Act identifies the persons who are liable to register. It provides that a person who either undertakes an activity "on behalf of" a foreign principal that is registrable in relation to the foreign principal (sub-s (1)(a)), or who enters a registrable arrangement with a foreign principal (sub-s (1)(b)), "becomes liable" to register in relation to the foreign principal. By s 16, a person who has become liable to register must apply to the Secretary for registration in relation to the foreign principal. Under ss 42-43, the Secretary is obliged to maintain a register of persons registered under the Act and make publicly available certain information in relation to such persons.

10. The Act gives further content to the terms "foreign principal", "on behalf of", "registrable activity" and "registrable arrangement".

    10.1. "Foreign principal" is defined in s 10 of the Act to mean a "foreign government", a "foreign government related entity", a "foreign political organisation" and a "foreign government related individual". Each of those terms is further defined in s 10. Relevantly, a "foreign political organisation" includes "a foreign organisation that exists primarily to pursue political objectives".

    10.2. Section 11 identifies when a person undertakes an activity "on behalf of" such a

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6 Hansard, Commonwealth, House of Representatives, 7 December 2017 at 13147 (Annexure SC-13, SCB 898).

7 PJCIS, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (June 2018) and PJCIS, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (June 2018) (Annexure SC-06, SCB 244-598). See also Hansard, Commonwealth, House of Representatives, 26 June 2018 at 6351.

foreign principal, which includes where the person undertakes the activity "under an arrangement with the foreign principal" (sub-s (1)(a)(i)).

10.3. The term "registrable activity" is given content in Part 2, Div 3 of the Act:[8]

10.3.1. An activity is registrable in respect of any kind of "foreign principal" if it is "general political lobbying", "communications activity" or "disbursement activity" undertaken in Australia, for the "purpose of political or governmental influence".[9] "General political lobbying" and "disbursement activity" are defined in s 10, and "communications activity" is defined in s 13 (relevantly to include, subject to exceptions, where a person "communicates or distributes information or material to the public or a section of the public"). The circumstances in which an activity is undertaken for the "purpose of political or governmental influence" are set out in s 12.[10]

10.3.2. Sections 22 and 23 set out further circumstances in which an activity will be registrable by reason of the position (previously) held by the person undertaking the activity.

10.4. An activity is not registrable if the person is exempt from registering in relation to the activity under Part 2, Div 4.[11] The exemptions principally relate to circumstances where it is seen to be inappropriate to require registration (e.g. in relation to: providing legal advice or representation; undertaking Parliamentary, diplomatic, consular or similar activities; or engaging in religious activities in good faith) or where a person's link to the foreign principal is necessarily overt (e.g. in relation to foreign government employees, and particular activities where the identity of the foreign principal and the person's relationship to the foreign principal are apparent or disclosed).

10.5. The term "registrable arrangement" is defined in s 13A(1) to mean, in short compass, an arrangement between a person and a foreign principal for the person to undertake a registrable activity on behalf of the foreign principal.

8 The definition of "registrable activity" in s 10 of the Act directs attention to ss 20-23 of the Act.
9 Section 21, Table (Items 2-4) of the Act.
10 Section 14 provides further content to the concept of "purpose".
11 Sections 20(b), 21(1)(c), 22(d) and 23(d) of the Act. The exemptions themselves are found in ss 24-30.

11. Section 57 provides for certain registration-related offences. The precise scope of the offences is important to a proper appreciation of the burden imposed by the Act. The Act does *not* simply criminalise *communication* in the absence of registration (cf. PS [11]). Rather, it criminalises knowingly or recklessly failing to register or renew registration, including in circumstances where a registrable activity (such as communication) is undertaken. The distinction is important in assessing the mental elements of the offences: criminal sanction attaches to the failure to register, not the act of communicating; undertaking a registrable activity (such as communication activity on behalf of a foreign principal) is at most one physical element of the offence.

12. Once a person has registered, they have the responsibilities set out in Part 3. They include reporting material changes in circumstances and disbursement activities (ss 34-35); reviewing the currency of information and reporting registrable activities during voting periods (ss 36-37); making certain disclosures when undertaking communications activity (s 38); renewing registration (s 39) and keeping certain records (s 40). Failure to fulfil those responsibilities may constitute an offence, punishable by a fine (s 58).[12]

13. Under s 45, the Secretary may, by written notice, require a person to provide information or documents that may satisfy the Secretary as to whether the person is liable to register in relation to a foreign principal. Failure to comply with such a notice may, in some circumstances, constitute an offence (s 59).

14. Finally, at PS [18], the plaintiff identifies the specific provisions of the Act which it purports to challenge, including several definitional provisions (PS [18(a)]). Definitional provisions do not have operative effect, but rather indicate how substantive provisions of the Act are to be construed.[13] They can therefore only be challenged to the extent that they contribute to a constitutional defect in substantive provisions; even then, they may only be challenged to the extent that they are relevant to the application of the Act to the plaintiff.[14] The purported challenge to the definitional provisions should therefore fail.

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12 Each of the offences referred to in s 58 of the Act carries a maximum penalty of 60 penalty units. Pursuant to s 4AA(1) and (3) of the *Crimes Act 1914* (Cth), and the Notice of Indexation of the Penalty Unit Amount provided by the Attorney-General on 14 May 2020, the current value of a penalty unit is $222. Accordingly, the current maximum penalty for each of the offences referred to in s 58 of the Act is $13,320.

13 *Kelly v The Queen* (2004) 218 CLR 216 at [103] (McHugh J).

14 See, eg, *Knight v Victoria* (2017) 261 CLR 306 at [32]-[33] (the Court); *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448 (***Clubb***) at [32]-[36] (Kiefel CJ, Bell and Keane JJ), [135]-[138] (Gageler J), [230] (Nettle J) and [329] (Gordon J).

C. The Implied Freedom of Political Communication

15. The implied freedom of political communication is a qualified limitation on legislative power, implied from ss 7, 24 and related sections of the Constitution, to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors".[15] The communications protected by that freedom are "information, ideas and arguments which are necessary to make an informed judgment as to how [the Australian people] have been governed and as to what policies are in the interests of themselves, their communities and the nation".[16] Following *McCloy* and *Brown v Tasmania*,[17] whether a particular legislative restriction infringes the implied freedom will be answered by reference to the three-part test identified in PS [29].

Effective burden

16. The first question – whether the law effectively burdens the implied freedom in its terms, operation or effect – requires consideration of how the law "affects the freedom generally".[18] A "law which prohibits or limits political communication to any extent will generally be found to impose an effective burden on the implied freedom of political communication".[19]

17. The Commonwealth accepts that the Act effectively burdens political communication. As explained in [9]-[10] above, the Act imposes registration obligations on persons who undertake particular types of activities (including communications activity) on behalf of foreign principals for the purpose of political or governmental influence. Those activities are obviously capable of involving communication on political or governmental matters. Further, once persons have so registered, they are subject to the responsibilities set out in Part 3 of the Act, as explained in [12] above. In those circumstances, the Act places some burden on political communication, because certain persons cannot lawfully engage in certain types of political communication if they knowingly or recklessly fail to register (registration then resulting in certain other burdens).

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15 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 560 (the Court); see also *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at [101] (Gageler J).

16 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 231 (McHugh J).

17 (2017) 261 CLR 328 (***Brown***).

18 *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions No 1***) at [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

19 *Comcare v Banerji* (2019) 93 ALJR 900 (***Banerji***) at [29] (Kiefel CJ, Bell, Keane and Nettle JJ).

18. In cases where legislation imposes an effective burden on political communication, it is necessary to identify the nature and extent of the burden with precision, as it is only *insofar as* the law imposes such a burden that the Court's supervisory role is engaged to consider the justification for that burden (cf. PS [31]).[20] Here, the burden that the Act imposes on political communication is modest. It applies only to a limited subset of political communication (as well as to many activities that do not constitute political communication). Further, even when it applies to political communication, it does not purport to prohibit, or even restrict, such communication. Rather, its effect is limited to imposing a requirement to register prior to entering into such communication, and requirements to take particular steps following such registration. None of those requirements are onerous, and several are similar to requirements found in other legislative regimes.[21] Further, as mentioned, the Act does not criminalise communication *per se*, but rather the failure to register. Contrary to PS [8(b)], the Act therefore does not regulate speech "in terms". It regulates knowing or reckless disobedience of the obligation to *register* in various circumstances.

19. The plaintiff's submission that the Act imposes a discriminatory viewpoint-based burden – the alleged viewpoint being communications "made 'on behalf of' a foreign principal" – should not be accepted (PS [32(c)], also PS [32(b)]). The Act does not impose a burden on "communication which target[s] ideas or information", or the "character" of such ideas or information, but rather on "an activity or mode of communication by which ideas or information are transmitted".[22] Thus, any communication can be made by a foreign principal *directly* without regulation under the Act. It is only if a communication is made through an intermediary that the Act is engaged. It is the focus on the mediating relationship that marks the statute as one regulating only a particular *mode* of communication. When a communication occurs through that mode, however, the Act

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20 *McCloy* (2015) 257 CLR 178 at [127] (Gageler J), see also at [68] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328 at [90] (Kiefel CJ, Bell and Keane JJ), [180] and [192]-[195] (Gageler J), [269] (Nettle J) and [397] (Gordon J).

21 At the federal level, see, eg, *Commonwealth Electoral Act 1918* (Cth), Pt XX (imposing registration and disclosure obligations on donors and political entities to which they donate) and *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth), Pts 2-3B (establishing registers containing information on the foreign ownership of agricultural land and water entitlements in Australia). At the State level, see *Lobbying of Government Officials Act 2011* (NSW); *Integrity Act 2009* (Qld), Ch 4; *Lobbyists Act 2015* (SA) and *Integrity (Lobbyists) Act 2016* (WA). At least the Queensland and South Australian Acts mandate updating of particulars on the register: see, respectively, s 50 (Qld) and s 11 (SA).

22 *ACTV* (1992) 177 CLR 106 at 143 (Mason CJ), see also at 234-235 (McHugh J).

applies to all such communication, regardless of content,[23] and does not apply to the same content if communicated by a different mode. Unlike in *Brown*, there can be no suggestion that the Act discriminates against particular viewpoints in practical effect, for communications undertaken on behalf of foreign principals are not homogenous.[24] That is illustrated by the fact that the Act applies equally to the foreign governments identified in the extrinsic materials (China, Russia, North Korea and Iran)[25] and to the "conservative/classical liberal perspective" of the ACU (SCB 56 [20]).

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20. Even if the plaintiff's complaint about discrimination were refocused upon source-based discrimination (as may be suggested by PS [12]), that would not assist it. There is no discrimination against foreign sources of communication, which are free to engage in communication activities directly. In any event, "discrimination" is relevant to the implied freedom inquiry only insofar as it assists to understand the restrictive effect of legislation.[26] As explained by the plurality in *Brown*, "[a] law effecting a discriminatory

20 burden on the freedom does not necessarily effect a greater burden on the freedom"; a discriminatory burden may "impose only a slight, or a less than substantial, burden".[27] The central vice of any discrimination is the potential for it to "distort the flow of political communication",[28] so as to undermine "the equality of political power which is at the heart of the Australian constitutional concept of political sovereignty".[29] No such distortion is effected by the Act, which does not purport to prohibit or restrict communication. To the contrary, the Act protects *against* distortion of political and

30 electoral processes by rendering transparent the source of communications where it may otherwise be obscured.[30] Without such transparency, electors may make choices *uninformed* about the interests truly sought to be advanced (SCB 55 [19]).[31]

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23 Cf. *McCloy* (2015) 257 CLR 178 at [136]-[137] (Gageler J).

24 *Brown* (2017) 261 CLR 328 at [95] (Kiefel CJ, Bell and Keane JJ), [193] and [198]-[199] (Gageler J); see also *Clubb* (2019) 93 ALJR 448 at [55]-[56] (Kiefel CJ, Bell and Keane JJ) and [364] and [375] (Gordon J), cf. [170]-[174] (Gageler J). See more generally Parliamentary Joint Committee on Human Rights, *Human*

40 *Rights Scrutiny Report*, Report 3 of 2018 (27 March 2018) at 205 [2.235].

25 Hansard, Commonwealth, House of Representatives, 7 December 2017 at 13146 (Annexure SC-13, SCB 897).

26 See, eg, *Brown* (2017) 261 CLR 328 at [95] (Kiefel CJ, Bell and Keane JJ).

27 *Brown* (2017) 261 CLR 328 at [94] (Kiefel CJ, Bell and Keane JJ).

28 See, eg, *Unions No 1* (2013) 252 CLR 530 at [137] (Keane J).

29 *McCloy* (2015) 257 CLR 178 at [271] (Nettle J).

30 See, by way of analogy, *Unions NSW v New South Wales* (2019) 264 CLR 595 (***Unions No 2***) at [30]-[31] (Kiefel CJ, Bell and Keane JJ) and [71] (Gageler J).

31 See also Hansard, Commonwealth, House of Representatives, 26 June 2018 at 6397 (Annexure SC-14, SCB 902).

Legitimate purpose?

21. The second *McCloy/Brown* question requires, as its starting point, the identification of the purpose of the impugned provisions. That purpose is discerned through the ordinary processes of statutory construction, giving consideration to the meaning of the words in the particular provision, to other provisions in the Act, to the historical background to the provision, and to any apparent social objective.[32] The purpose is properly identified at a higher level of generality than the meaning of the words of the provisions themselves:[33] it is the goal or "mischief" to which the provisions are directed (PS [33]).[34]

22. Adopting the above approach, 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. While that purpose is achieved through the use of various *mechanisms* which are intended to promote transparency, the purpose of the Act is not transparency *per se* (cf. PS [34], [36]-[37]).

23. That purpose is apparent from the text of the Act, which expressly records in s 3 that the scheme for registration is directed to "improv[ing] the transparency of … activities on behalf of … foreign principals" and which carries that object into effect through the substantive provisions outlined in Part B above.

24. That purpose is also apparent from the context in which the Act was enacted, which includes a "growing global trend" of foreign influence operations (SCB 53 [15]-[16]), including in Australia, at what ASIO described as "an unprecedented scale" (SCB 53-54 [17]). The extrinsic materials accompanying the introduction of the three Bills referred to in [6] above confirm that purpose. As explained in its Revised Explanatory Memorandum, the FITS Bill was intended 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".[35] The purpose of making such

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32 *Unions No 2* (2019) 264 CLR 595 at [171] (Edelman J). See also *Monis v The Queen* (2013) 249 CLR 92 at [125] (Hayne J) and [317] (Crennan, Kiefel and Bell JJ); *Unions No 1* (2013) 252 CLR 530 at [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at [132] (Gageler J), [232] (Nettle J) and [320] (Gordon J); and *Brown* (2017) 261 CLR 328 at [321] (Gordon J).

33 *Unions No 2* (2019) 264 CLR 595 at [171] (Edelman J).

34 *Brown* (2017) 261 CLR 328 at [101] (Kiefel, Bell and Keane JJ), [208] (Gageler J) and [321] (Gordon J); *Clubb* (2019) 93 ALJR 448 at [257] (Nettle J).

35 Revised Explanatory Memorandum, *FITS Bill* at 6 [10], see also at 2 [3]-[4].

information transparent "to the decision-maker and the Australian public" was to allow such people "to accurately assess the interests being brought to bear".[36]

25. To similar effect, the Prime Minister explained (in the second reading speech to the related EFI Bill) that the purpose of the Act's registration requirement was to "give the Australian public and decision-makers proper visibility when foreign states or individuals may be seeking to influence Australia's political processes and public debates", and to "apply[] the basic principles of disclosure to allow the public and policymakers to assess any underlying agenda".[37] Similar comments were made by the Attorney-General in his further second reading speeches after the EFI Bill and the FITS Bill were amended following consideration by the PJCIS.[38] In relation to the FITS Bill, the Attorney-General explained that, while foreign actors are "free to promote their interests in Australia", that must be done "in a lawful, transparent and open way".[39] He went on to say:[40]

> Decision-makers in the Australian government and the public should know what interests are being advanced in respect of particular decisions or processes. However, it is difficult to assess the interests of foreign actors when they use intermediaries to advance their interests or activities, such as lobbying or the communication of information or material. This concealment ultimately undermines the ability of the decision-maker and the public to evaluate and reached informed decisions on the basis of those representations.
>
> For the first time, the public and decision-makers in government will have access to information to enable them to accurately assess how foreign sources may be seeking to influence Australia's government and political process.

Access to such information was described as an integral aspect of the Strategy; consistently with [6] above, "sunlight" was to be "at the very centre".[41]

26. The Act's purpose of minimising the risk of foreign principals exerting improper influence upon the integrity of Australia's political or election processes is "not only compatible" with the system of representative and responsible government, but is a

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36 Revised Explanatory Memorandum, *FITS Bill* at 2 [5].
37 Hansard, Commonwealth, House of Representatives, 7 December 2017 at 13147 (Annexure SC-13, SCB 898).
38 Hansard, Commonwealth, House of Representatives, 26 June 2018 at 6351-2 and 6397-9 (Annexure SC-14, SCB 902-904).
39 Hansard, Commonwealth, House of Representatives, 26 June 2018 at 6397 (Annexure SC-14, SCB 902).
40 Hansard, Commonwealth, House of Representatives, 26 June 2018 at 6397 (Annexure SC-14, SCB 902) (emphasis added), see also at 6398-6399 (SCB 903-904).
41 Hansard, Commonwealth, House of Representatives, 7 December 2017 at 13147 (Annexure SC-13, SCB 898).

striking example of a purpose that serves to "preserve and enhance" that system.[42] Far from being an "imagined necessity" (cf. PS [28]), it is common ground that there is a growing global trend of foreign influence operations that attempt to influence democratic processes (SCB 53 [15]), that undisclosed foreign influence is occurring in Australia at an unprecedented scale (SCB 53-54 [17]) and that (SCB 55 [19]):

26.1. undisclosed foreign influence (whether or not intended to damage or destabilise Australia) can impede the ability of Australian decision-makers, and the Australian public, to make informed decisions, because it can conceal the nature of the competing interests at play; and

26.2. conversely, transparency of foreign influence can contribute to the effective functioning and accountability of Australian government institutions and help protect the integrity of those institutions.

27. As explained in *McCloy*, a compelling purpose "may be the most important factor in justifying the effect that the measure has on the freedom", for some objects might "justify very large incursions on the freedom".[43] The Act's purpose is such a purpose.

28. The legitimacy and importance of the Act's purpose is reinforced by its consonance with the Constitution's express concern to protect the system of representative and responsible government from foreign influence: esp. ss 44(i) and 45(i).[44] The importance of that purpose has also been recognised in jurisdictions with a strong constitutional protection of freedom of speech: in both the United States and Canada, statutory schemes directed to similar ends have been upheld as valid.[45]

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42 *McCloy* (2015) 257 CLR 178 at [47] (French CJ, Kiefel, Bell and Keane JJ); see also *Banerji* (2019) 93 ALJR 900 at [100] (Gageler J) and [153] (Edelman J).

43 *McCloy* (2015) 247 CLR 178 at [84], see also at [86] (French CJ, Kiefel, Bell and Keane JJ); see also *Brown* (2017) 261 CLR 328 at [131] (Kiefel CJ, Bell and Keane JJ), [213] (Gageler J) and [295] (Nettle J).

44 See *Re Canavan* (2017) 263 CLR 284 at [24] (the Court), discussing *Sykes v Cleary* (1992) 176 CLR 77 at 107 (Mason CJ, Toohey and McHugh JJ), 109 (Brennan J) and 127 (Deane J).

45 As to the United States, see, eg, *Bluman v Federal Election Commission*, 800 F Supp 2d 281 at 288 (DDC, 2011) (accepting that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process"), affirmed in a summary opinion by the Supreme Court: 565 US 1104 (2012). Earlier, in *Citizens United*, the Supreme Court had noted that it "need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process": *Citizens United v Federal Election Commission*, 558 US 310 at 362 (2010). More broadly, the constitutionality of aspects of the *Foreign Agents Registration Act of 1938*, 52 Stat. 631-633, was upheld in *Meese v Keene*, 481 US 465 (1987) (especially at 469-470). As to Canada, see *Harper v Canada (A.G.)* (2001) ABQB 558 at [118] and [187]-[189]. The

Reasonably appropriate and adapted?

29. Applying the analytical tool of structured proportionality that was developed in *McCloy*, and refined in subsequent cases, the impugned provisions are reasonably appropriate and adapted to the legitimate purpose identified above.[46]

30. *Suitability*: The Act is suitable, as it "exhibits a rational connection to its purpose", in the sense that "the means for which it provides are capable of realising that purpose".[47] By requiring the registration of certain relationships involving foreign principals, and by imposing certain responsibilities on registered persons, the Act is capable of minimising the risk that improper influence will be exerted by foreign principals upon the integrity of Australia's political or election processes. The plaintiff's suggestion to the contrary is misconceived. After correctly stating the test of suitability (PS [41]), the plaintiff then addresses an entirely different issue, being the rational connection between the law's legitimate purpose "and the plaintiff's situation" (PS [42]). The matters set out at PS [42]-[44] do not bear upon the suitability analysis, or indeed upon any other aspect of the implied freedom analysis, for the focus of the implied freedom analysis is not "on the facts of a particular case" but at the level of "effect more generally".[48] In any case, to the extent that the plaintiff seeks to invoke its own "situation" to contend for overbreadth in the Act when measured against its purpose (which again forms no part of the "suitability" inquiry), that contention should not be accepted. It rests on the attempt described at [4] above impermissibly to qualify the agreed facts. There is nothing incongruous about requiring the plaintiff to register its activities disseminating communications in Australia on behalf of the ACU, which is agreed to be a foreign political organisation.

31. *Necessity*: The Act is necessary, in the sense that there is no "obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden" upon the implied freedom.[49] As explained by the plurality in *McCloy*, this inquiry "does not deny that it is the role of the legislature to select the means by which a legitimate statutory purpose may be achieved … Once within the domain of selections

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relevant provision was not considered by the Canadian Supreme Court on appeal in *Harper v Canada* [2004] 1 SCR 827.

46 *McCloy* (2015) 257 CLR 178 at [2] and [72] (French CJ, Kiefel, Bell and Keane JJ).

47 *Banerji* (2019) 93 ALJR 900 at [33] (Kiefel CJ, Bell, Keane and Nettle JJ); see also *McCloy* (2015) 257 CLR 178 at [80] (French CJ, Kiefel, Bell and Keane JJ).

48 Borrowing from *Clubb* (2019) 93 ALJR 448 at [35] (Kiefel CJ, Bell and Keane JJ); see also *Brown* (2017) 261 CLR 328 at [90] (Kiefel CJ, Bell and Keane JJ).

49 *Banerji* (2019) 93 ALJR 900 at [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature's".[50] These formulations have been developed to ensure that courts do not "exceed their constitutional competence by substituting their own legislative judgments for those of parliaments".[51] They emphasise that the circumstances in which courts will invalidate a law on the basis of a lack of necessity are limited. Thus, an alternative will not be "equally effective" unless it is "as capable of fulfilling [the] purpose as the means employed by the impugned provision, 'quantitatively, qualitatively, and probability-wise'".[52] Similarly, where (as in the present case) the burden imposed by the legislature's chosen measure is slight, it will be difficult for a plaintiff to establish that its alternative imposes a "significantly lesser burden".[53]

32. None of the four measures identified by the plaintiff constitutes an alternative in the requisite sense. The first measure would require disclosure of the foreign principal at the time a communication is made, consistently with s 38 of the Act and the *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth) (**Rules**) (PS [46]). That measure applies only to one of the four types of registrable activity under the Act ("communications activity"), so the measure cannot be said to be a "true alternative" in its present form:[54] it would only cover a subset of the conduct regulated by the Act. Having regard to s 5 of the Rules (especially Items 4 and 16 of the Table), it is far from clear that, if any such requirement were transposed to apply to other registrable activities, such as parliamentary or general political lobbying activities, that disclosure requirement would be effective. Even if those difficulties were overcome, the plaintiff has not discharged its burden of demonstrating that a single disclosure requirement would achieve the object of the Act "to the same extent" as that effected by the scheme presently in place, nor that it is equally practicable.[55] Further, the proposal ignores important work that the Act does in rendering foreign influence transparent to those who are *not themselves recipients* of the communication: registration means that electors can know whether foreign principals are lobbying elected representatives behind

50 *McCloy* (2015) 247 CLR 178 at [82] (French CJ, Kiefel, Bell and Keane JJ); see also *Clubb* (2019) 93 ALJR 448 at [267]-[269] (Nettle J).
51 *McCloy* (2015) 247 CLR 178 at [58] (French CJ, Kiefel, Bell and Keane JJ); see also *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at [36] (French CJ) and [115] (Crennan, Kiefel and Bell JJ).
52 *Tajjour* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ).
53 See, eg, *Banerji* (2019) 93 ALJR 900 at [35] (Kiefel CJ, Bell, Keane and Nettle JJ) (emphasis added).
54 *McCloy* (2015) 257 CLR 178 at [361] (Gordon J); *Tajjour* (2014) 254 CLR 508 at [83]-[90] (Hayne J) and [113]-[115] (Crennan, Kiefel and Bell JJ).
55 As to the plaintiff having the burden, see *Clubb* (2019) 93 ALJR 448 at [266(3)] (Nettle J).

closed doors or, indeed, communicating with a section of the public of which the elector is not themselves a member. The plaintiff's second proposed measure – "add[ing] to the list of exemptions communications that identified their connection to a foreign principal at the time of communication" (PS [50]) – faces similar difficulties.

33. The plaintiff's third measure – "amend[ing] the definition of the types of relationships with foreign principals that the [Act] is legitimately aimed at revealing" (PS [50], see also PS [47]-[49]) – lacks sufficient precision to be an alternative, and may in any case proceed on a misunderstanding of what the Act seeks to achieve. The purpose of registration is to ensure that "the Australian public and decision-makers [have] proper visibility when foreign states or individuals may be seeking to influence Australia's political processes and public debates"[56] – essentially, to render overt what may otherwise be obscured. The Act does not operate by reference to some form of "harm" criterion: as explained in the Second Reading Speech, registration "should not be seen as any kind of taint", and "certainly not as a crime".[57] To the extent that the plaintiff submits that the types of relationship to which the Act applies should be substantially narrowed, presumably by reference to some sort of harm criterion (see also PS [36]), that submission therefore necessarily envisions an entirely different legislative model. To approach the necessity inquiry in that way "would involve the Court impermissibly substituting the legislative provision under consideration for something else".[58]

34. The plaintiff's fourth measure – limiting the operation of the Act to political "interference", rather than mere "influence" (PS [51]) – proposes as an obvious and compelling alternative legislation that would be directed to a different end than that sought to be achieved by the Act. As explained at SCB 52 [14], and as recognised at PS [38], there is a conceptual distinction between foreign influence and foreign interference, and by enacting the Act, Parliament chose to address the former.[59] The necessity inquiry focuses upon whether the plaintiff is able to identify alternative measures to achieve the *same* purpose as that sought to be achieved by the Act. It does not permit the statutory purpose selected by the legislature to be discarded in favour of a

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56 Hansard, Commonwealth, House of Representatives, 7 December 2017 at 13147 (Annexure SC-13, SCB 898).
57 Hansard, Commonwealth, House of Representatives, 7 December 2017 at 13147 (Annexure SC-13, SCB 898).
58 *Tajjour* (2014) 254 CLR 508 at [115] (Crennan, Kiefel and Bell JJ).
59 See, eg, Revised Explanatory Memorandum, *FITS Bill* at 2 [1] and [4].

different one. As none of the four measures identified by the plaintiff constitutes an "alternative" in the relevant sense, the Act is "necessary".

35. *Adequacy in its balance*: Finally, the Act is adequate in its balance, because "the benefit sought to be achieved by the law is [not] manifestly outweighed by its adverse effect on the implied freedom" (PS [54]).[60] The plaintiff does not address this inquiry in any detail (PS [55]). Its scant submissions should not be accepted. In circumstances where the purpose of the law is one of significant importance, and the burden on the implied freedom is modest, this inquiry must be answered favourably to validity.

D. Freedom of Interstate Intercourse

36. Section 92 of the Constitution, by providing that "intercourse among the States … shall be absolutely free", guarantees freedom of "the passage of persons and things, tangible or intangible, to and fro across State borders".[61] Notwithstanding the apparently unqualified language of s 92, it is clear that interstate intercourse is capable of some regulation or restriction.[62] The critical question is whether any burden on interstate intercourse that results from a regulation or restriction can be justified.[63]

The relationship between the implied freedom and the intercourse limb of s 92

37. The Commonwealth's primary submission is that the coherence of constitutional doctrine requires the conclusion that the intercourse limb of s 92 can have no greater invalidating effect than the implied freedom of political communication in any case where:

37.1. the relevant interstate intercourse consists entirely of communication;

37.2. that communication concerns government or political matters; and

37.3. the impugned law burdens that communication only incidentally (meaning that it does not in terms discriminate against communication across a border, and the burden is imposed for a purpose other than restricting interstate intercourse).[64]

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60 *Banerji* (2019) 93 ALJR 900 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ); see also *Clubb* (2019) 93 ALJR 448 at [69]-[70], [102] and [128] (Kiefel CJ, Bell and Keane JJ), [270]-[275] (Nettle J) and [495]-[497] (Edelman J).

61 *ACTV* (1992) 177 CLR 106 at 192 (Dawson J). See also *Nationwide News v Wills* (1992) 177 CLR 1 (***Nationwide News***) at 54-56 (Brennan J) and 82-83 (Deane and Toohey JJ); *AMS v AIF* (1999) 199 CLR 160 (***AMS***) at [97] (Gaudron J).

62 See, eg, *Cole v Whitfield* (1988) 165 CLR 360 (***Cole***) at 393 (the Court); *ACTV* (1992) 177 CLR 106 at 192-193 (Dawson J); *Cunliffe v The Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) at 366 (Dawson J).

63 See, eg, *Cole* (1988) 165 CLR 360 at 393 (the Court); *Nationwide News* (1992) 177 CLR 1 at 58 (Brennan J).

64 See, eg, *Cunliffe* (1994) 182 CLR 272 at 307-308 (Mason CJ).

38. In cases of that kind, there is no role for any separate analysis of the intercourse limb, because otherwise that limb would render redundant the carefully drawn limits on the invalidating effect of the implied freedom. The scope for independent operation of the implied freedom would, in effect, be confined to communication on government or political matters that occurs wholly within a State (though see PS [25(b)(i)], and [43] below). All cases concerning political communication across State borders would also have to be assessed against the intercourse limb of s 92. Such an outcome would be inconsistent with the implied freedom, properly understood as a necessary implication from the text of the Constitution and thus necessarily cohering with s 92. Rejecting earlier comments in *Miller v TCN Channel Nine Pty Ltd*,[65] four Justices in *Nationwide News* and *ACTV* found that the intercourse limb of s 92 did not preclude the implication of the implied freedom because, in effect, s 92 was "not intended to deal exhaustively with the right of Australians to communicate with each other".[66] Such an outcome would also be incompatible with almost 30 years of case law on the implied freedom. No reason has been shown for such a radical reorganisation of settled constitutional principle.

39. An interpretation of the intercourse limb of s 92 that prevents it from erasing the limits of other constitutional doctrines derives support, by analogy, from that adopted by Gummow and Hayne JJ in *APLA* to the overlap between the two limbs of s 92. There, their Honours held that in cases where both limbs potentially apply, the validity of a law should be assessed "exclusively by reference" to the trade and commerce limb.[67]

40. The above approach is also consistent with the result (though admittedly not the reasoning) in the few cases where intercourse claims have been advanced in conjunction with claims concerning the implied freedom of political communication, for in none of those cases has s 92 had a greater invalidating effect than the implied freedom.[68] For

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65 (1986) 161 CLR 556, discussed in *Nationwide News* (1992) 177 CLR 1 at 81 (Deane and Toohey JJ).

66 *ACTV* (1992) 177 CLR 106 at 214 (Gaudron J), and see to similar effect *Nationwide News* (1992) 177 CLR 1 at 53 (Brennan J) and 81 (Deane and Toohey JJ).

67 See *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322 (***APLA***) at [160]-[165] (Gummow J), see also [408] (Hayne J).

68 In *Nationwide News* (1992) 177 CLR 1, four Justices found certain provisions invalid under the implied freedom (Brennan, Deane, Toohey and Gaudron JJ). Brennan J held those provisions would not violate s 92 (at 52-53 and 60), but Deane and Toohey JJ, and Gaudron J, did not consider it necessary to reach a conclusion on s 92 (at 78-82 and 94-95). Mason CJ, Dawson and McHugh JJ did not address either the implied freedom or s 92 (at 34, 84 and 103). In *ACTV* (1992) 177 CLR 106, five Justices found certain provisions invalid under the implied freedom: at 147 (Mason CJ), 174-176 (Deane and Toohey JJ), 218-221 and 224 (Gaudron J) and 238, 241 and 245 (McHugh J). Only Dawson J considered s 92, rejecting both that challenge and the implied freedom challenge: at 189, 191 and 196. Brennan J rejected the implied freedom

example, in *Cunliffe*, each Justice considered the implied freedom before considering s 92.[69] No member of the Court held that s 92 would invalidate provisions that would have been valid under the implied freedom. The four Justices constituting the majority (Brennan, Dawson, Toohey and McHugh JJ) held that the provisions breached neither the implied freedom nor s 92.[70] The three dissenting Justices (Mason CJ, Deane and Gaudron JJ) held that some of the impugned provisions offended the implied freedom. Mason CJ found that, in the circumstances of that case, "s 92 would have an invalidating operation but one which would be less extensive than the implied freedom";[71] Deane and Gaudron JJ did not address whether s 92 would have separately invalidated those provisions, but held that it would not have invalidated the provisions that they had found to conform to the implied freedom.[72]

41. If the above submission is accepted then, in the event that the Court holds that the burden that the Act places on political communication is justified according to implied freedom doctrine, it would follow that it is unnecessary to consider whether the *same burden* on the *same communications* contravenes the intercourse limb of s 92. Satisfaction of the former test entails satisfaction of the latter.

Any burden on interstate intercourse is justified

42. If it is necessary to address the intercourse limb of s 92, then there is no uncertainty about the test to be applied (cf PS [26]). That follows because, for the reasons developed below, any burden that the Act imposes on interstate intercourse is, at most, an incidental burden. The applicable test in determining the validity of burdens of that kind is that applied by majorities of this Court in both *AMS* and *APLA*, being whether the "impediment"

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challenge, but invalidated certain provisions on other grounds: at 167. In *APLA* (2005) 224 CLR 322, six Justices held that the communication prohibited by the relevant regulations was not communication about government or political matters, and the five Justices who considered the s 92 argument rejected it: [26]-[29] and [36]-[39] (Gleeson CJ and Heydon J), [55]-[71] (McHugh J, who did not consider s 92), [160]-[180] and [213]-[221] (Gummow J), [376]-[383] and [397]-[427] (Hayne J) and [445]-[464] (Callinan J); cf. [345]-[365] (Kirby J, dissenting as to the character of the communications and not considering s 92). Each Justice other than Gummow J dealt with the implied freedom argument before dealing with the s 92 argument.

69 *Cunliffe* (1994) 182 CLR 272 at 298-308 (Mason CJ), 326-333 (Brennan J), 335-347 (Deane J), 360-367 (Dawson J), 378-385 (Toohey J), 387-392 (Gaudron J) and 395-397 (McHugh J).

70 *Cunliffe* (1994) 182 CLR 272 at 333 (Brennan J), 364-367 (Dawson J), 384-385 (Toohey J) and 395-397 (McHugh J).

71 *Cunliffe* (1994) 182 CLR 272 at 308.

72 *Cunliffe* (1994) 182 CLR 272 at 346-347 (Deane J) and 392 (Gaudron J).

imposed on interstate intercourse is "greater than that reasonably required to achieve the objects of the applicable legislation" (the ***AMS/APLA* test**).[73]

43. The plaintiff has not explained precisely how it alleges that the Act burdens interstate intercourse (cf. PS [25]). Its submission that the Act "targets political communication in terms" is plainly incorrect (see [18] above). So, too, is its submission that "political communication is intrinsically interstate communication" (PS [25(b)(i)]). That was at least implicitly rejected by Deane and Toohey JJ in *Nationwide News*, who emphasised that one aspect of the differing scope of the implied freedom and the intercourse limb of s 92 was that the implied freedom was "not confined by any distinction between interstate and intrastate communications".[74] The plaintiff identifies no reason why political communication cannot occur at the local level, and the cases cited by the plaintiff do not support such a proposition. Those cases recognise that the implied freedom extends to "discussion of government or politics at State or Territory level and even at local government level" because such discussion "might bear on the choice that the people have to make in federal elections".[75] That is, political and governmental communication relating to *intrastate* issues may affect the electoral choices of the people of the Commonwealth, whether or not those communications cross State lines. That is why cases addressing State legislation directed to subjects traditionally within the province of State legislative power contain no suggestion that the political communication in issue had acquired some *interstate* quality.[76] Instead, the Court's focus has remained on whether the political communication is capable of affecting "the electoral choices to be made by the people of the Commonwealth".[77] That is a sufficient basis to reject the proposition that the Act "directly and substantially burdens interstate intercourse" simply because it places some burden on political communication (contra PS [25](b)(i)).

44. Properly construed, the Act imposes only an incidental burden or restriction on interstate intercourse, in the sense described in [37.3] above.[78] Adopting the language of McHugh J

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73 *AMS* (1999) 199 CLR 160 at [48] (Gleeson CJ, McHugh and Gummow JJ) and [221] (Hayne J); *APLA* (2005) 224 CLR 322 at [38] (Gleeson CJ and Heydon J), [177] (Gummow J) and [420] (Hayne J). That test is correctly identified at PS [24]. The statement of Gaudron J in *AMS* at [101] upon which the plaintiff relies (PS [26(a)]) did not command the support of a majority.

74 *Nationwide News* (1992) 177 CLR 1 at 81.

75 *Lange* (1997) 189 CLR 520 at 571; *Nationwide News* (1992) 177 CLR 1 at 75 (Deane and Toohey JJ).

76 See, eg, *Brown* (2017) 261 CLR 328 and *Clubb* (2019) 93 ALJR 448.

77 *Clubb* (2019) 93 ALJR 448 at [31] (Kiefel CJ, Bell and Keane JJ).

78 See, eg, *Cunliffe* (1994) 182 CLR 272 at 307-308 (Mason CJ).

in *Cunliffe*, that burden arises "as the consequence of regulating another subject matter".[79] The burden in this case has some similarities to that in *Cunliffe*, for here the most that can be said is that providing that certain persons cannot lawfully engage in certain types of communication unless they comply with the obligations contained in the Act *might* practically impact the "making [of] communications across State borders", insofar as any communications the subject of the Act take place across those borders (SCB 60 [39]).[80]

45. The plaintiff is therefore wrong to suggest (PS [26]) that this case requires the Court to identify some new test to apply so-called "intermediate case[s]". Further, were it to do so, there would be no warrant to take up the plaintiff's suggestion of imposing a "threshold of permitted purposes" such that "only a *compelling* purpose should be permitted capable of justification" in cases such as the present (PS [26(a)(i)], see also PS [21(a)]), nor any warrant to give the word "reasonably" a different meaning from that which it ordinarily bears in constitutional adjudication (PS [26(a)(ii)(C)]). The plaintiff does not identify any authority or principled basis supporting either of those suggestions.

46. Applying the *AMS/APLA* test, the "impediment" imposed on interstate intercourse by the Act is no "greater than that reasonably required to achieve the objects of the applicable legislation". The impediment is very slight, and, consistently with the analysis above in the context of the implied freedom, the object of the Act could not fully be achieved without imposing some requirement to register certain communications and some responsibilities on persons post-registration.[81] In those circumstances, the burden imposed by the Act is no greater than that reasonably required to achieve its objects.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

47. Approximately 2.5 hours will be required to present the oral argument of the defendant.

Dated: 21 October 2020

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79 *Cunliffe* (1994) 182 CLR 272 at 396 (McHugh J).
80 *Cunliffe* (1994) 182 CLR 272 at 308 (Mason CJ), see also 366-367 (Dawson J). See more generally *APLA* (2005) 224 CLR 322 at [170] (Gummow J) in relation to the meaning of "intercourse" in a similar context.
81 See, by analogy, *APLA* (2005) 224 CLR 322 at [179] (Gummow J).

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **LIBERTYWORKS INC**

Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA

Defendant

ANNEXURE TO DEFENDANT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the defendant sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in its submissions.

No	Description	Version	Provision(s)
Commonwealth provisions			
1.	Commonwealth Constitution	Current	ss 7, 24, 44(i), 45(i), 92
2.	*Commonwealth Electoral Act 1918* (Cth)	Current	Pt XX
3.	*Crimes Act 1914* (Cth)	Current	s 4AA
4.	*Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (Cth)	As passed	Entire Bill
5.	*Foreign Influence Transparency Scheme Act 2018* (Cth)	Current	Entire Act
6.	*Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth)	Current	s 5
7.	*Judiciary Act 1903* (Cth)	Current	s 78B
8.	*National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (Cth)	As passed	Entire Bill
9.	*Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth)	Current	Pts 2-3B
State and Territory provisions			
10.	*Integrity Act 2009* (Qld)	Current	Ch 4
11.	*Integrity (Lobbyists) Act 2016* (WA)	Current	Entire Act
12.	*Lobbying of Government Officials Act 2011* (NSW)	Current	Entire Act
13.	*Lobbyists Act 2015* (SA)	Current	Entire Act