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

Commonwealth of Australia
Defendant

PLAINTIFF'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES IN THE SPECIAL CASE

2. The issues are represented by the questions of law arising in the proceeding in the form of a special case for the opinion of the Full Court, as follows:

   a) Is the *Foreign Influence Transparency Scheme Act 2018* (Cth) 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?

   b) Is the *Foreign Influence Transparency Scheme Act 2018* (Cth) invalid, either in whole or in part (and if in part, to what extent), on the ground that it is contrary to the freedom of interstate intercourse referred to in s 92 of the Constitution?

   c) In light of the answers to questions a) and b), what relief, if any, should issue?

   d) Who should pay the costs of and incidental to this special case?

PART III: SECTION 78B NOTICE

3. The plaintiff has served Notices pursuant to 78B of the *Judiciary Act 1903* (Cth) on all State and Territory Attorneys-General.

PART IV: LEGISLATION

4. The *Foreign Influence Transparency Scheme Act 2018* (Cth) (**FITS Act**) came into force on 10 December 2018.[1]

[1] Unless otherwise stated, all statutory references in these submissions are to the *FITS Act*.

Filed on behalf of the Plaintiff
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Date: 22 September 2020

5. The object of the *FITS Act* is stated in s 3 to be 'to provide for a scheme for the registration of persons who undertake certain activities on behalf of foreign governments and other foreign principals, in order to improve the transparency of their activities on behalf of those foreign principals.'

6. The *FITS Act* accomplishes that object primarily via the establishment of a register and the compulsion of Australians who undertake certain political 'activities', ostensibly 'on behalf of' a 'foreign principal', to register with that registry, which is maintained by the Secretary of the Attorney-General's Department: ss 3 and 42.

7. The 'activities' are political lobbying, political communication and politically-related payments: s 10 (definitions) and ss 20-21.

8. 'Activities' are political when made for the purpose of political or government 'influence', which is defined very broadly. Indeed, as the submissions below seek to establish, the breadth of this definition, together with the breadth definition of acting 'on behalf of' set out next, is ultimately to distort any natural meaning or common understanding of the conception of activities that involve acting on behalf of a foreign principal. Such activities include influencing the public or a section of the public in relation to politics: ss 10 (definitions – 'influence' includes 'affect in any way'), 12 and 14.

   a) In relation to *communication* activities,[2] this definition is on all fours with this Court's definition of political communication under the implied freedom:[3] *Unions NSW v New South Wales* [2013] HCA 58; 252 CLR 530 (**Unions**) at [30] (French CJ, Hayne, Crennan, Kiefel (as her Honour then was) and Bell JJ); *Lange v Australian Broadcasting Corporation* [1997] HCA 25; 189 CLR 520 (**Lange**) at 571[4] (the Court);

   b) The present case is a rare example of *in terms* regulation of political communication, which is presumptively 'direct' or non-incidental in its burden

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2 Which includes 'lobbying': s 10 ('lobby' includes "*communicate, in any way*, with a person or a group of persons for the purpose of influencing any process, decision or outcome"). See also s 13.

3 The addition of the category of 'communication' activities as part of the requirement to register (as opposed to an obligation 'merely' to disclose at the time of communication) is an Australian 'innovation' in the US version of the *FITS Act* (which undoubtedly formed the template for the *FITS Act*): *Foreign Agents Registration Act* (1938) 22 U.S.C. §§ 611 – 621 (**FARA**) (available at: https://www.justice.gov/nsd-fara/fara-index-and-act)

4 "[T]his Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. [...] The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters."

and so automatically attracts stricter scrutiny:[5] *Clubb v Edwards; Preston v Avery* [2019] HCA 11; 93 ALJR 448 (**Clubb**) at [181] (Gageler J) [372], (Gordon J); *Brown v Tasmania* (2017) 261 CLR 328 (**Brown**) at 367-368 [120] (Kiefel CJ, Bell and Keane JJ); *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[99] (the Court); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] (Gleeson CJ); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (**ACTV**) at 143 (Mason CJ).

9. The definition of acting 'on behalf of' a foreign principal is not confined to the general law of agency or employment law,[6] and is again very wide – it is satisfied if the activity is under an **arrangement** with, or in the service of, or by order or at the request of, or under the direction of the foreign principal, whether or not consideration was involved: s 11. In turn, 'arrangement' is defined in s 10 as "includes a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten." (emphasis added) By the combined extended definitions of 'activities'; 'on behalf of'; and 'arrangement'; a domestic entity such as the plaintiff in the activities that this litigation is concerned with wears the statutory denotation of acting on behalf of a foreign principal when, by any reasonable, common understanding of what the plaintiff has done, there is a total disconnect between that statutory denotation and the true connotation of the plaintiff's activities.

10. A foreign principal is a foreign government, or a related entity or individual of same, or a foreign political organisation (which is a foreign political party or an organisation that exists primarily to pursue political objectives[7]): s 10 (definitions)

11. Registration is by force of application: ss 16 and 17. For those to whom the registration obligations of the *FITS Act might* apply:[8]

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5 This proposition is correct regardless of whether Mason CJ in *ACTV* was referring to the US First Amendment jurisprudence on 'content-based' government regulation: *Brown* at [120] (Kiefel CJ, Bell and Keane JJ). As it happens, the *FITS Act* does regulate the content of political communication, considered later in these submissions.

6 This is to be contrasted (again) with the analogue US statute, which contains a stricter definition more aligned with the general law of agency and employment law: *FARA* at §611c.

7 Again, the *FITS Act* 'innovates' on its US template by adding this extension: *FARA* at §611b

8 The word 'might' is apposite as the breadth and indeterminacy of the criteria of selection for liability to register with the scheme means that the practical operation of the *FITS Act* is to create an indeterminate class of Australians criminally prohibited from communicating politically unless registered with the State.

a) Before registration: Any *exercise* of the freedom of political communication is (*pre-)conditioned* on an obligation to register (backed by criminal sanction): ss 16, 18(3) (especially) and 57;

b) After registration: The *continuing* exercise of the freedom of political communication is *conditioned* - backed by criminal sanction - on continuing and onerous registration obligations: ss 19, 31-32, 34, 36-37, 39-40, 57, 57A, 58(1) and 58(3).

Examples of the responsibilities of registration under the *FITS Act* are:

i) Registrants are required to report promptly, within 14 days, material changes in circumstances: s 34;

ii) A positive requirement on a registrant to review information previously provided to the Secretary (of the Attorney-General's Department) in relation to the registration when an election period or a referendum voting period begins: s 36;

iii) Annual renewal of registration where a person remains liable to register: s 39;

iv) Record-keeping obligations, including:

(A) information or material forming part of any communications activity that is registrable in relation to the foreign principal: s 40(2)(c), and

(B) other information or material communicated or distributed to the public or section of the public on behalf of the foreign principal: s 40(2)(e).

12. For those to whom the *FITS Act* might apply in relation to communication activities, the *content* of political communication is regulated – backed by criminal sanction - via the imposition of discriminatory source-disclosure obligations: ss 38 and 58(2); Part 2 of the *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth) (**Disclosure Rules**); *Clubb* at [165] and [181] (Gageler J); [372]-[373], [375] and [377] ("or source") (Gordon J); [507]-[508] (Edelman J); *Brown* at 367-368 [120] (Kiefel CJ, Bell and Keane JJ); *McCloy v NSW* (2015) 257 CLR 178 (**McCloy**) at 238-239 [152]-[153] (Gageler J); *Smith v Oldham* (1912) 15 CLR 355 (**Smith v Oldham**).

13. Division 4 of Part 2 of the *FITS Act* (ss 24 - 30) contains 13 categories of exemption from its application, provisions which plainly inform consideration of the justification (rationality or 'suitability') of the *FITS Act*.[9] The manner in which these exemptions calibrate the operation of the *FITS Act* to that extent and in respect of those considerations, and the contrast between how such exemptions could have been extended to calibrate it in respect of the activities of the plaintiff, features in the argument below.

14. The Secretary (of the Attorney-General's Department) has power to issue a Notice, backed by criminal sanction, for the purpose of obtaining information in order to determine whether a person is liable to register under the *FITS Act*: ss 45 and 59.

15. Part 5 of the *FITS Act* contains enforcement provisions (ss 56 - 61A), revealing a legislative preference for *criminal* offence provisions – there are no civil penalty or administrative penalty provisions contained in the *FITS Act*.[10]

16. The regulatory and reporting requirements on persons like the plaintiff; and those who merely wish to contribute to its organised and branded political discussions; together with the criminal sanctions for non-compliance, are apt to quieten or chill all but the most robust voices. The expression 'chilling effect' is prone to overuse in this area of discourse, but, it is submitted, not on this occasion.

PART V: FACTS

17. The facts are contained in the agreed special case (**SC**), located in the Court Book (**CB**) at CB50-64. The following is a summary of the salient facts:[11]

    a) In August 2019 the plaintiff organised and held a political conference (**CPAC Australia**) whose purpose was the gathering together of like-minded persons (Australian and international) to share ideas: SC[38]/CB60. The conference mirrored a similar type of conference (**CPAC**) held annually for many years in the United States of America (**US**), which is very prominent in that country: SC[26]-[27]/CB57. The organisers of the US conference (**ACU**) supported and attended the Australian conference: SC[35]/CB59-60.

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[9] The categories of exemptions range from religious activities (s 27) to persons who are registered as a charity (s 29C) to artistic purposes (s 29D).

[10] To be contrasted (again) with *FARA* in the US, which also contains civil and administrative enforcement mechanisms.

[11] Abbreviations in these submissions are the same as in Court Book: CB[X] is a page reference; SC[Y] is a paragraph reference.

b) Upon the intervention of the Shadow Attorney-General (SC[37]/CB60), an officer of the Attorney-General's Department sent, just prior to the holding of CPAC Australia, letters to the plaintiff (SC[42]/CB62) and to a number of former Members of Parliament (including a former Prime Minister) (SC[49]-[50]/CB62), drawing the recipients' attention to potential obligations they might have under the *FITS Act*.

c) On 22 October 2020 an officer of the Attorney-General's Department sent a s 45 Notice[12] (**Notice**) to the plaintiff requesting information in relation to CPAC Australia and ACU: SC[51]/CB62. This was the first time a Notice had issued under the *FITS Act*. The plaintiff refused to comply with the Notice, putting it in, subject to the validity of the *FITS Act*, contravention of an offence provision: SC[57]/CB63.

d) News that the Notice had been sent to people in relation to CPAC Australia broke in early November 2019 and attracted considerable media attention (especially in relation to the letter that had been sent to the former Prime Minister): SC[55]/CB63.

e) On 20 December 2020, the Secretary of the Attorney-General's Department wrote to the plaintiff stating that no further action would be taken in relation to the Notice: SC[56]/CB63. The Secretary added that he "remain[ed] of the view that [the plaintiff] may have registration obligations in relation to the ACU and CPAC": CB1293.

f) On 7 February 2020, the plaintiff filed an action in the original jurisdiction of this Court: CB8.

g) CPAC Australia will again be held in early November 2020: SC[58]/CB63.

Matters that are common ground and the application of the FITS Act *to the plaintiff*

18. The plaintiff challenges the validity of the following provisions of the *FITS Act*:

a) Section 10 - definitions of: 'arrangement', 'foreign political organisation' (part b)), 'influence', 'lobby' (part a);

b) Sections 11-14, 16, 18, 21, 37, 39, 57, 58-59

(**impugned provisions**).

[12] Pursuant to s 45 of the *FITS Act*.

19. The plaintiff has standing to challenge the impugned provisions in this Court: SC[9]/CB51. Further, it is common ground that:

a) ACU is a foreign principal, because it is a foreign political organisation (in fact, a foreign corporation[13]); that is, it is a foreign organisation that exists primarily to pursue political objectives: s 10; SC[20]/CB55

b) The plaintiff, in putting on CPAC Australia, acted on behalf of ACU in relation to a 'registrable activity' (political communication) and/or entered a registrable arrangement with ACU: ss 10 ('arrangement"),[14] 11(1)(a)(i), 13A, 16, 18 and 21; SC[35]-[46]/CB59-62

i) The 'arrangement' being the plaintiff and ACU agreeing or forming an 'understanding' that the plaintiff would organise CPAC Australia and ACU would assist in terms of speakers and getting "the event up and running".

ii) The *FITS Act* therefore applied to the plaintiff for organising CPAC Australia, which it "co-host[ed]" with ACU. That is, in the words of the *FITS Act*, the plaintiff was subject to the *FITS Act* for having communicated and/or distributed information or material to the public, in agreement or understanding with ACU, for the substantial purpose of affecting in any way one or more of the political processes or proceedings referenced in s 12(1) of the *FITS Act*.

PART VI: ARGUMENT

Summary of argument

20. The plaintiff relies on two aspects of the Constitution to contend that the *FITS Act* is invalid: the 'intercourse limb' of s 92 (in relation to communication), and the 'implied freedom' of political communication. The *FITS Act*, both in its terms and its practical application to the plaintiff and persons like the plaintiff wishing to overtly promote discussion of political ideas and ideals, compromises in a significant and impermissible way each of these high constitutional values, in circumstances where it is as needless as it is contrary to the stated purpose of the *FITS Act*. In short, in the name of avoiding covert foreign influence it regulates and has a chilling effect on overt political discourse.

[13] SC-17/CB1140

[14] An "*arrangement* includes a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten."

21. In relation to both these constitutional aspects, the *FITS Act* imposes a direct and substantial burden on the respective freedoms (intercourse or political communication). That being so:

    a) In relation to s 92 of the Constitution, the test for validity requires that the legislative purpose be compelling, and that the means adopted to achieve the purpose be "reasonably necessary". The impugned provisions fail on both grounds.

    b) In relation to the implied freedom, and while it can be accepted that the purpose of the *FITS Act* might satisfy the lower threshold test of being compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, the impugned provisions nonetheless fail to satisfy the test of justification as expounded in this Court's case law for the implied freedom.

Law

Section 92 – Intercourse limb

22. The sphere of operation of the intercourse limb is "quite distinct" from the sphere of operation of the trade and commerce limb: *Cole v Whitfield* (1988) 165 CLR 360 (**Cole**) at 388 (the Court). Intercourse encompasses communication, including political communication: *APLA* at [38] (Gleeson CJ and Heydon J); *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 381 (Dixon J, as his Honour then was). While communication can also be trade and commerce, political communication generally is not, and is not in the present case.[15]

23. Due to the relatively few number of cases, this Court's jurisprudence in relation to the intercourse limb of s 92 of the Constitution is underdeveloped, generally, and especially since *Cole*. The only clear authority concerns the two 'poles' at either end of the scale of the extent of burden on interstate intercourse:

    a) ***In terms* cross-border burden:** In the case of legislation that is 'aimed at' or 'directed at' cross-border intercourse with the effect of burdening it, there is unanimous presiding authority by this Court that, regardless of legislative purpose, such legislation is invalid: *ACTV* at 192-195 (Dawson J); *Cole* at 393 (the Court); *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 117 (Issacs J, as his Honour

[15] Consideration of some *obiter dicta* in *APLA* (at [165] (Gummow J) and [408] (Hayne J)) concerning the *possible* application of the trade and commerce test in *Cole* to the intercourse limb of s 92 therefore does not arise in the present case.

then was), 118 Higgins J; *Gratwick v Johnson* (1945) 70 CLR 1 at 13-14 (Latham CJ), 16 (Rich J), 17-18 (Starke J), 19-20 (Dixon J, as his Honour then was), 21 (McTiernan J).

24. **Incidental burden:** In the case of legislation that only *incidentally* burdens interstate intercourse, the test is that the burden be no "greater than that reasonably required [or reasonably necessary] to achieve the objects of the legislation in question": *APLA* at [38] (Gleeson CJ and Heydon J), [177] (Gummow J), *AMS v AIF* [1999] HCA 26; 199 CLR 160 (**AMS**) at [45] (Gleeson CJ, McHugh and Gummow JJ), [100]-[101] (Gaudron J), [221] (Hayne J), [277]-[278] (Callinan J).[16]

25. In the present case the burden falls between these two poles. The burden imposed by the *FITS Act* is not incidental, but rather direct and substantial (or 'significant').[17] This is because the *FITS Act* is a rare example of a statute which targets political communication *in terms*, with the effect of burdening its exercise via registration and disclosure obligations, backed by criminal sanction.

a) The *FITS Act* is not 'aimed at' or 'directed at' political communication qua interstate communication, and so the present case does not fall as obviously within the first category above.

b) Nonetheless, this Court's presiding authority respecting the implied freedom of political communication means that political communication is intrinsically interstate communication: *Unions* at [30] (French CJ, Hayne, Crennan, Kiefel (as her Honour then was) and Bell JJ); *Lange* at 571 (the Court).

i) Legislation which directly and substantially burdens political communication therefore directly and substantially burdens interstate intercourse.

ii) To a like effect, in the present case, the *FITS Act's* targeting of political communication qua interstate communication is a valid conclusion from orthodox statutory construction of its express terms: see, just as examples, ss 10 (definitions of 'lobby' and 'parliamentary lobbying'), 12 and 21; *AMS*

[16] See also *Smithers* at 109 (Griffith CJ), 109 – 110 (Barton J); *Gratwick* at 16 (Rich J) and 19 (Dixon J); *ACTV* at 232 (McHugh J); *Cunliffe v Commonwealth* (1994) 182 CLR 272; [1999] HCA 26 at 396 (McHugh J); *Betfair* at [102] – [103] and [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[17] In the different context of the implied freedom a similar distinction has begun to emerge: *Comcare v Banerji* [2019] HCA 23; 93 ALJR 900 (**Banerji**) at [35] (majority) ("significant purpose")

at [44] (Gleeson CJ, McHugh and Gummow JJ); *Pioneer Express Pty Ltd v Hotchkiss* [1958] HCA 45; (1958) 101 CLR 536 at 549-550 (Dixon CJ).

iii) This reasoning is usefully compared with the reasoning on the impact of the internet on the national market in post-*Cole* cases adjudicating the trade and commerce limb: *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 (**Betfair**) at [12]-[14] (majority); *Betfair Pty Limited v Racing New South Wales* [2012] HCA 12; 249 CLR 217 (**Betfair No 2**) at [2] (majority), [124] (Kiefel J).

26. In the present case - an intermediate case – unless the same test as expounded in *APLA* and *AMS* for an incidental burden is applicable,[18] there appears to be no authority of this Court that assists.

a) This Court's jurisprudence concerning the implied freedom of political communication does not directly assist, and nor is it to be supposed that, as a matter of logic, the test for an *express* limitation on legislative power would be identical to the test for an *implied* limitation on legislative power: *AMS* at [101] (Gaudron J). If that is correct, then such a textual - and constitutional - difference would manifest in two ways:

i) First, the threshold of permitted purposes of legislation before justification be permitted to be undertaken must be greater for the express limitation: only a *compelling* purpose should be permitted capable of justification.

ii) Second, the theoretical case is sound that the test of justification should be stricter for an *express* limitation: *AMS* at [101] (Gaudron J). This Court's presiding test for the trade and commerce limb of s 92 is 'reasonably necessary', where the word 'necessary' is given is ordinary meaning.

[18] It will make no difference provided that this test is – which it appears to be – a test of 'reasonably required' (or 'reasonably necessary') where the word 'required' (or 'necessary') is given its ordinary meaning, not its lesser meaning in the sense of 'appropriate and adapted' or 'proportionate', which is the sense in which it is used in early implied immunity cases and (relatedly) for determining whether legislation is incidentally valid. Close consideration of the judicial context of the exposition of the 'reasonably required' test would appear to support the former, stricter construction, even for an incidental burden on the intercourse freedom: *APLA* at [38] (Gleeson CJ and Heydon J); *AMS* at [43] (Gleeson CJ, McHugh and Gummow JJ) (citing the *Bank Nationalisation Case* on 'reasonable regulation' - *Commonwealth v Bank of NSW* [1949] HCA 47; (1949) 79 CLR 497 at 639-641); Stellios, "The intercourse limb of section 92 and the High Court's decision in *APLA v Legal Services Commissioner (NSW)*" (2006) 17 *Public Law Review* 10 at 14-15.

(A) By example of its application by this Court in post-*Cole* trade and commerce limb cases, this test appears intended to be stricter than the test for justification in this Court's case law concerning the implied freedom.[19]

(B) Whatever the theoretical merits of that position, since members of the Court's adoption of structured proportionality in implied freedom cases, the distinction *potentially* no longer arises, and the 'reasonably necessary' justification as it is called in that type of test is (at least nominally[20]) subsumed within the second stage of this Court's three stage proportionality test: *McCloy* at [2]-[4] (Kiefel CJ, Bell and Keane JJ).

(C) 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.

This is so even if the impugned option achieves the purpose to a greater extent – the qualifier 'reasonably' directs attention to the trade-off necessitated by an *express* constitutional constraint on legislative power.

Where there are alternatives available which reasonably achieve the purpose while imposing less detriment to the freedom, then a legislature acts outside its legislative power in choosing the higher-detriment option: *Betfair* at 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel (as her Honour then was) JJ).

b) Both aspects of this dual test involve evaluations of degree, perhaps even evaluations of 'imponderables' - an unavoidable yet still utile aspect of the exercise of this Court's constitutional duty: *Clubb* at [271] (Nettle J); *Brown* at

[19] The phrase 'appropriate and adapted' (or 'proportional') was translated across to the implied freedom case law in the early years of this Court's development of the implied freedom jurisprudence, and that test was the same test as had previously been developed to determine when legislation was validly incidental to a s 51 head of power: *APLA* at [58]; *Lange* at 567-568

[20] See further below, as the issue is not as straight-forward as this suggests.

377 [160] (Gageler J); *Betfair* at 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel (as her Honour then was) JJ).

Implied freedom of political communication

27. Freedom of political communication is an "indispensable incident" to the system of representative and responsible government created by the Constitution:[21] *Lange* at 559 (the Court).

28. Mason CJ in *ACTV* at 145 stated that "[t]he *raison d'etre* of freedom of communication in relation to public affairs and political discussion is to enhance the political process … thus making representative government efficacious." His Honour continued:

> The enhancement of the political process and the integrity of that process are by no means opposing or conflicting interests and that is one reason why the Court should scrutinize very carefully any claim that freedom of communication must be restricted in order to protect the **integrity** of the political process. Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process. (emphasis added)

29. Unlike for the intercourse limb of s 92, the test to be applied for the implied freedom is clear. The validity of the *FITS Act* falls to be determined by reference to the test articulated in *McCloy* at [2]-[4] (Kiefel CJ, Bell and Keane JJ) as modified in *Brown* at [104] (Kiefel CJ, Bell and Keane JJ), and helpfully set out in *Clubb* at [5] (Kiefel CJ, Bell and Keane JJ):

> 1. Does the law effectively burden the implied freedom in its terms, operation or effect?
>
> 2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
>
> 3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

[21] The freedom does not exist to protect only majority views, or views currently culturally popular: *Clubb* at [177] (Gageler J); *Monis v The Queen* (2013) 249 CLR 92 at [122] (Hayne J) ("[t]he very purpose of the freedom is to permit the expression of unpopular or minority points")

30. A three-stage structured proportionality tool of analysis may[22] then be employed to answer the third question, which asks whether the impugned law is:

a) "suitable", in the sense that it has a rational connection to the purpose of the law;

b) "necessary", in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom; and

c) "adequate in its balance", which requires "a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom": *Clubb* at [6] (Kiefel CJ, Bell and Keane JJ), [266] (Nettle J).

Application of law to the impugned provisions

Effective burden

31. *Any* effective burden on the freedom must be justified: *Clubb* at [64] (Kiefel CJ, Bell and Keane JJ). The extent of the burden is irrelevant provided the burden is "real": *Unions* at [40] (French CJ, Hayne, Crennan, Kiefel (as her Honour then was) and Bell JJ); *Tajjour* at [33] (French CJ), [105]-[106] (Crennan, Kiefel and Bell JJ). The expression 'effectively burden' means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications: *McCloy* at [126] (Gageler J).

32. In the present case, by its operation and practical effect, the *FITS Act* effectively burdens the freedom:

a) The requirement to register alone puts "some limitation" on the making or the content of political communication: SC[59]/CB63;

b) In fact, as already detailed above, the burden is more than merely 'effective' – it is "direct, substantial and discriminatory": *Clubb* at [174], [183] (Gageler J);

c) The liability to register arises in this case directly on the basis of a "communication activity" and is one which discriminates against political communication that expresses a particular point of view, namely, that it is made

[22] The process of analysis described by Gageler J at [204], [232] and Gordon J at [397] in *Brown* produces the same result in this case.

"on behalf of" a foreign principal: *McCloy* at [136]-[137] (Gageler J), [222] (Nettle J).

Constitutional purpose of the FITS Act

Purpose

33. The (constitutional) purpose of a law is what the law is designed to achieve in fact, or "the 'mischief' which the law is designed to address", and is to be ascertained by the text and context of the law: *Brown* at [100]-[101] (Kiefel CJ, Bell and Keane JJ), [209] (Gageler J), [321]-[322] (Gordon J); *McCloy* at [132] (Gageler J); *APLA* at [178] (Gummow J)

34. The *FITS Act* states its purpose to be "to improve the transparency of those activities when done on behalf of foreign principals": s 3 (emphasis added). This express statutory indication is sufficient, but if needed, the conclusion there indicated is reinforced by examination of the text and structure of the *FITS Act* as a whole, as well as by secondary materials contained in the Special Case.

35. While not strictly required in order to determine constitutional purpose in the present case, delving further into the secondary materials reveals that the Minister in his second reading speech noted that "we will not tolerate foreign influence activities that are in any way covert, coercive or corrupt. That is the line that separates legitimate influence from unacceptable interference."[23] The secondary materials speak of the 'four pillars' of sunlight, enforcement, deterrence and capability, and it is plain that 'improved transparency' as a legislative purpose aligns with the 'sunshine' pillar, to 'ensure activities are exposed to sunlight'.[24] The purpose of the registration scheme 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. The link could be a financial relationship or some other form of arrangement.'[25]

36. From this consideration of the text and context of the *FITS Act* it is plain the *FITS Act* is directed to the purpose of *transparency*. This is to be contrasted with that which is clandestine, deceptive, covert, coercive or corrupt - it is conduct of that character which

[23] SC-13 at CB895ff [Noting the Minister's rhetorical but counter-logical equation of covert influence with interference – see further below]
[24] SC-13 at CB898.
[25] SC-13 at CB898.

the *FITS Act* is designed to reject. Similarly, it is notable also that the *FITS Act* is seemingly also directed at an 'arrangement' akin to a financial relationship.[26]

Compatibility

37. Required for analysis under s 92 of the Constitution, the concept of a purpose having to be *compelling* before justification will be undertaken is evident in some judicial analysis under the implied freedom of political communication: *Banerji* at [35] (Kiefel CJ, Bell, Keane and Nettle JJ) ("significant purpose"); Gageler J in *Clubb* at [183] ("pursuit of a compelling governmental purpose"). Nonetheless, the general position is that there is a broader tolerance for legislative purpose for the *implied* rather than the express freedom, consistent with its nature as an implication only, and expressed via the test that a purpose is 'legitimate' in the sense that it is 'compatible' with the maintenance of the constitutionally prescribed system of representative and responsible government, what is sometimes called in that jurisprudence the 'compatibility' threshold. The mild statutory purpose of the *FITS Act* plainly passes that broader test. Moreover, 'improved transparency' as a broad purpose can be considered to be directed at the integrity of the political process, and is therefore prima facie legitimate or compatible: *McCloy* at [42] (French CJ, Kiefel, Bell and Keane JJ).

38. In the secondary materials, care must be taken to distinguish material and statements of genuine national security interest from the lesser and more general 'public interest' goal of 'improving transparency': *Monis v The Queen* [2013] HCA 4; 249 CLR 92 at [131] (Hayne J). Care should be taken not to elide the distinction between 'interference' and 'influence' in those materials, acknowledging that the former effect (when established) is a genuine national security interest.[27] Further, not all 'influence' is relevant - the second reading speech on the introduction of the FITS Bill made it clear that the legislative concern was not 'influence' per se, but only *covert* influence – that was where the line was to be drawn.[28] Even then, care must be taken that 'covert influence' not be synonymised with 'interference'.

39. While always a matter of impressionistic evaluative judgment, a legislative goal of 'improved transparency' is a relatively mild one – desirable, but care must be taken to

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[26] SC-13 at CB898.

[27] Noting, importantly, that there were two bills introduced as a 'package', with different purposes – see the Second Reading Speech of the Attorney-General on the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (Cth) and *Foreign Influence Transparency Scheme Bill 2017* (Cth) given in the House of Representatives on 26 June 2018 at SC-14 at CB902.

[28] SC-13 at CB895ff

ensure the price is not a greater incursion into other important values, relevantly for present purposes, discouraging or 'chilling' participation in political discourse. Associating it with the word 'integrity' in relation to the political process does not change that evaluative assessment, nor the assessment of the trade-off. Indeed, an opposite conclusion would retroactively cast a shadow on the nature of the Australian democratic process up to now.

40. In the enlightenment-liberal tradition, the preferred metaphor in relation to political communication and ideas has always been that of the public square or public forum – sometimes even the 'market place' of ideas - where ideas jostle and prevail according to intrinsic merit, regardless of source: *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983); Mill, *On Liberty* (2 ed.) (1860) London: Parker & Son. The counter-argument that it is important to know the source of communication in addition to the content of communication is not unknown in the Australian political tradition, and has been resolved by requiring, at least in election periods,[29] the addition of the source to a communication, which is not too much to ask: *Smith v Oldham*.

The test of proportionality

Suitability

41. A law is suitable in that sense if it exhibits a rational connection to its purpose, and a law exhibits such a connection if the means for which it provides are capable of realising that purpose: *Banerji* at [33] (Kiefel CJ, Bell, Keane and Nettle JJ).

42. There is no rational connection between the purpose just identified, and the plaintiff's situation. There was no covert or otherwise clandestine aspect of the arrangement between the plaintiff and the ACU. To the contrary, the CPAC Australia was "promoted throughout Australia", including through the use of Google and Facebook.[30] The event, and the relationship between the plaintiff and the ACU, was at all times transparent.

43. In addition, other than not requiring payment of the conference fee of any speaker attending the CPAC Australia (as is ordinarily the case when a guest is invited to speak at a conference), there was no financial aspect of the arrangement between the ACU and the plaintiff.[31]

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[29] Eg Section 321D of the *Commonwealth Electoral Act 1918*.
[30] SC [35], SCB 59-60.
[31] SC [46], SCB 61.

44. Despite those matters, the plaintiff's activities in co-hosting a conference with a conservative US think tank was caught by the registration scheme of the *FITS Act*. This is legislative overreach when the proper and legitimate purpose of the Act is recalled. There is no rational connection between that purpose and the plaintiff's activities, which were conducted in a fully transparent manner, and which was thus not amenable to any "improve[d]…transparency".

Necessity

45. Whether the purpose be compelling or otherwise, any burden under s 92 must be no greater than is reasonably necessary to achieve that purpose. The test of 'reasonable necessity' in s 92 cases is a true necessity test. While a form of a 'necessity' test is incorporated into the second limb of the structured proportionality test in implied freedom cases, the example of recent cases suggests a wide degree of 'room for manoeuvre' under that test. That test of 'necessity' is that a law remains valid unless there 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* at [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

46. Even when measured against a test of such width, the impugned provisions fail; indeed, there is a complete answer to the question in that there is *the* obvious and compelling alternative contained in the *FITS Act* itself: any communication on behalf of a foreign principal must be made transparent by means of the source being disclosed at the time of communication:[32] s 38 read with the Disclosure Rules. This is a type of provision long approved by this Court, precisely in satisfaction of a purpose of 'improved transparency': *Smith v Oldham*.

47. Further, the definitions of 'on behalf of' and 'arrangement' in the *FITS Act* are conspicuously over-inclusive when held up against the *FITS Act's* constitutional purpose, in that liability to register captures a wide range of situations properly labelled "legitimate influence" (to use the words of the Minister contained in the secondary materials, as noted above). In the circumstances of the plaintiff, the Secretary (of the Attorney-General's Department) simultaneously acknowledges that the plaintiff, in putting on CPAC Australia, had satisfied the purpose of transparency; yet the Secretary also stated his belief that the plaintiff was still liable to register: CB1293. By that

[32] See also the two instructive examples given at pages 111-112 of the *Explanatory Memorandum*, available at: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6018_ems_deec7318-8967-469e-8a97-3786453cbd90/upload_pdf/677086rem.pdf;fileType=application%2Fpdf

admission against interest by one of its senior officers, the Commonwealth reveals, at least in relation to communication activities, that the registration regime is surplus to requirements in the achievement of the *FITS Act's* transparency purpose.

48. A quick perusal and assessment of the benignity of the types of entity, arrangement and activity displayed on the (online) register reveals the extent of the over-inclusiveness of wide statutory definitions – to give just two examples (at the time of writing): Australian branches of international law firms,[33] and ASX-listed mining companies in conventional commercial overseas mining joint ventures.[34]

49. The extension of the *FITS Act* to cover entities and situations such as these is an "imagined necessity".[35] The *FITS Act* takes a legitimate legislative purpose and under the guise of seemingly reasonable legislative encroachment on the freedom, imposes burdens on ordinary Australians which quietens or seriously risks quietening ordinary political discussion.

50. The *FITS Act* itself also contemplates "exemptions". In some respects, the rationale for some of those exemptions is not immediately apparent. But in any event, as against those recognised exemptions, the communications activity in this case, for being just that, is and was caught by the *FITS Act*. One obvious, simple, approach would be to add to the list of exemptions communications that identified their connection to a foreign principal at the time of communication, adapting the time honoured method of electoral laws. Thus, covert or clandestine activities would still achieve the desired regulation. Alternatively, amend the definition of the types of relationships with foreign principals that the *FITS Act* is legitimately aimed at revealing, again as an obvious and compelling alternative.

51. Finally, to this list of objections may be added the broad definition of 'influence'. The *FITS Act* could be directed to political 'interference' as opposed to mere 'influence' where the current definition ('affect in any way') unnecessarily and impermissibly captures an innumerable universe of activity, including the ordinary expression of political views.

52. The number of effective alternatives, their ease of implementation and their harmony with the legislative schema already in place underscores the objectionable character of the impugned provisions.

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[33] Even though such entities may arguably be covered by the exemption in s 25 of the Act.
[34] https://transparency.ag.gov.au/.
[35] *ACTV* at 145 (Mason CJ).

Adequacy of balance

53. Given the submissions in relation to the first two limbs, this third limb does not arise: *Clubb* at [6] (Kiefel CJ, Bell and Keane JJ); *Brown* at [280] (Nettle J). It does not arise under a s 92 analysis.

54. If this question does arise, the test under this third limb, at least as expounded in the Court's most recent implied freedom case, is that a law is to be regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by the adverse detriment on the implied freedom: *Banerji* at [38] (Kiefel CJ, Bell, Keane and Nettle JJ); *Brown* at [290] (Nettle J).

55. The previous discussion is here also relevant to illustrate that the constitutional purpose of the *FITS Act* is not served by the detriment on the freedom which accompany the over-reaching restrictions of the *FITS Act*:

a) Even if a "communications activity" could be legitimately and necessarily policed, requiring registration of those activities, with criminal sanctions employed for the failure to register and failure to comply with the *FITS Act* is disproportionate to achieving those means.

b) This is particularly so where the registration takes effect on application (s 17) such that a person, who might out of an abundance of caution, register under the *FITS Act* due to a misunderstanding or miscomprehension of the vague and wide definitions employed, would be subject to the ongoing requirements under the *FITS Act*, with a failure to comply being, in some instances, reason for imprisonment.[36]

Not reasonably appropriate and adapted

56. Even leaving aside proportionality as a tool of analysis,[37] the *FITS Act* is not reasonably appropriate and adapted to advance a legitimate purpose in a manner that is compatible with the maintenance of a constitutionally prescribed system of government. The provisions are neither "closely tailored" to the achievement of the identified purpose, and the burden imposed is greater than is reasonably necessary to achieve that purpose: see eg *Brown* at [204], [232] (Gageler J), [397] (Gordon J).

[36] See eg *Levy v Victoria* (1997) 189 CLR 579 at 614 (Gummow and Toohey JJ) ("The attachment of a penalty is a significant matter in the assessment of the validity of such a law").
[37] See eg Gordon J in *Clubb* at [390] and the cases cited therein.

57. It is plain from the plaintiff's case that to fall within the registration obligations of the *FITS Act* an 'arrangement' need not be in the service of, on the order or request of, or under the direction of a foreign principal, and need not be financially motivated. The conduct captured by the *FITS Act* in the present case brings home the point that the legislative balance is beyond what is justifiable.

PART VII: APPLICABLE PROVISIONS

58. The following provisions are applicable:

a) *Commonwealth of Australia Constitution Act*, s 92;

b) *Foreign Influence Transparency Scheme Act 2018* (Cth), ss 3, 10-14, 16-21, 24-32, 34, 36-40, 42, 45, 56-61A;

c) *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth), Part 2;

d) *Commonwealth Electoral Act 1918* (Cth), 321D.

PART VIII: ORDERS SOUGHT

59. The Plaintiff seeks the following orders:

a) A declaration that the impugned provisions in the *FITS Act* are invalid.

b) Costs.

c) Such further or other orders as the Court deems appropriate.

PART IV: TIME FOR ORAL ARGUMENT

60. Up to 3.5 hours will be required by the Plaintiff in oral submissions.

Date: 22 September 2020

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