



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: S10/2020  
File Title: LibertyWorks Inc v. Commonwealth of Australia  
Registry: Sydney  
Document filed: Form 27F - Outline of oral argument-Plaintiff's outline  
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IN THE HIGH COURT OF AUSTRALIA  
 SYDNEY REGISTRY

S10/2020

BETWEEN:

LIBERTYWORKS INC

Plaintiff

and

COMMONWEALTH OF AUSTRALIA

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Defendant

### PLAINTIFF'S OUTLINE OF ORAL SUBMISSIONS

#### Part I:

1. This outline is in a form suitable for publication on the internet.

#### Part II:

2. The purpose of the FITS Act, being transparency, is demonstrable from its terms: s 3, and the history of its enactment: explanatory memorandum JBA 8/2516 [399]-[401]; second reading speech SCB 2/896-898.

#### Scheme of the FITS Act

- 20 3. It engages a foreign dimension: s 11 and the definition of 'arrangement', 'foreign principal' and 'foreign political organisation' in s10.
4. It fixes to activity for the purposes of political or governmental influence: s 12.
5. Registerable activities are dealt with in Division 3 being:
  - Lobbying - ss 20 and 21 items 1 and 2
  - Capturing expenditure not caught by the Commonwealth Electoral Act – s 21(1) item 4 and the definition of 'Disbursement activity' in s 10
  - Political communications – s 21(1) item 3

6. In any of those instances continuing registration obligations are engaged: ss 16 and 18.
7. There is an extensive list of exemptions in Part 2 Division 4. They are acknowledged to have a 'transparency' basis: DS 19.4
8. Registration brings with it reporting and other obligations – Part 3 Divisions 2 and 3.
9. Information is kept by the Secretary of the Department and some of which is made publicly available – Part 4 Division 2.
10. Non-compliance is dealt with in Part 5 and carries with it significant criminal sanctions.
11. Importantly, by s 38 [JBA 1/64] and the rules made in furtherance of that section; JBA [2/189], the FITS Act provides ample means for transparency achieved by disclosure. In doing so it practically aligns with the disclosure of domestic actors in political discourse during an election campaign: *Commonwealth Electoral Act* s 321D [JBA 2/181]

#### Material Facts

12. That the FITS Act in so far as it regulates political communication (other than requiring a foreign connection to be disclosed) is objectionable to the implied freedom is illustrated in its practical operation in relation to the plaintiff.
- 20 13. The nature of the plaintiff and its activities are set out in ASC 6/10-12. That organisation had a conference amongst those who wished to discuss its views, including by involving a like-minded organisation from overseas: ASC 20-34. It did so demonstrably openly: ASC 35-36, 38-46.
14. The fact that it openly identified the involvement of a like-minded foreign organisation caused it to be identified to the Department: SCB 3/1185. That lead to the correspondence culminating in these proceedings: SCB 3/1195 and onwards.

15. Ultimately the defendant accepted that the goal of transparency had been achieved: SCB 3/1234. This aligns with the risks that are said to be the basis for the FITS Act; SCB 14-19

No Justification

16. The burden is demonstrated: APS 26-27 and accepted by the defendant: DS 17. The defendant asserts that the burden is modest: DS 18 The above analysis of the legislative provisions is not consistent with that, nor has been its practical consequence of discouraging discussion about political matters: ASC 59.

10 17. Consequently, the law must be justified. The plaintiff accepts that the law has a legitimate purpose and is compatible: APS [28]-[34].

18. The question is thus is it appropriate and adapted? That it is not is demonstrated by the identification of its stated purpose, vis transparency, and the ease with which that can be achieved, by adaptation of s 38 of the FITS Act, without the other onerous requirements that go with it.

19. That alternative would involve no more than in s38(1)(c) deleting the words from “registrable in ...” and in their place inserting the words “not exempted by Part 2 Division 4” and deleting item 3 from s 21– APS [40]. Some stylistic changes might follow, but nothing of substance.

20 20. A straightforward corollary would be to add to Part 2 Division 4 an exemption by an additional section which moved Part 2 of the FITS Rules in to the exemptions in the FITS Act, and deleted the first line of sub-s 5(1) of the rules and instead inserted the words “a person is exempt in relation to instances of communications activity if that person complies with this section”: APS [44].

21. Such an analysis demonstrates that the FITS Act, in so far as it concerns communication, fails when tested against necessity or alternatively adequacy in its balance. Indeed, limited to the issue of communication, the FITS Act lacks a rational connection with transparency and the means for achieving that purpose.

Dated: 2 March 2021



**Peter Dunning**

**Richard Scheelings**